

**MEMORANDUM**

DATE: June 16, 2003

TO: Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

FROM: Jeffrey May  
Deputy Assistant Secretary, Group I  
Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing  
Duty Investigation of Dynamic Random Access Memory Semiconductors from the  
Republic of Korea

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**Background**

On April 7, 2003, the Department of Commerce (“the Department”) published the preliminary determination in this investigation. See Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 16766 (“Preliminary Determination”). The “Analysis of Programs” and “Subsidies Valuation Information” sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the “Analysis of Comments” section below, which also contains the Department’s responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

- Comment 1: Direction of Credit
- Comment 2: Specificity Relating to Direction of Credit
- Comment 3: Application of Commercial Benchmarks to Determine the Amount of Benefits to Hynix Semiconductor Inc. (formerly, Hyundai Electronics Industries Co., Ltd. (“HEI”)) (“Hynix”)
- Comment 4: Direction of Credit Through the Government of the Republic of Korea’s

- (“GOK”) Control of the Bond Market
- Comment 5: Hynix Creditworthiness
- Comment 6: Korea Development Bank (“KDB”) Fast Track Program
- Comment 7: Hynix October 2001 Debt-to-Equity Conversion
- Comment 8: Hynix October 2001 Debt Forgiveness
- Comment 9: Hynix Five-Year Interest-Free Loan Stemming from October 2001 Restructuring
- Comment 10: Hynix October 2001 Retroactive Reduction of Accrued Interest as Part of Debt-Equity Swap
- Comment 11: Hynix Benefit from Convertible Bonds (“CB”) Arising Between Issuance and Conversion Stemming from October 2001 Restructuring
- Comment 12: Treating Loans to Hynix in Excess of Banking Act Exposure Limitations and Documents Against Acceptance (“D/A”) Financing as Grants
- Comment 13: D/A Interest Rates
- Comment 14: Hynix Sales
- Comment 15: Hynix Short-Term Financing
- Comment 16: Ministerial Errors In Certain Hynix Preliminary Determination Calculations
- Comment 17: Use of LG Semiconductor, Inc. (“LG Semicon”) Bonds as Hynix Benchmarks
- Comment 18: Calculation of Uncreditworthy Benchmarks
- Comment 19: Other General Benchmark Issues
- Comment 20: Samsung Electronics Co., Ltd. (“SEC”) Creditworthiness
- Comment 21: Facts Available for SEC’s Unreported Short- and Long-Term Financing
- Comment 22: Treatment of Certain SEC Interest Payments
- Comment 23: SEC Sales
- Comment 24: Energy Savings Fund (“ESF”) Program
- Comment 25: De Facto Specificity of Certain Tax Programs Under the Tax Reduction and Exemption Control Act (“TERCL”) and/or the Restriction of Special Taxation Act (“RSTA”)
- Comment 26: RSTA Article 26 and Import Substitution
- Comment 27: 21<sup>st</sup> Century Frontier Research and Development (“R&D”) Program
- Comment 28: Other R&D Programs
- Comment 29: Export Insurance Program
- Comment 30: Electricity Discounts Under the Requested Load Adjustment (“RLA”) Program
- Comment 31: Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates, and on Domestic Sales of Finished Products Manufactured from Imported Raw Materials
- Comment 32: Import Duty Reduction for Cutting Edge Products
- Comment 33: Permission for Hynix and SEC to Build in Restricted Area
- Comment 34: Exemption of Value-Added Tax (“VAT”) on Imports Used for Bonded Factories under Construction

## Subsidies Valuation Information

### *Allocation Period*

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (“AUL”) of the renewable physical assets used to produce the subject merchandise. Section 351.524(d)(2) of the Department’s regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service’s 1977 Class Life Asset Depreciation Range System (the “IRS Tables”). For dynamic random access memory semiconductors (“DRAMs” or “subject merchandise”), the IRS Tables prescribe an AUL of 5 years. None of the responding companies or interested parties disputed this allocation period. Therefore, we have used the 5-year allocation period for all respondents.

### *Discount Rates and Benchmarks for Loans*

Pursuant to 19 CFR 351.524(d)(3)(i), the Department will use, when available, the company-specific cost of long-term, fixed-rate loans (excluding loans deemed to be countervailable subsidies) as a discount rate for allocating non-recurring benefits over time. Similarly, pursuant to 19 CFR 351.505(a), the Department will use the actual cost of comparable borrowing by a company as a loan benchmark, when available. According to 19 CFR 351.505(a)(2), a comparable commercial loan is defined as one that, when compared to the loan being examined, has similarities in the structure of the loan (e.g., fixed interest rate v. variable interest rate), the maturity of the loan (e.g., short-term v. long-term), and the currency in which the loan is denominated. In instances where no applicable company-specific comparable commercial loans are available, 19 CFR 351.505(a)(3)(ii) allows the Department to use a national average interest rate for comparable commercial loans.

Hynix and SEC reported that they had the following types of countervailable loans outstanding during the period of investigation<sup>1</sup>: 1) long-term fixed- and variable-rate foreign currency loans; 2) long-term fixed- and variable-rate won-denominated loans; 3) short-term fixed-rate won-denominated loans; and 4) short-term fixed-rate foreign currency loans. Some of these loans were received prior to 1992. Hynix also received non-recurring benefits during the POI, as discussed in the “Analysis of Programs” section, below.

We are using the following benchmarks and discount rates in this final determination:

### *Discount Rates and Benchmarks for Long-Term Loans*

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<sup>1</sup>The period of investigation (“POI”) in this proceeding is January 1, 2001 through June 30, 2002.

The Department has determined in past cases that the GOK directed the lending practices of most financial institutions in the ROK relating to the ROK steel industry during the time periods covered by those cases. See, e.g., Final Affirmative Countervailing Duty Determinations and Final Negative Critical Circumstances Determinations: Certain Steel Products from Korea, 58 FR 37338, 37339 (July 9, 1993) (“Certain Steel”); Final Affirmative Countervailing Duty Determination: Structural Steel Beams from the Republic of Korea, 65 FR 41051 (July 3, 2000) (“Structural Beams”); Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from the Republic of Korea, 67 FR 62102 (October 3, 2002) (“Cold-Rolled Steel”), Final Negative Countervailing Duty Determination: Stainless Steel Plate in Coils from the Republic of Korea, 64 FR 15530 (March 31, 1999) (“Plate in Coils”); and Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 64 FR 73276 (December 29, 1999) (“CTL Plate”). However, in Plate in Coils, the Department determined that the GOK does not exercise direct or indirect control over ROK branches of foreign commercial banks. Also, in Cold-Rolled Steel, we found that, subsequent to April 1999, companies no longer needed approval from the GOK to access direct foreign loans or issue foreign securities. Thus, we found in these past cases that loans from ROK banks were not appropriate for use as benchmarks, but that loans from ROK branches of foreign commercial banks, and direct foreign loans and foreign securities obtained after April 1999, were acceptable for use as a benchmark.

As explained below in the “Direction of Credit and Other Financial Assistance” discussion in the “Analysis of Programs” section, as well as in Comments 1 and 2, we have determined in the instant investigation that: 1) the GOK continued to direct the lending practices of most lending institutions in the ROK through 1998 relating to the semiconductor industry, and 2) that the GOK directed credit and other financial assistance to Hynix and other Hyundai Group companies during the period January 1999 through June 30, 2002. Moreover, consistent with our determinations in Plate in Coils and Cold-Rolled Steel, we continue to find that the GOK did not exercise direct or indirect control over ROK branches of foreign commercial banks, direct foreign loans obtained after April 1999, and foreign securities issued after April 1999. Thus, except as discussed below with regard to Citibank, we have generally continued to utilize such loans as benchmarks for SEC and Hynix, when available.

Based on the above, we are using the following benchmarks to calculate the benefits conferred by GOK-directed long-term loans which are still outstanding during the POI (see, also, Comments 16, 17, 18, and 19 below):

- For countervailable, won-denominated, long-term loans for creditworthy companies, we used the company-specific corporate bond rate on the companies’ won-denominated public and private bonds, where available. Use of the bond data as a benchmark is consistent with Plate in Coils, 64 FR at 15531, in which we determined that the GOK did not control the ROK domestic bond market after 1991. Where company-specific rates were not available, we used the adjusted national average of the yields on three-year, won-denominated corporate bonds as reported by the Bank of Korea (“BOK”), as discussed below in Comment 19. We note that

the use of the three-year corporate bond rate from the BOK follows the approach taken in Plate in Coils, 64 FR at 15532, in which we determined that, absent company-specific interest rate information, the won-denominated corporate bond rate is the best indicator of the commercial long-term borrowing rates for won-denominated loans in the ROK.

- For countervailable, foreign currency-denominated, long-term loans for creditworthy companies, we used, where available, the company-specific interest rates on the companies' comparable commercial, foreign currency loans from foreign bank branches in the ROK or information on company-specific corporate bond rates on the companies' foreign currency-denominated corporate bonds. If this type of benchmark was unavailable, then, consistent with past cases (see, e.g., Cold-Rolled Steel), we relied on lending rates as reported by the International Monetary Fund's ("IMF") International Financial Statistics Yearbook.
- Finally, because we have determined that Hynix was uncreditworthy from January 1, 2000 through June 30, 2002, in accordance with 19 CFR 351.524(d)(3)(ii) (see, infra section on "Creditworthiness"), we have calculated for Hynix only long-term uncreditworthy benchmarks and discount rates for 2000 through June 30, 2002. According to 19 CFR 351.505(a)(3)(iii), in order to calculate these rates, the Department must specify values for four variables: 1) the probability of default by an uncreditworthy company; 2) the probability of default by a creditworthy company; 3) the long-term interest rate for creditworthy borrowers; and 4) the term of the debt. For the probability of default by an uncreditworthy company, as discussed in Comment 18, below, we have used the average cumulative default rates reported for the Caa-to C-rated category of companies as published in Moody's Investors Service, "Historical Default Rates of Corporate Bond Issuers, 1920-1997" (February 1998). For the probability of default by a creditworthy company, also as discussed in Comment 18, below, we used the cumulative default rates for investment grade bonds as published in Moody's Investor Service, "Statistical Tables of Default Rates and Recovery Rates" (February 1998). For the long-term interest rate that would be paid by a creditworthy company, we are using 1) the national average of the three-year ROK won corporate bond rate as published by the BOK for won-denominated loans and for the discount rate, and 2) the IMF's International Financial Statistics Yearbook for foreign-currency denominated long-term loans. For the term of the debt, we used 3 years as discussed in Comment 18, below.

### Benchmarks for Short-Term Loans

As discussed below in the "Direction of Credit and Other Financial Assistance" section and in Comments 1 and 2, we have found that the GOK directed credit for all loans to Hynix during the POI (with the exception of Citibank). Thus, we cannot rely on Hynix' company-specific commercial won- or foreign currency-denominated loans outstanding during the POI as our benchmark. Instead, for those programs requiring the application of a short-term, fixed, won- or foreign currency-denominated interest rate benchmark, we used the lending rates as reported in the IMF's International Financial

Statistics in accordance with 19 CFR 351.505(a)(3)(ii).

### *Equityworthiness*

Section 771(5)(E)(i) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (“the Act”) and 19 CFR 351.507 state that, in the case of a government-provided equity infusion, a benefit is conferred if an equity investment decision is inconsistent with the usual investment practice of private investors. According to 19 CFR 351.507, the first step in determining whether an equity investment decision is inconsistent with the usual investment practice of private investors is to examine whether, at the time of the infusion, there was a market price for similar, newly-issued equity. If so, the Department will consider an equity infusion to be inconsistent with the usual investment practice of private investors if the price paid by the government for newly-issued shares is greater than the price paid by private investors for the same, or similar, newly-issued shares.

If actual private investor prices are not available, then, pursuant to 19 CFR 351.507(a)(3)(i), the Department will determine whether the firm funded by the government-provided infusion was equityworthy or unequityworthy at the time of the equity infusion. In making the equityworthiness determination, pursuant to 19 CFR 351.507(a)(4), the Department will normally determine that a firm is equityworthy if, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable time. To do so, the Department normally examines the following factors: 1) objective analyses of the future financial prospects of the recipient firm; 2) current and past indicators of the firm’s financial health; 3) rates of return on equity in the three years prior to the government equity infusion; and 4) equity investment in the firm by private investors.

Section 351.507(a)(4)(ii) of the Department’s regulations further stipulates that the Department will “normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion.” Absent an analysis containing information typically examined by potential private investors considering an equity investment, the Department will normally determine that the equity infusion provides a countervailable benefit. This is because, before making a significant equity infusion, it is the usual investment practice of private investors to evaluate the potential risk versus the expected return, using the most objective criteria and information available to the investor.

The equityworthiness analysis relating to Hynix’ debt-to-equity conversions as part of the Hynix October 2001 Restructuring program is located in the “Analysis of Programs” section and in Comment 7, below.

### *Creditworthiness*

The examination of creditworthiness is an attempt to determine if the company in question could obtain

long-term financing from conventional commercial sources. See 19 CFR 351.505(a)(4). According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. In making this determination, according to 19 CFR 351.505(a)(4)(i), the Department normally examines the following four types of information: 1) the receipt by the firm of comparable commercial long-term loans; 2) present and past indicators of the firm's financial health; 3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and 4) evidence of the firm's future financial position.

With respect to item number one, above, pursuant to 19 CFR 351.505(a)(4)(ii), in the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee (either explicit or implicit), will normally constitute dispositive evidence that the firm is not uncreditworthy. However, according to the Preamble to the Department's regulations, in situations, for instance, where a company has taken out a single commercial bank loan for a relatively small amount, where a loan has unusual aspects, or where we consider a commercial loan to be covered by an implicit government guarantee, we may not view the commercial loan(s) in question to be dispositive of a firm's creditworthiness. (See Countervailing Duties; Final Rule, 63 FR 65348, 65367 (November 28, 1998) ("Preamble").)

On March 31, 2003, the Department issued its preliminary analysis with regard to Hynix' creditworthiness in which we found Hynix to be uncreditworthy in 2000 through June 2002. (See March 31, 2003 memorandum entitled "Creditworthiness Analysis of Hynix Semiconductor Inc." ("Creditworthiness Memo"), which is on file in the Department's Central Records Unit in Room B-099 of the main Department building ("CRU").) In that analysis, we noted that Hynix received loans from several commercial banks during this period, but determined that these loans, with the exception of the Citibank loans, were either government-provided loans, or that the financial institutions in question were entrusted or directed by the GOK to provide these loans. Thus, we determined that these loans were not dispositive of Hynix' creditworthiness due to the GOK's involvement in their provision. Consistent with our findings on this issue under the "Direction of Credit and Other Financial Assistance" section of this memorandum, we continue to find that these loans do not constitute dispositive evidence for the purposes of this analysis.

Further, while we considered in our preliminary finding that the presence of commercial loans from the ROK branch of a foreign bank such as Citibank may constitute dispositive evidence of a company's creditworthiness, we also preliminarily found that these loans were part of larger financing effort taken in concert with GOK or GOK-directed participation and, thus, possibly covered by an implicit government guarantee, within the meaning of the Department's regulations, as noted above. We further considered that in past proceedings the Department found programs with funding from the KDB, such as the Hynix restructuring program, were commonly viewed by financial institutions in the ROK as having the government's tacit approval. This tacit approval effectively provided these programs with an implicit government guarantee. See Creditworthiness Memo at 2. Additionally, we cited to certain

portions of an affidavit from Citibank (submitted by Hynix in March 2003) ("March Affidavit") which appeared to provide further support for a finding of implicit guarantee. Consequently, we preliminarily found that the Citibank loans were covered by an implicit government guarantee and, therefore, determined that these loans did not constitute dispositive evidence of Hynix' creditworthiness.

Since our preliminary analysis, relevant evidence has been added to the record which warrants a reconsideration of our finding of implicit guarantee, particularly information gathered at verification from the ROK financial institutions that portray a complex picture of the lending environment and shed further light on lending practices in the ROK. This includes information provided by Citibank officials in an interview at verification, which Citibank further clarified in a second affidavit submitted by the respondent in May 2003 ("May Affidavit").

According to the May Affidavit, Citibank officials categorically denied at verification that Citibank's participation was covered by a GOK guarantee, implicit or explicit, and explained that, based on prior experience outside the ROK, the bank had developed a clear understanding of where an "implicit guarantee" would or would not work. See May Affidavit at 3. They added that an implicit government guarantee for a private company does not work and, hence, that Citibank's credit approval guidelines did not allow credit decisions to be based on an implicit guarantee by a government. See May Affidavit at 3. Citibank officials also sought to clarify the meaning of the March Affidavit, specifically that the reference to non-financial factors considered by Citibank in its decision to join in the Hynix restructuring referred not to the GOK's participation in the program but to a show by the ROK banks that they, too, were committed to supporting Hynix. Thus, in their view, the Department's finding that the reference supported the conclusion of an implicit guarantee was based on a complete misunderstanding of the meaning of the earlier affidavit. See May Affidavit at 3.

In this regard, the Department notes that this reference to non-financial considerations in the March Affidavit referred to various factors which included, but were clearly not limited to, the participation in certain parts of the restructuring by the ROK banks. We note further that a significant majority of the ROK banks who participated in the Hynix restructuring were either GOK-owned or GOK-controlled. Thus, we continue to believe that our understanding regarding this particular point was based on a reasonable inference from the language of the March Affidavit. Additionally, we note as a clarification that we were not restricting the meaning of an implicit government guarantee to the sense of a guarantee that the government itself would repay the debt (as might be the meaning understood by a bank in a typical loan scenario). Rather, our preliminary finding was premised on evidence that the ROK financial community perceived a policy commitment by the GOK to ensure Hynix' survival as a going concern and, thereby, the company would in the future be able to repay the debt.

Nevertheless, in light of the evidence provided since the preliminary analysis, specifically the additional information offered by Citibank as discussed above, we find that the Citibank loans were not necessarily covered by an implicit government guarantee in the sense that the loans were guaranteed repayment by the government itself. However, for the reasons discussed below, we continue to find



that the Citibank loans do not constitute dispositive evidence of Hynix' creditworthiness, nor do they provide appropriate benchmarks for measuring any subsidies to Hynix found in this investigation.

For the purposes of our final determination, we have considered other factors relevant to the loans provided by Citibank, such as the relative size of the loans and other features, or the nature of the lending arrangements, which have been noted by the petitioner in this investigation. In this regard, the Preamble to the Department's regulations states that, "regarding other characteristics that might render particular loans not comparable to the government-provided loan, such as collateral and size, we will consider arguments made by the parties based on the facts presented in their cases." See Preamble, 63 FR at 65363. The Preamble further states that, although comparable commercial loans will normally constitute dispositive evidence of creditworthiness, if the loan is relatively small and has, inter alia, "unusual aspects," then "receipt of that loan will not be dispositive of the firm's creditworthiness, and we will go on to examine the other factors listed in {19 CFR 351.505(a)(4)(i)(B) through (D)}." See Preamble, 63 FR at 65367.

The first factor we have evaluated concerns the size of the loans provided by Citibank. Since the Department is examining the various arrangements in the Hynix restructuring as one comprehensive, integrated program that covers a ten-month period, and consistent with the guidance provided in the Preamble to the Department's regulations, as discussed above, we find that an examination of Citibank's loans in the context of the overall lending during this period is appropriate. This debt consisted of the December 2000 syndicated loan, the KDB Fast Track program, and the May and October 2001 restructuring provisions. The total debt provided through these arrangements totaled trillions of won, the vast majority of which, as noted above, was provided by GOK-owned or GOK-controlled banks. When considered in this context, Citibank's involvement was relatively small in absolute and percentage terms compared to the involvement of the GOK-owned or GOK-controlled participants. See, also, memorandum dated June 16, 2003 entitled "Business Proprietary Information for the Final Determination" ("BPI Memo"), which is on file in the Department's CRU. In this regard, record evidence provides some indication that Citibank recognized that the size of its lending to Hynix was relatively minor. For example, at verification, Citibank officials characterized Citibank's participation in the May restructuring as a "symbolic gesture" in support of Hynix. See Hynix Verification Report at 19.<sup>2</sup>

In addition, we have carefully looked at the factors Citibank took into account in making its loans. Citibank clearly took into consideration the behavior of the ROK banks (which were either GOK-owned or GOK-controlled) in its decision to participate, as it explained at verification. For example, in regard to the syndicated loan, Citibank officials stated that Citibank wanted to show its commitment, but did not want to be the "lender of last resort" and "needed a clear signal from the ROK banks" that

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<sup>2</sup>All verification reports cited in this memorandum are dated May 15, 2003, and are on file in the Department's CRU.

they were willing to support Hynix as well, and that Citibank did not seek internal credit approval for its portion of the syndicated bank loan until after the ROK banks had committed to the arrangement. See Hynix Verification Report at 19. In a similar vein, Citibank officials indicated that Citibank had decided to “ride” with the ROK banks to see if Hynix could make it as an ongoing concern, and that Citibank made a bet that the ROK banks would protect their exposure. See Hynix Verification Report at 21.

Thus, we find that the risk assessments of Hynix’ lenders, including Citibank, were influenced by the continuing involvement of the GOK and the widely shared perception in the ROK financial community that the GOK’s policy commitment to Hynix’ survival continued to be significant. Finally, with regard to the later part of the Hynix restructuring program, Citibank officials expressed their belief at verification that, under the Corporate Restructuring Promotion Act (“CRPA”) regime, creditor banks holding 75 percent of Hynix’ debt could impose their decision on everyone else and that, while foreign creditors may have wanted more freedom to maneuver, they didn’t see that they had much choice. See Hynix Verification Report at 20.

Another relevant feature is that Citibank participated in the debt arrangements in an extraordinary manner not comparable to those of the average lender. Together with its sister company, Salomon Smith Barney (“SSB”),<sup>3</sup> Citibank was retained by Hynix to act as exclusive financial advisor and, in that capacity, expected to earn in fees an amount equal to a significant portion of the principal of the loans it provided in the Hynix restructuring program, and even more than the expected interest on those loans themselves. Such a dual role brings with it mixed motivations with regard to risk assessment, which is inherent in the combined lending and investment functions of Citibank and SSB, which may further distinguish the calculus of risk to Citibank from that of an average lender. In this regard, Citibank largely relied on SSB’s assessments of Hynix for its own decisions which, as noted earlier, were influenced by Citibank’s desire to show support by arranging to provide a small amount of lending.

Finally, another relevant facet of the Citibank loans is the overarching, strategic perspective also inherent in Citibank’s role of financial advisor, which the average lender clearly would not share. For example, Citibank officials at verification related that among the reasons behind the genesis of the Hynix restructuring program was that Citigroup officials thought that Hynix would be a good test-case to try out the different packages available through Citigroup that would offer a comprehensive solution. See Hynix Verification Report at 18. The bank officials also remarked that Citibank and SSB looked at the big picture in the ROK and saw not just Hynix’ immediate liquidity problems but a more general structural problem in the ROK financial market. See Hynix Verification Report at 19. Additionally, the March Affidavit demonstrates Citibank’s involvement with “a number of other companies” in the ROK. Hence, Citibank’s decisions related to Hynix appear to have been informed by Citibank’s interests in the ROK market writ large. These facets in Citibank’s role in the Hynix program were unique to Citibank in that program, and distinguish its motivations from those of the average lender. This

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<sup>3</sup>Citibank and SSB are both divisions of Citigroup.

extraordinary role meant that Citibank's risk calculus operated on a level sufficiently different as to make the loans that it provided problematic for the purposes of comparability.

Consequently, taking these considerations into account, we continue to find that the Citibank loans cannot be considered reasonably comparable and, therefore, do not constitute dispositive evidence or provide the appropriate benchmarks, within the meaning of 19 CFR 351.505(a)(4)(i) and consistent with the additional guidance provided by the relevant section of the Preamble.

In our preliminary analysis, we also pointed to the lack of other comparable loans that would constitute dispositive evidence of Hynix' creditworthiness. Since that finding was based on historical information, and no new information has been discovered that sufficiently rebuts our finding in that regard, we continue to find that the other loans extended to Hynix during the relevant period would not constitute dispositive evidence of the company's creditworthiness. See Creditworthiness Memo at 1. Additionally, the respondent contends that the Department should not presume that loans from GOK-owned banks and other ROK banks (including those with what the respondent has characterized as significant foreign ownership) are not comparable commercial loans for the purposes of our analysis. On this point, see the extensive discussion regarding these lenders in Comments 1 and 3, below. Based on that discussion, we continue to find that such loans do not provide dispositive evidence of Hynix' creditworthiness.

Lacking dispositive evidence, we normally turn our analysis to the other factors set forth in 19 CFR 351.505(a)(4)(i)(B) through (D), as we did in the preliminary analysis. With regard to Hynix' past and present financial condition based on various financial indicators, as well as Hynix' cash flow adequacy and future outlook according to independent financial reports, we undertook a detailed examination in the preliminary analysis. Since that examination was based on historical data, our preliminary findings in that regard continue to be relevant and we continue to rely on those findings for the final determination. See Creditworthiness Memo at 3 to 5. We note that the respondent has submitted comments faulting certain components of that section in our analysis, and we address them in the comment section under Comment 5 further below. Further, we note that, at verification, Hynix produced documents related to the internal credit analyses performed by some of Hynix' lenders in the restructuring program. Since we have determined that those lenders provided the relevant loans under the direction or entrustment of the GOK, we find that those documents are a priori invalid for the purposes of this analysis. Hence, we have not included those documents in our discussion.

These contentions notwithstanding, and lacking additional evidence sufficient to refute the Department's earlier findings in this regard, our preliminary conclusions stand. Consequently, in light of all the considerations discussed above, we continue to find Hynix to be uncreditworthy during the period of 2000 through June 2002. Therefore, we have used an uncreditworthy benchmark rate in calculating the benefit from loans received during this time period, and have also used an uncreditworthy discount rate in calculating any non-recurring benefits received by Hynix that were allocable to the POI.

## Analysis of Programs

Based upon our analysis of the petition and the responses to our questionnaires, we determine the following:

### *I. Programs Determined to Be Countervailable*

#### A. Direction of Credit<sup>4</sup> and Other Financial Assistance

##### *The GOK's Credit Policies Through 1998*

As discussed above in the “Discount Rates and Benchmarks for Loans” section, the Department has examined the issue of whether the GOK controlled the lending practices of banks in the ROK in past cases. For the period through 1991, we determined that the GOK’s direction of credit policies resulted in countervailable subsidies to the ROK steel industry. See, e.g., Certain Steel, CTL Plate, and Structural Beams. In subsequent determinations, the Department found that the GOK continued to control, directly and indirectly, the long-term lending practices of most sources of credit in the ROK through 1998, and that this direction of credit was specific to the steel industry. See Plate in Coils and CTL Plate for our findings regarding 1997 and 1998, respectively. However, although we determined that the GOK directed the provision of loans by ROK banks in Plate in Coils and the Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 64 FR 30636, 30639 (June 8, 1999) (“Sheet and Strip”), we concluded that loans from ROK branches of foreign banks (i.e., branches of U.S. and foreign-owned banks operating in ROK) did not confer countervailable subsidies. This determination was based upon our finding that credit from ROK branches of foreign banks was not subject to the government’s control and direction. Additionally, because these loans were not directed or controlled by the GOK, we used them as benchmarks to establish whether loans from domestic banks conferred a benefit upon respondents.

We provided the respondents in the current proceeding an opportunity to present new factual information concerning the GOK’s direction of long-term lending during this previously-examined period. No party contested or provided new information challenging the Department’s findings prior to 1998. Moreover, although certain respondents indicated that they were challenging the Department’s finding for 1998, the respondents have not provided any new information that has not already been examined in past proceedings (e.g., CTL Plate and Structural Beams). Therefore, we determine that the GOK controlled, directly and indirectly, the long-term lending practices of most sources of lending

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<sup>4</sup>In referring generally to “direction of credit,” we are using a short-hand term for an indirect subsidy whereby a government entrusts or directs the provision of loans or other financial assistance. Entrustment as well as direction are both intended to be included, unless the context indicates otherwise, and either or both of them can form the basis of a determination of “entrusts or directs.”

in the ROK through 1998, with the exception of loans from ROK branches of foreign banks, as noted above, and, consequently, that the GOK entrusted and directed these banks to make loans.

### *Specificity*

Consistent with section 771(5A) of the Act, we next examined whether this direction of credit was specific to the semiconductor industry.

In Structural Beams and CTL Plate, the Department found that the GOK directed credit to “strategic” industries, such as steel, automobiles, and consumer electronics, throughout the 1970s, 1980s, and 1990s. As discussed in the Preliminary Determination, there is substantial evidence on the record demonstrating that the GOK considered the semiconductor industry a “strategic” industry. Specifically, as far back as 1976, it was clear that the semiconductor industry was one of the GOK’s “strategic” industries and was designated to receive special treatment from the GOK, including loans. Moreover, in Structural Beams, we found that, after the removal of the de jure preferences for “strategic” industries in 1985, the GOK continued to channel billions of dollars in lending into sectors favored by the government’s industrial policies. We also found that, throughout the 1990s, “bankers in {the ROK believed} that the {KDB} is still known for preferring the semiconductor, shipbuilding, and steel industries.” (See Structural Beams June 7, 2000 memorandum to the file, “Direction of Credit in Korea: Structural Steel Beams from the Republic of Korea” (“Structural Beams Direction Memo”) the public version of which is included as an appendix to the March 31, 2003 memorandum entitled “Direction of Credit Citations” (“Direction Citations Memo”), which is on file in the Department’s CRU.)

In this investigation, there is substantial evidence illustrating the GOK’s favoritism toward the semiconductor industry dating as far back as 1975 and continuing through the end of 1998. For example, the “Six-Year Electronics Industry Promotion Plan” of 1975 called for U.S. Dollar (“USD”) 94 million in public financing for “the domestication of the entire process of semiconductor manufacturing.” The GOK’s Seven Year High Technology Development Plan (1990) (“Seven Year Plan”) called for USD 1.83 billion of “High-Tech industry Promotion Fund{s}” for the development of ROK microelectronics products. The Seven Year Plan specifically identified 16 and 64 megabit DRAMS as the primary beneficiaries of GOK development funding, tax incentives, and the construction of an industrial estate. Under the “Seventh Five-Year High Technology Development Plan,” the Highly Advanced National (“HAN”) program was established to support the production of 256 megabit DRAMS by 1996 and one gigabit DRAMS by 2000, with USD 4.9 billion in government expenditures through 2001.

In 1994, the Ministry of Trade, Industry, and Energy (“MOTIE”) announced its selection of five strategic investment sectors (semiconductors, liquid crystal displays (“LCD”), aircraft, satellites, and machine tools) to receive government support. “As for the semiconductor industry, 46.9 billion won will be spent on {R&D} for a 256- {megabit DRAMS} this year and 20 billion won for LCD research.

Of these amounts, 19.2 billion won and 10 billion won, respectively, will be extended from the government budget. By 1997, a total of 195.4 billion won. . . are to be invested in {semiconductors}.” In a July 1997 interview, the Director General of the Electronics, Textile, and Chemical Industry Bureau of MOTIE stated, “{t}he government’s long-term strategy calls for {the ROK} becoming the world’s largest producer of semiconductor chips in the year 2010.” Finally, a study of the GOK’s industrial policies of the 1990s concluded that the GOK’s primary methods of supporting the semiconductor industry were: 1) direct financing (research grants and subsidized loans from GOK controlled banks); 2) inducing “quasi-private banks to channel loan funds” to semiconductors; 3) providing access to foreign capital; and 4) granting tax breaks for R&D expenditures.<sup>5</sup>

Therefore, as further discussed below in Comment 2, we find that there is substantial record evidence demonstrating that the GOK considered the semiconductor industry “strategic” and that the GOK targeted the semiconductor industry through 1998 as a recipient of GOK directed credit. Thus, we find that credit was directed to the semiconductor industry through 1998 in accordance with section 771(5A)(D)(iii)(IV) of the Act.

*The GOK’s Involvement in the ROK Lending Sector from 1999 through June 30, 2002*

The Department has also addressed GOK direction of credit in the years subsequent to 1998. In the Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 67 FR 1964 (January 15, 2002) and Cold-Rolled Steel, we provided the respondents with an opportunity to present new factual information concerning the government’s credit policies in 1999 and 2000, respectively. No party provided any new information on the GOK lending policies for domestic banks in either case. Therefore, we determined in those cases that long-term lending from domestic commercial banks and from specialized banks, such as the KDB, was directed by the GOK in 1999 and 2000, respectively. Additionally, with respect to direct foreign loans (*i.e.*, loans from offshore banks) and offshore foreign securities issued by ROK companies, we found that, subsequent to April 1999, companies no longer needed approval from the GOK to access direct foreign loans or to issue foreign securities. See Cold-Rolled Steel. Thus, we determined that these loans were not directed or controlled by the GOK, and could serve as benchmarks.

In the instant investigation, the petitioner has alleged that the GOK continued to influence and direct the practices of lending institutions in the ROK through the POI, and that the semiconductor sector received a disproportionate share of the benefits provided pursuant to this direction, resulting in the conferral of countervailable benefits on the producers/exporters of the subject merchandise. The petitioner has also alleged that, if the Department does not find that the semiconductor industry received a disproportionate share of financing during this period, this directed credit was specific to Hynix. The

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<sup>5</sup>See Petitioner’s March 14, 2003 submission at Exhibit C-4.

petitioner asserts, therefore, that the Department should countervail all loans and benefits from GOK owned/controlled/directed institutions that

were received by the producers/exporters of the subject merchandise, or all loans and benefits received specifically by Hynix, obtained during this period that were outstanding during the POI.

We provided the respondents in this proceeding an opportunity to present new factual information concerning the GOK's credit practices from 1999 through June 30, 2002 which we would consider along with our findings in the above-noted prior investigations. Certain respondents challenged the Department's prior overall direction of credit findings for 1999 and 2000. Parties in this investigation also presented information concerning the GOK's role in the ROK financial lending sector from 2001 through June 30, 2002. However, no party has challenged the Department's finding in Cold-Rolled Steel that direct foreign loans obtained after April 1999 and foreign securities issued after April 1999 were not directed or controlled by the GOK and could serve as benchmarks. Therefore, we continue to find as we have in past proceedings that the government did not exercise direct or indirect control over direct foreign loans obtained after April 1999 and foreign securities issued after April 1999.

As for the Department's general direction of credit findings for 1999 and 2000, because of the Department's prior determinations that the GOK controlled and directed credit provided by most ROK banks through 2000, discussed above, the burden of demonstrating that the GOK has changed its practices is placed, in large part, upon the respondents. Moreover, with respect to 1999 and 2000, because the Department has previously found that the GOK directed credit provided by most ROK banks in those years, new information or evidence of changed circumstances must be presented before the Department will change its previous findings.

In its response, the GOK argued that the post-1997 financial reforms instituted following the ROK financial crisis have led to the liberalization of the ROK financial sector, and that the GOK did not direct credit provided by domestic and government-owned banks from 1998 through the end of the POI. The GOK has also placed new information on the record to support its claim. As noted above, the Department has already addressed the impact of these reforms in 1998 in CTL Plate and Structural Beams. However, for the subsequent period, the GOK has submitted new information which we have analyzed to determine whether the GOK continued to direct credit from 1999 through June 30, 2002.

In conducting our analysis of this issue, we have first distinguished between banks that are themselves government authorities within the meaning of section 771(5)(B) of the Act and commercial banks that are not considered to be government authorities. In CTL Plate and Structural Beams, we found that, although changes had been made to the legislation regulating government-controlled specialized banks, such as the KDB, in the aftermath of the financial crisis, the respondents did not provide any evidence to demonstrate that the KDB has discontinued its practice of selectively making loans to specific firms or activities to support GOK policies.

Record evidence from the instant investigation indicates that the KDB and other specialized banks, such as the Industrial Bank of Korea (“IBK”), continue to be government authorities within the meaning of section 771(5)(B) of the Act. The term “authority” is defined in section 771(5)(B) of the Act as “a government of a country or any public entity within the territory of the country.” As stated in the Preamble to the Department’s regulations, “. . .we intend to continue our longstanding practice of treating most government-owned corporations as the government itself.” See Preamble, 63 FR at 65402.

In order to assess whether an entity such as the KDB should be considered to be the government for purposes of countervailing duty (“CVD”) investigations, the Department has in the past considered the following factors to be relevant: 1) government ownership; 2) the government’s presence on the entity’s board of directors; 3) the government’s control over the entity’s activities; 4) the entity’s pursuit of governmental policies or interests; and 5) whether the entity is created by statute. See, e.g., Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 30954 (July 13, 1992); Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from the Netherlands, 52 FR 3301, 3302, 3310 (February 3, 1987); and Sheet and Strip, 64 FR at 30642-30643.

According to the BOK in a February 2002 report on ROK financial institutions, most of the specialized banks are government-controlled banks. With regard to the KDB, all of the KDB’s shares are held by the GOK. Additionally, according to the KDB Act, the KDB’s purpose is “the supply and management of major industrial funds to promote industrial development and the advancement of the national economy.” All of KDB’s senior management and its auditor are appointed by the ROK President or the Ministry of Finance and Economy (“MOFE”). KDB’s annual business plan must be approved on an annual basis by the MOFE, and the KDB is supervised by the MOFE (except for prudential supervision, which is carried out by the Financial Supervisory Commission (“FSC”). Any net losses suffered by the KDB are covered by the GOK according to Article 44 of the KDB Act.

The purpose of the IBK is “to promote independent economic activities for small and medium enterprises and to enhance their economic status in the national economy.” The majority of the IBK’s shares are held by the GOK. The IBK’s top officials are appointed by the ROK President or by a GOK ministry. According to the IBK Act, one of the IBK’s activities is to “perform business entrusted by the Government and public entities,” and to “achieve the purpose of the bank {as noted above} with the approval of the relevant Minister.” The IBK’s annual business plan and operations manual (including its lending methods) must be approved by the relevant minister. Any annual losses suffered by the IBK are covered by the GOK.

Based on this information and our past findings, we determine that the KDB and the other specialized banks, such as the IBK, are government authorities. Hence, the financial contributions they made fall within section 771(5)(B)(i) of the Act.



As for the commercial banks in which the GOK owned a majority or minority stake and the other ROK commercial banks, as discussed in Comment 1, we have determined that these entities are not actual “GOK authorities” within the meaning of section 771(5)(B) of the Act. Therefore, we have considered whether these banks, as well as other ROK lenders, were entrusted or directed by the GOK to provide funds to the respondents during the period 1999 through the end of the POI. See section 771(5)(B)(iii) of the Act. Based on our analysis of this issue in Comments 1 and 2, below, we find that the GOK directed Hynix creditors to provide financing and other assistance to Hynix from 1999 through June 2002.

Finally, we note that, in past cases, we have found that loans from ROK branches of foreign banks are not subject to the direction of the GOK. (See, e.g., Plate in Coils and Cold-Rolled Steel.) As part of this finding, we found in past cases that loans from Citibank were not directed by the GOK. (See, e.g., Plate in Coils memorandum dated March 4, 1999, “Analysis Concerning Post 1991 Direction of Credit,” which is included as an appendix to the Direction Citations Memo.) Based on these past findings, we have determined that the lending and credit practices of Citibank are not directed by the GOK. However, as discussed in Comments 1 and 5, below, while we find that Citibank’s loans from prior periods are acceptable for use as a benchmark, we find that Citibank’s loans relating to the Hynix restructuring are not appropriate for use as benchmarks.

### *Specificity*

We next address the issue of specificity in accordance with section 771(5A) of the Act. As discussed below, for the period 1999 through June 30, 2002, record evidence in this proceeding indicates that the GOK only directed or provided loans and other benefits to a specific company or group of companies. The group of companies to which the GOK directed or provided loans during this period comprises companies that continue to be or were part of the Hyundai Group, including one of the respondents in this proceeding, Hynix.

As evidenced by many of the articles cited below in Comment 1 and in the Preliminary Determination regarding the GOK’s direction of credit from 1999 through the POI, the vast majority of the statements relating to government pressure on banks specifically identified Hyundai Group companies or Hynix, or programs, such as the Fast Track program, that were directed to Hyundai Group companies. (This evidence differs significantly from the policy statements, quotes and other record evidence relating to the pre-1999 period, which identify the semiconductor industry, as a whole, as the target of GOK directed credit.) For example, as discussed below in Comment 1, in September 2002, a National Assembly member spoke out against the GOK’s direction of credit to the Hyundai Group companies. However, National Assembly members were not the only ones speaking of this direction. In addition to other comments made by the Blue House stating that semiconductors were a “backbone industry” in the ROK discussed in Comment 1, below, the official response to the National Assembly Report from President Kim’s office was as follows: “{w}e are doing what is deemed necessary to save companies leading the country’s strategic industries.” In January 2001, the Korea Times stated that “cash-starved

{ROK} companies claimed that the government's measures were only aimed at certain larger companies such as {Hyundai Merchant Marine, Co. Ltd ("HMM")}, HEI, and Korea Industrial Development." According to a March 2001 article in the Korea Herald, "{o}nce again, the government appears to have backtracked on reform pledges, as it allegedly forced creditors to extend trillions of won in fresh financial aid to three Hyundai Group firms - {HEI, Hyundai Engineering and Construction ("HEC")}, and Hyundai Petrochemical {"HPC"}."}

The National Assembly Report cited above relied on data relating to the corporate restructuring measures taken by the following Hyundai Group companies from May 2000 through June 2002: HEC, Hynix, HPC, and HMM. During this period, ROK financial institutions participated in the Hyundai Group's restructuring measures, which included new loans, equity swaps, the acceleration of debt acquisition, the extension of debt maturities, CB purchases, and debt exemptions for a total of 244,106 billion won. The total for Hynix was 120,017 billion won, nearly 50 percent of the above-noted total. During the same period, GOK authorities (the KDB and the Export-Import Bank of Korea, among others) provided support to the Hyundai Group totaling 115,365 billion won (Hynix data is not reported separately from these figures). Hynix' share of restructuring measures from financial institutions accounted for nearly 50 percent of the Hyundai Group's total.

As noted in the Preliminary Determination, in considering whether this program was *de facto* specific, we are mindful of other scenarios where there have been debt restructuring programs in situations of national financial difficulty. For example, in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand, 66 FR 50410 (October 3, 2001) ("Thai Hot-Rolled Steel"), the Department found that a debt restructuring program was not specific to the respondent steel company because it was not limited to an enterprise or industry. There, the evidence showed that the program was broadly available across many industries, and the Department's evaluation showed that there was no predominant user or disproportionate share of the program, as well as other factors. (See Thai Hot-Rolled Steel, 66 FR 50410 and accompanying September 21, 2001 Decision Memorandum at Section III.A.4.) By contrast, here we find a number of indicators of ROK activity specifically focused on aiding Hynix and the Hyundai Group of companies.

Therefore, as discussed above, there is substantial record evidence demonstrating the GOK's commitment, and actions taken, to prevent the collapse of the Hyundai Group, and Hynix in particular. Additionally, as in Structural Beams, in the instant investigation, we reviewed a list of the largest recipients of KDB and Korea Exchange Bank ("KEB") financing as part of our specificity analysis. (See BPI Memo for a detailed discussion of this data and how it supports our specificity finding.) In addition, we considered information regarding the magnitude of monies involved with corporate restructurings under corporate restructuring laws in the ROK, as discussed above. At verification, the GOK provided data showing the amount of debt restructured for ROK companies undergoing CRPA debt restructurings. See GOK Verification Report at Verification Exhibit 1-5, pages 4-5. This data includes Hynix, HEI, and HPC's debt restructurings under the CRPA and shows that the three Hyundai Group companies account for a disproportionately large share of the debt restructurings for all

companies on the list. (See BPI Memo for a further discussion of this data.)

As further discussed below in Comment 2, because record evidence indicates that the GOK's actions with respect to its direction of credit were specific to current or former Hyundai Group companies and Hynix in particular, we find that this program is specific for Hynix pursuant to section 771(5A)(D)(iii)(IV). Further, we determine that the GOK did not direct credit to SEC or the semiconductor industry as a whole during this period. Therefore, we determine that any loans or other benefits provided to SEC during this period pursuant to the allegations of direction of credit are not countervailable according to section 771(5) of the Act.

### *Specific Financial Contributions Made Pursuant to the GOK's Direction of Credit*

Having determined that the GOK entrusted or directed credit to the semiconductor industry through 1998, and to Hynix from 1999 through the end of the POI, we now examine the financial contributions made by the directed financial institutions and the benefits conferred by those financial contributions.

#### 1. *Hynix Financial Restructuring and Recapitalization*

In the fall of 2000, because of the weakness in the ROK financial system in the wake of the 1997 financial crisis, many companies, like HEI, were continuing to have trouble securing financing for their operations or refinancing maturing debt. HEI, specifically, had serious looming financial troubles, with several trillion won in short-term debt that was coming due in 2001.

According to Hynix, and as further discussed below, the first step taken by HEI and its financial advisors, Citibank and SSB, was to work with HEI's creditors to borrow funds to meet immediate liquidity needs. These funds were arranged for in December 2000 in the form of a won 800 billion syndicated bank loan, which was organized by Citibank. Hynix reports that this was a stop-gap measure to cover certain immediate financial needs while a more comprehensive restructuring and recapitalization plan was being developed and implemented. At the same time, HEI was also nominated by its creditors to participate in a new GOK program starting in January 2001, the KDB Fast Track Debenture Program (discussed in greater detail below). Also in January 2001, Hynix arranged with its creditors to secure an increase in its documents against acceptance ("D/A") line of credit from USD 800 million to USD 1.4 billion.

In March 2001, as part of its corporate restructuring, HEI changed its name to Hynix. This step was taken in advance of its official August 2001 separation from the Hyundai *chaebol*. At the same time, a group of Hynix' 17 major creditors formed the first Hynix Creditors' Financial Institution Council ("Creditors' Council"). According to the GOK, this Creditors' Council was modeled after the corporate workout process established by the GOK in June 1998 pursuant to the Corporate Restructuring Agreement ("CRA"), which was an informal agreement that comprised 210 ROK financial institutions. Under the CRA, the lead creditor, which would be responsible for negotiating any corporate work-out terms, headed the Creditors' Council, a council made up of the troubled

corporation's creditor banks. (In September 2001, the CRA was replaced by the CRPA, a more formal mechanism under ROK law which codified the corporate workout methods that were being utilized under the CRA.) However, although this Creditors' Council was based on the CRA councils, according to the GOK, it was not part of the CRA program but was a voluntary agreement among Hynix' creditors based on experience acquired while pursuing other workout agreements. GOK owned-or controlled banks were large creditors of Hynix and played a key role in the Creditors' Council.

Hynix and SSB presented this Creditors' Council with an overall restructuring proposal for Hynix. This proposal included recapitalization in the form of a won one trillion CB issuance, an issuance of USD 1.25 billion in common shares in the form of Global Depository Shares ("GDS"), and rescheduling and restructuring of Hynix' debt through maturity extensions and greater availability of short-term debt instruments. Hynix and its creditors formally agreed to this restructuring plan in May 2001, with the restructuring program being contingent upon a successful GDS issuance. As a result of the successful USD 1.25 billion GDS issuance on foreign and domestic capital markets, in June 2001, Hynix issued won 994.1 billion in CBs, borrowed won 5.9 billion in the form of a separate loan, and had many of its maturing debts rescheduled or refinanced. Hynix also was able to continue to access short-term usance, overdraft, and D/A financing.

Despite these restructuring efforts, by summer of 2001, it became apparent that more restructuring would be necessary due to the prolonged downturn in the DRAMS market and Hynix' continuing financial troubles. Thus, Hynix and its advisors worked with Hynix' creditors to develop a new restructuring package that was adopted in October 2001. As part of this package, which was negotiated pursuant to the new CRPA, Hynix' new CRPA Creditors' Council developed three options for Hynix' creditors: 1) for creditors that agreed to extend new loans, the creditors could convert D/A balances to general long-term loans, swap CBs and unsecured loans to new CBs (which would be subsequently converted into equity), and refinance or extend the remaining loans; 2) creditors that did not agree to extend new loans, but did agree to the debt-to-equity conversion, could convert all of their secured loans and 28 percent of their unsecured loans into the CBs that would subsequently be swapped for equity, with the remainder of the unsecured loans to be forgiven; 3) creditors that did not agree to either new loans or the debt-to-equity conversion could exercise their appraisal rights for all of their secured debt and 25 percent of their unsecured debt based on Hynix' liquidation value (as established by an external consultant), and have the remainder of the debt forgiven. These options were established by the Creditors' Council, of which GOK or GOK-owned banks comprised a large part. The various creditors of Hynix selected among these options, with the result that won 2.993 trillion in debt was swapped for equity on December 6, 2001, won 1.45 trillion in debt was forgiven, some new loans were issued, and numerous loans were extended or refinanced.

As discussed above in the "Direction of Credit and Other Financial Assistance" section and in Comments 1 and 2, below, we have determined that the GOK entrusted or directed Hynix' creditor banks to participate in these restructuring programs and to provide credit and other funds to Hynix in

order to assist it through its financial difficulties. As indicated in the overview of the Hynix restructurings, the financial assistance provided to Hynix by its creditors took various forms. We determine that these different means of supporting Hynix were new financial contributions as described in section 771(5)(D) of the Act. Specifically, the loans, CBs, extensions of maturities (which we view as new loans), D/A financing, usance financing, overdraft lines, debt forgiveness, and debt-for-equity swaps are direct transfers of funds from the GOK-directed financial institutions to Hynix. (See section 771(5)(D)(i) of the Act.)

We determined the benefits to Hynix from the various instruments as follows:

- For the new long-term loans and bonds that were issued as part of the restructuring program, we compared the interest rates on the directed long-term loans and new bonds to the benchmark interest rates detailed in the “Subsidies Valuation Information” section, above, in accordance with section 771(5)(E)(ii) of the Act. For the period January 2000 through June 2002, we used an uncreditworthy benchmark rate because we determined that Hynix was uncreditworthy during this period (as discussed above in the “Creditworthiness” section). For long-term variable-rate loans, the repayment schedules of these loans did not remain constant during the lives of the respective loans. Therefore, we have calculated the benefit from these loans using the Department’s variable rate methodology as described in 19 CFR 351.505(a)(5) and 19 CFR 351.505(c)(4). For long-term fixed-rate loans and bonds, consistent with Cold-Rolled Steel, we calculated the benefit using the Department’s standard fixed-rate methodology specified in 19 CFR 351.505(c)(2). We summed these benefits to determine the total benefit during the POI from the long-term loans and bonds.
- For short-term loans and bonds, we calculated the benefit using the methodology specified in 19 CFR 351.505(c)(1) and (2). We summed these benefits to determine the total benefit during the POI from these short-term loans.

#### *Debt-to-Equity Swaps*

As discussed above, as part of the October 2001 restructuring package, certain of Hynix’ creditors swapped some of their outstanding debt for equity. To determine whether these equity purchases conferred a benefit on Hynix, we followed the methodology described in 19 CFR 351.507. See Comment 7 below. Based on this analysis, we determine that Hynix was unequityworthy at the time of the October 2001 debt-to-equity swap. Therefore, in accordance with 19 CFR 351.507(a)(6), we have treated the amount of equity purchased by Hynix’ creditors, other than Citibank, as a grant.

In carrying out this debt swap, Hynix first converted its outstanding debt into 2.99 trillion won in new CBs which carried an obligation to convert the bonds into equity. These bonds were issued on December 6, 2001. Because the new CBs carried a conversion obligation, Hynix recorded the debt-to-equity swap as a capital adjustment in its 2001 financial statements. Therefore, we have treated the

benefit as having been provided to Hynix in 2001. In accordance with 19 CFR 351.507(c), we allocated the benefit of the debt-to-equity conversion over the AUL using the uncreditworthy discount rate as described in the “Subsidies Valuation Information” section, above.

In addition, as discussed in Comment 11 below, because we have treated the equity infusion as having occurred in December 2001, there is no basis for countervailing the CBs outstanding during the period December 2001 through June 2002.

#### *Debt Forgiveness*

Under 19 CFR 351.508(c), the benefit conferred by a debt forgiveness is the amount of the debt forgiven. To calculate the benefit to Hynix received during the POI from the October 2001 debt forgiveness, we allocated the entire amount of debt forgiven over the AUL using an uncreditworthy discount rate. Additionally, as discussed in Comment 10 below, prior to the debt-to-equity conversion, Hynix retroactively reduced the interest rates on certain debts to calculate the amount of interest liability that would be converted to equity. The benefit conferred is the difference between the actual interest liability using the original interest rate and the revised interest liability calculated with the October 2001 interest rate (*i.e.*, the amount converted to equity), which we calculated in accordance with 19 CFR 351.508.

#### *KDB “Fast Track” Debenture Program*

In the aftermath of the 1997 financial crisis, many ROK companies had to borrow heavily to service their USD-denominated debts, which soared as the value of the won plummeted against the USD. Many companies did so through corporate bond issues, most of which were set to mature in late 2000 and 2001. However, when it came time for these bonds to mature, difficulties in the financial market, including unwillingness by investors to invest in the bond market due to heightened risk, especially in companies with poor credit ratings, made it difficult for many companies to refinance or service their maturing bonds. Moreover, many financial institutions could not extend further financing to companies because of loan exposure limits put in place following the financial crisis. Due to this situation, many ROK companies, especially those with below-investment grade bond ratings, were left with serious liquidity problems. Furthermore, the won 65 trillion in corporate bonds coming due in 2001 threatened to overwhelm the capital markets.

Therefore, the GOK instituted several programs to try to address this situation. In June 2000, the GOK established the Collateralized Bond Obligation (“CBO”) and Collateralized Loan Obligation (“CLO”) programs in order to support the refinancing of corporate bonds and loans. Through these programs, corporate bonds or loans from many companies were bundled together in individual asset-backed securities (“ABS”) for loans or bonds, as applicable, similar to a bond/loan mutual fund. When each ABS was issued, the Korea Credit Guarantee Fund (“KCGF”) provided enough of a guarantee on the ABS that allowed the ABS to have an AAA rating on the market to make it more attractive to

investors. No more than 10 percent of the debt of any one company could be placed into a single bundle of bonds or loans. According to the GOK, any company with maturing bonds was eligible to participate in the CBO and CLO programs.

Because the CBO and CLO programs alone were not sufficient to handle the volume of maturing bonds at the end of 2000 and 2001, including the effects of the Hyundai Group liquidity crisis, the GOK created the KDB Fast Track/Debenture Program to address this problem. Under the Fast Track program, which was administered by the KDB, companies selected to participate in this program first had to redeem 20 percent of their bonds that were maturing in 2001; the remaining 80 percent of the maturing bonds were purchased by the KDB, and were subsequently replaced with new bonds issued by the participating companies. Of the bonds purchased by the KDB that were replaced by new issues, 10 percent of the new bonds issued were kept by the KDB, 20 percent of each new issue was purchased by the company's creditors (a blanket waiver was issued by the GOK in order to allow the creditors to exceed their loan exposure limits), and the remaining 70 percent of each new issue was bundled with other bonds and sold as CBOs or CLOs (which were partially guaranteed by the KCGF). As part of the agreement that had to be signed by the participating companies, each company was required to purchase a certain percentage of its subordinated bonds bundled with other bonds in the CBOs and CLOs (three percent in the case of a CBO, and five percent for a CLO). The program ceased to operate at the end of 2001.

According to the GOK, in order to participate in the Fast Track program, companies had to be nominated by their Creditors' Councils. Companies eligible to participate in this program, as established in Article 8 of the Creditor Financial Institutions and Corporate Credit Guarantee Fund Council Agreement to Facilitate Bond Offerings, are those that 1) are experiencing temporary liquidity problems due to a large-scale maturation of corporate bonds but have the ability to redeem at least 20 percent of those bonds; 2) are nominated by their Creditors' Council; and 3) are not distressed companies that are undergoing corporate reorganization or workout programs. According to record evidence, only six companies participated in this program, four of which were current or former Hyundai affiliates.

Hynix was selected to participate in the Fast Track program in January 2001. According to Hynix, won 1.208 trillion of its bonds were refinanced through this program. Of this total, the KDB purchased won 120.8 billion (or 10 percent) of the maturing bonds, the creditor banks purchased won 241.6 billion (or 20 percent) of the maturing bonds, and the CBO/CLO funds purchased 70 percent of the remaining new issues, won 845.6 billion. Upon incorporation into the CBO and CLO funds, Hynix then repurchased the specified proportion of the subordinate bonds through the CBOs and CLOs. Hynix participated in the program until August 2001.

As discussed above, we determine that the GOK's direction of credit was specific to Hynix and other current or former Hyundai Group companies. Additionally, we determine that the Fast Track program was de facto specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because the

participants in this program were limited in number. However, as discussed in Comment 6 below, we determine that the bonds that were placed in the CBO and CLO funds as part of this program did not provide a countervailable subsidy to Hynix because, according to record information, those programs were available to anyone with maturing bonds that wanted to participate and there were a wide range of companies and industries that participated. Thus, we have found no evidence of de jure or de facto specificity in the application of the program.

To determine the benefit received by Hynix as a result of the Fast Track program, we compared the interest rates on the directed bonds to the benchmark interest rates detailed in the “Subsidies Valuation Information” section, above. As discussed below in Comment 6, we calculated the benefit from these bonds using the Department’s standard fixed-rate methodology described in 19 CFR 351.505(c)(1). We summed these benefits to determine the total benefit during the POI. We note that, in the Preliminary Determination, we based our benefit calculations for the Fast Track program on the interest payments reported by Hynix in its loan chart. However, as it appears that those reported interest payments were payments that were made on the entire Fast Track bonds that were issued (including the portions of the bonds that were transferred into the CBO program), for the final determination we are basing our benefit calculations only on the 30 percent of the bonds that were retained by Hynix creditors and the KDB, and are eliminating from the calculation the 70 percent of the bonds that were transferred into the CBO program.

## 2. *Other Loans Provided from 1999 through the POI*

With the exceptions noted below, for all other loans obtained by Hynix during this period that were outstanding during the POI, we calculated the benefit using the methodology described above for the Hynix restructuring loans.

Hynix stated in its questionnaire responses that it obtained Long-Term Usance loans, as well as loans under the Fund for Promotion of Informatization and the Fund for Promotion of Defense Industry, during this period that were outstanding during the POI. We verified that these loans were for projects involving non-subject merchandise. Thus, we have not included these loans in our final determination benefit calculations for Hynix.

## 3. *Loans Provided Prior to 1999*

As explained above, the Department has determined that the GOK entrusted or directed banks to provide credit to the semiconductor industry in the period through 1998. We further determine that these GOK-directed loans to Hynix and SEC are financial contributions as described in section 771(5)(D)(i) of the Act.

The directed loans received by Hynix and SEC through 1998 that were outstanding during the POI were long-term fixed- and variable-rate foreign currency loans and long-term fixed- and variable-rate



won-denominated loans. In order to determine whether a benefit was received by Hynix or SEC as a result of the long-term loans that were received through 1998 (with the exception of those noted below), we compared the interest rates on the directed loans to the benchmark interest rates detailed in the “Subsidies Valuation Information” section, above. For long-term variable-rate loans, the repayment schedules of these loans did not remain constant during the lives of the respective loans. Therefore, we have calculated the benefit from these loans using the Department’s variable rate methodology as described in 19 CFR 351.505(a)(5) and 19 CFR 351.505(c)(4). For long-term fixed-rate loans, consistent with Cold-Rolled Steel, we calculated the benefit using the methodology specified in 19 CFR 351.505(c)(2). We summed the benefit amounts during the POI to determine the total benefit for each company.

SEC reported that certain loans received under the Science and Technology Promotion Fund prior to 1999 were tied to non-subject merchandise (loans made from this fund are discussed in Structural Beams, 65 FR 41051 and accompanying July 3, 2000 Decision Memorandum at 13). Furthermore, both Hynix and SEC stated in their questionnaire responses that their loans from the Fund for Promotion of Informatization and the Fund for Industrial Technology Development that were obtained during this time period were for projects involving non-subject merchandise. Thus, as we have verified this to be the case, we have not included these loans in our final determination benefit calculations.

#### Countervailable Subsidy Rates for Hynix and SEC

We used the above-described methodologies to calculate the benefit from all of the financial contributions discussed above, and summed the benefit amounts from all financial contributions. We then divided the total benefit by each respective company’s total sales values during the POI. On this basis, we determine the net countervailable subsidy to be 44.48 percent ad valorem for Hynix and 0.01 percent ad valorem for SEC.

#### B. Operation G-7/HAN Program

Implemented under the Framework on Science and Technology Act, the G-7/HAN program began in 1992 and ended in 2001. Its purpose was to raise the ROK’s technology standards to the level of the G-7 countries. There were 18 different project areas, including semiconductors, environment, and energy. Eight ministries participated in various projects, with the Ministry of Science and Technology (“MOST”) acting as the funding authority.

For the project area entitled “Next Generation Semiconductors” (“NGS”), MOST assigned the administrative function to the Korean Semiconductor Research Association, an industry R&D association. This association was renamed in 1998 as the Consortium of Semiconductor Advanced Research (“COSAR”), and it acted as the intermediary between the MOST and participating companies. Applications were submitted to COSAR, which passed them on to a committee at MOST for evaluation. Under the NGS project, the GOK, through MOST, made interest-free loans to

participating companies. These loans were provided as matching funds; in general, participating companies contributed at least 50 percent of the total R&D funding, while the government contribution was capped at 50 percent. See GOK Verification Report at 29.

After completion of the project, the companies paid “technology usance fees” to the government pursuant to a “technology execution contract.” While these were not loan repayments, *per se*, the amount paid equaled the government’s contribution to the project. Upon making the final payment, ownership of the technology developed under the project was transferred entirely to the company. See Hynix Verification Report. Both Hynix and SEC had loans outstanding during the POI under this program.

For purposes of this final determination, we have analyzed whether the NGS program confers a countervailable subsidy. Although the NGS fits under the umbrella of G-7/HAN, NGS and the other G-7/HAN project areas are administered separately, and have project specific regulations in addition to the common management regulations. Therefore, we view the different project areas as separate programs.

Because funding provided under the NGS is limited to semiconductor research, we determine that the NGS is specific within the meaning of section 771(5A)(D)(I). We also find that a financial contribution was provided under section 771(5)(D)(i) of the Act in the form of direct loans from the GOK. Finally, pursuant to section 771(5)(E) of the Act, we determine that the benefit conferred by this program is the difference between the amount the companies paid on the loans and the amount the companies would pay on comparable commercial loans.

Consistent with section 771(5)(D)(i) of the Act and 19 CFR 351.505(c)(2), we calculated the benefit from these loans by comparing the interest actually paid on the loans during the POI to what the companies should have paid during the POI. We used as our benchmarks the rates described in the “Discount Rates and Benchmarks for Loans” section, above. We then divided the total benefit from the loans for each company by the company’s semiconductor sales in the POI to calculate the total countervailable subsidy. On this basis, we determine that Hynix and SEC received countervailable benefits of 0.22 percent ad valorem and 0.03 percent ad valorem, respectively.

#### C. 21<sup>st</sup> Century Frontier R&D Program

The 21st Century Frontier R&D program was established in 1999 with a structure and governing regulatory framework similar to those of the G-7/HAN program, and for a similar purpose, *i.e.*, to promote greater competitiveness in science and technology. See GOK Verification Report at 30. Altogether, the program comprised 19 project areas, each typically having a 10-year time horizon. As with G-7/HAN, the program provided long-term interest-free loans in the form of matching funds. Also, repayment of the program funds is made in form of “technology usance fees” upon completion of

the project, pursuant to a schedule established under a technology execution, or implementation, contract.

For the project area entitled “Tera-Level Nano-Devices Development Program” (“TND”), MOST assigned the supervisory function to the Korean Institute of Science and Technology, a government-invested institution. See Hynix Verification Report. The TND program began in 2000 and will end in June 2010. During the period of 2000 to 2002, the government provided 10 billion won annually to the program. See GOK Verification Report. Hynix reported that it had TND loans outstanding during the POI. Although SEC reported no TND loans, evidence on the record of this proceeding indicates otherwise. (See Comment 27)

Given the nearly identical structure of the G-7/HAN and 21<sup>st</sup> Century Frontier programs, we have determined that project area is the appropriate level of analysis. Therefore, we have analyzed whether the TND Program confers a countervailable subsidy on the respondents.

Because the evidence on the record indicates that funding under the TND is limited to Hynix, SEC, and various government research institutes, we determine that the TND Program is specific within the meaning of section 771(5A)(D)(I). We also find that a financial contribution was provided under section 771(5)(D)(i) of the Act in the form of direct loans from the GOK. Finally, pursuant to section 771(5)(E) of the Act, we determine that the benefit conferred by this program is the difference between the amount the companies paid on the loans and the amount the companies would pay on comparable commercial loans.

Consistent with section 771(5)(D)(i) of the Act, we calculated the benefit to Hynix from these loans by comparing the interest actually paid on the loans during the POI to what the companies should have paid during the POI. We used as our benchmarks the benchmarks discussed in the “Discount Rates and Benchmarks for Loans” section above. We then divided the total benefit from the loans for each company by the company’s total sales in the POI to calculate the total countervailable subsidy. On this basis, we determine that Hynix received a countervailable benefit of 0.00 percent ad valorem.

For SEC, the Department was not able to determine, based on the available evidence, whether funds received under the TND Program were tied to non-subject merchandise, as claimed by SEC. However, even if the amounts received by SEC were not tied to non-subject merchandise, any benefit to the company would be insignificant. Therefore, we find no countervailable benefit to SEC under the TND Program.

The petitioner has alleged that the 21<sup>st</sup> Century Initiative also provided a subsidy in the form of a governmental provision of a good or service. We disagree, and our finding is described in response to Comment 27.

## *II. Programs Determined to Be Not Countervailable*

A. Tax Programs Under the TERCL and/or the RSTA

Pursuant to ROK tax law, domestic companies are permitted to claim investment tax credits for various kinds of investments. If the investment tax credits cannot all be used at the time they are earned, then the company is permitted to carry them forward for use in subsequent years. The tax code also permits a company to establish a tax reserve related to investment, which serves as a deferral of tax liability. Companies must choose either the reserve or the credit, not both, so benefits cannot be claimed twice for a single investment.

Until December 28, 1998, ROK tax credits were set forth in various acts, including the TERCL. On that date, the TERCL was superceded by the RSTA. Pursuant to this change in the law, investment tax credits are now governed by the RSTA.

Hynix earned investment tax credits during the POI. However, due to the net tax loss for the income tax returns filed during the POI, the company could not use and did not claim any investment tax credits during the POI. During the POI, SEC both earned and used tax credits.

The specific Articles under the TERCL and the RSTA that we have investigated in the instant investigation are discussed separately below in this section or below in the “Programs Determined Not To Have Been Used or To Have Provided No Benefits During the POI” section:

1. *Tax Credit for Research and Human Resources Development Expenses (Article 10 of RSTA/ Article 9 of TERCL)*

Article 10 of the RSTA replaced Article 9 of the TERCL at the beginning of 2001. RSTA Article 10 provides a tax credit for certain qualifying expenses related to research and human resources development. Under Article 9 of the TERCL, the credit was limited to certain mining, manufacturing, or other businesses (including computer companies), as specified by the implementing Presidential Decree. Under Article 10 of the RSTA, however, eligibility was extended to all domestic businesses, except for those in real estate or consumption services.

We verified that Hynix did not earn or use RSTA Article 10 tax credits during the POI. We verified that SEC both earned and used RSTA Article 10 tax credits on its 2001 and 2002 tax returns.

We determine that RSTA Article 10 tax credits are not specific as import substitution subsidies. We further determine that RSTA Article 10 credits are not de facto specific (see Comment 26). Therefore, we determine that RSTA Article 10 does not provide a countervailable subsidy.

2. *Temporary Tax Credit for Investment (Article 26 of RSTA)*

Article 26 of RSTA (formerly Article 27 of TERCL) authorizes a tax credit equaling a maximum of ten percent of the amount a domestic company invests in eligible machinery and equipment. At the GOK verification, we examined RSTA Article 26 provisions and noted that the law establishes the credit at a uniform ten percent rate for both domestic and imported equipment. The import substitution advantage set forth in this article was abolished on December 30, 1996 under the TERCL.

Although the Article itself permits a ten percent tax credit, this is a ceiling; the actual allowed percentage is prescribed in a Presidential Enforcement Decree. Various decrees implemented different tax credit percentages between 1992 and 2002. While the Article itself has not drawn a distinction between investments made in domestically produced facilities versus imported facilities since 1996, the Presidential Enforcement Decree has, in the past, authorized tax credits for investments in domestically produced equipment only. However, beginning on June 3, 1997, and extending through the end of the POI, the Decree does not distinguish between investments in domestic-origin versus foreign-origin machinery and equipment.

We confirmed that SEC used Article 26 tax credits for its 2001 tax filing that had been carried forward from 1999. Accordingly, these credits were earned after the ROK eliminated the different tax treatment for investment in domestic versus imported facilities. We, therefore, determine that RSTA Article 26 credits used by SEC during the POI are not specific as import substitution subsidies. We further determine that the RSTA Article 26 credits are not de facto specific (see Comment 26). Therefore, we determine that RSTA Article 26 does not provide a countervailable subsidy.

#### B. Import Duty Reduction for Cutting Edge Products

Under this program, which was in place from 1989 through 2000, respondent companies received a duty reduction of 30 percent on imports of “cutting edge” technology equipment, pursuant to Articles 3, 7 and 28 of the Customs Act.<sup>6</sup> The reduction rate was based on the CIF value of the imports. See SEC Verification Report. Addenda to the Customs Act limited eligibility to certain imports by manufacturers in seven advanced technology industrial sectors: precision electronics (including semiconductors), electronic control and high-precision machinery, new materials, industrial chemicals, biotechnology, optics, and aerospace. MOFE released official lists of eligible industries and eligible products for each industry. These lists were revised yearly based on fiscal considerations and pursuant to requests from the Ministry of Commerce, Industry, and Energy (“MOCIE”). In preparing the preliminary lists, MOCIE consulted with the various industry associations, which consulted with members and prioritized the products to recommend for eligibility. The Department confirmed at verification that the program ended as of December 31, 2000, and that benefits could not be carried

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<sup>6</sup>For all references to articles and provisions of the Customs Act and the related Addenda, see the GOK’s February 28, 2003 submission at Exhibit 1 and March 28, 2003 submission at Exhibit 3.

over beyond 2000. See Hynix Verification Report and SEC Verification Report.

The Customs Act expressly limited the benefits under this program to a select group of advanced technology industries. Consequently, we find that this program is de jure specific within the meaning of section 771(5A)(D)(i) of the Act. Because this program reduces by 30 percent the duties payable to the ROK Customs Service on certain imports, we find that a financial

contribution was provided by the government in the form of revenue foregone within the meaning of section 771(5)(D)(ii) of the Act.

The Department's regulations provide that duty reduction benefits are normally expensed in the year of receipt of the benefits. See 19 CFR 351.510(c) and 351.524(c)(1). However, the regulations also provide that duty reduction benefits may be allocable over time if "the subsidy was provided for, or tied to, the capital structure or capital assets of the firm." See 19 CFR 351.524(c)(2)(iii).

The respondents confirmed that, for the period 1997 through 2000, they received import reductions under this program for capital equipment related to semiconductor production. They also provided the yearly total reduction amounts, for which we examined source documentation at verification. See SEC Verification Report and Hynix Verification Report. Because these benefits were tied to capital goods, we find that they are potentially allocable to the POI, pursuant to 19 CFR 351.524(c)(2)(iii). To determine whether these benefits should be allocated to the POI or expensed in the years of receipt, we applied the 0.5 percent test as set forth in 19 CFR 351.524(b)(2). We divided each year's total duty reductions by the same year's total DRAMS and semiconductor sales. The calculations resulted in rates of less than 0.5 percent for each year for each respondent company. Consequently, we find that all benefits under this program should be expensed in the years of receipt, from 1997 through 2000, rather than allocated to the POI. Therefore, we determine that neither SEC nor Hynix received a countervailable benefit under this program during the POI.

#### C. Permission for Hynix and SEC to Build in Restricted Area

The petitioner alleged that respondent companies obtained special permission to build semiconductor facilities in areas restricted under the Seoul Metropolitan Area Readjustment Planning Act ("SMARPA"), enacted in 1994, and thereby received benefits in the form of better access to potential workers and existing infrastructure, as well as in the form of increased property values.<sup>7</sup> In April and May 2003, the petitioner placed additional information regarding alleged subsidies received by SEC through the bestowal of development rights.

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<sup>7</sup> Administrative authority rested with the SMARPA Committee, comprised of various Ministries, and regional and local governmental authorities, chaired by the Prime Minister, and under the coordination of the Ministry of Construction and Transportation ("MOCT").

According to information provided by SEC and the GOK, SMARPA and its accompanying Enforcement Decree established three development zones in the Seoul metropolitan area: (1) the overconcentrated zone, (2) the growth management zone, and (3) the nature preservation zone.<sup>8</sup> New construction or expansion of industrial and population-concentrating facilities are prohibited within the first and third zones, although the law allows certain exceptions at the discretion of MOCT and the SMARPA Committee. The second zone is less restricted, according to the GOK, as it is meant to accommodate new industrial development and draw industries currently located in the other zones away from those areas. However, even in the second zone, large-scale development projects exceeding 300,000 square meters in land area are subject to review by the SMARPA Committee for their impact on population, traffic, and the environment, pursuant to Article 19 of SMARPA and Article 4 of the Enforcement Decree. Developments of up to 300,000 square meters in land area do not require the same review and may proceed without the SMARPA Committee's deliberations.

The Department's investigation, including information obtained at verification, revealed that the respondent companies were differently situated under the SMARPA. Although Hynix' semiconductor facilities were located in the nature preservation zone, these had been constructed in the 1980s before the SMARPA was in effect and were, therefore, not subject to the SMARPA restrictions. During the period of 1996 through 2000, Hynix undertook new construction of an employee dormitory, which the Department confirmed at verification to be within the 30,000 square meter allowance for housing facilities in the nature preservation zone under Article 13 of the Enforcement Decree. See Hynix Verification Report.

With regard to SEC, we confirmed at verification that SEC's original semiconductor campus in Giheung, Gyeonggi Province, was located in the growth management zone where industrial development was encouraged by the government and, like that of Hynix, pre-dated the SMARPA. SEC also added an employee dormitory in 1996, and was approved in 1999 for a more extensive expansion of its production facilities into the Hwaseong district. The Department confirmed at verification that the dormitory addition required no special review under the SMARPA provisions for the growth management zone, as it was built inside the existing campus. See SEC Verification Report.

Information submitted by the petitioner indicated that, prior to the Hwaseong expansion, SEC faced an expansion cap of 25 percent of existing facilities, and that the cap was raised to 50 percent in October 1996, following concerted requests to the relevant ministries from SEC and other leaders in the electronics and semiconductor industries. The petitioner alleged that this expansion allowance was provided only to large companies in seven high-tech industry sectors, including the semiconductor industry, and was provided with the aim of promoting national economic development and national

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<sup>8</sup> For all references to articles and provisions under the SMARPA and the accompanying Enforcement Decree, both enacted in 1994, see the GOK's February 28, 2003 submission at Exhibit 3 and March 28, 2003 submission at Exhibit 5.

competitiveness in these industry sectors. The petitioner further alleged that SEC obtained land for the expansion directly from the government, and through confiscation authority granted by the government pursuant to provisions under the Industrial Placement & Development Act. According to the petitioner, the government provided a financial contribution and conferred a benefit in the form of land provided for less than adequate remuneration within the meaning of sections 771(5)(D) and (E) of the Act, as well as through the grant of exclusive development rights.

As in our preliminary analysis,<sup>9</sup> we determined that this allegation is best analyzed as the governmental provision of a good (land). Regarding the government's action in 1997 to allow certain industries to expand their plants, we determine this action restored development rights to landowners in the restricted areas, and that any increase in the value of the land would flow to them when they sold their properties to companies like SEC. In this situation, the government is not itself providing land to SEC. Additionally, we have determined that the information in the record does not support a finding that SEC was able to obtain this increased value by virtue of its alleged authority to confiscate the land. See Comment 33. Therefore, we determine that neither SEC nor Hynix received a subsidy by virtue of the government's permission to build in a restricted area.

#### D. Exemption of VAT on Imports Used for Bonded Factories under Construction

Under the GOK's VAT Act, a company is normally assessed a 10 percent VAT on imported equipment used for business. In turn, the company collects a VAT from its customer as part of the price of the goods produced by the company. The VAT paid by the company on the imported equipment is called the "input" tax, while the VAT that the company collects from the customer is called the "output" tax. The company submits a VAT report to the government on a monthly basis (see GOK May 13, 2003 submission), which reconciles the two VAT amounts by paying to the government only the amount by which the output tax exceeds the input tax. Conversely, if the input tax exceeds the output tax, the government refunds the difference to the company. Assessment and reconciliation of this tax burden continues in this manner, down through the distribution chain to the final consumer of the finished product. Thus, ultimately, the company pays nothing to the government and merely conveys the VAT; it is the final consumer, not the producer, who actually pays the VAT to the government.

Respondent companies were exempted from the "input" VAT normally payable at customs clearance on imported equipment for bonded factories under construction pursuant to Article 106 of the RSTA. See Hynix Verification Report and SEC Verification Report.

As we discussed in our preliminary analysis of this program in the Supplemental Preliminary

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<sup>9</sup>See May 28, 2003 memorandum entitled "Preliminary Determination on New Subsidy Allegations and New Subsidies Discovered in the Course of Investigation" ("Supplemental Preliminary Determination Memo"), which is on file in the Department's CRU.



Determination Memo, the Department has examined similar VAT exemptions or remissions in past proceedings and found that the amount of exempted or remitted VAT was, in itself, not countervailable within the meaning of 19 CFR 351.510 and 19 CFR 351.517. The Department further determined that exempting the tax at the time of importation, rather than the alternative, i.e., recovering the tax at the time of reconciliation, conferred no benefit because of the short time difference between the two events. Specifically, in Thai Hot-Rolled Steel, the Department found that the VAT was reconciled in the company's accounting records on a monthly basis, and that the potential time-value windfall from a month's lag time was insignificant and, therefore, conferred no benefit. See Thai Hot-Rolled Steel October 3, 2001 Decision Memorandum, under "VAT Exemptions Under the Investment Promotion Act."

The information on the record of this proceeding indicates that the ROK VAT exemption program operates in the same manner as those previously determined not to confer a benefit. Therefore, based on the Department's findings in Thai Hot-Rolled Steel and the other past proceedings discussed in our preliminary analysis, we determine that the VAT exemption program conferred no benefit.

#### E. ESF Program

The ESF program provides financing for investment in projects and equipment that use energy efficiently. The purpose of the program is to encourage companies to invest in energy-saving facilities. Under delegation from MOCIE, the Korean Energy Management Company ("KEMCO"), a government-invested organization, administers this program. Funds provided under this program are handled through commercial banks. Applications can be submitted either directly by the recipient company or through Energy Service Companies ("ESCO"). An ESCO is a company that has the technical knowledge to provide and install the energy saving devices.

An application is first reviewed by KEMCO to determine whether the technical aspects of the energy savings proposal in the application meet the criteria under the program's regulations. The application is then examined by the commercial bank, which performs a creditworthy analysis of the applicant before approving the loan. If the application is made through an ESCO, the bank does a credit analysis of both the ESCO and the customer. When a company goes through an ESCO, the company and the ESCO enter into a contract before the ESCO submits an application to KEMCO with the company's approval. The ESCO's customer is contractually obligated to repay both the interest and principal of the loan to the ESCO, while the ESCO repays the commercial bank. SEC applied directly to KEMCO for its ESF loans, while Hynix participated in this program through an ESCO.

In the Preliminary Determination, and in prior cases where we have countervailed directed credit in the ROK, we have treated ESF loans like any other commercial bank loans and, therefore, found them to be directed to the targeted enterprise/industry. As a consequence, we did not separately analyze ESF as a stand alone program.

We have reconsidered our approach to ESF for this final determination and are now analyzing the ESF program apart from directed credit. We have done this because the ESF program is a widely available program seeking to promote goals that are not related to the semiconductor industry or to current and former Hyundai Group companies. Also, there is no evidence that governmental support for the semiconductor industry played any role in making ESF loans available to SEC or Hynix (or its ESCOs).

In fact, the record evidence demonstrates that the ESF program is used by a significant number of companies in a wide range of industries. We confirmed that, during the POI, the approval rate for ESF loan applications was 95 percent. We found no evidence that the actual recipients of the subsidy were limited in number either on an enterprise or industry basis, that an enterprise or industry was a predominant user of the subsidy, or that an enterprise or industry received a disproportionately large amount of the subsidy.

Based upon this analysis and the information on the record, we determine that the ESF program is not specific within the meaning of section 771(5A) of the Act. Consequently, we find that no countervailable subsidy is conferred on Hynix or SEC through the ESF program.

*III. Programs Determined Not To Have Been Used or To Have Provided No Benefits During the POI*

We determine that no responding companies applied for or received benefits under the following programs during the POI:

- A. Short-Term Export Financing
- B. Tax Programs Under the TERCL and/or the RSTA
  - 1. *Reserve for Research and Human Resources Development (formerly Technological Development Reserve) (Article 9 of RSTA / formerly, Article 8 of TERCL)*

On December 28, 1998, the TERCL was replaced by the RSTA. Pursuant to this change in the law, TERCL Article 8 is now identified as RSTA Article 9. Apart from the name change, the operation of RSTA Article 9 is the same as the previous TERCL Article 8 and its accompanying Presidential Enforcement Decree.

This program permits a company operating in manufacturing or mining, or in a business prescribed by the Presidential Enforcement Decree, to establish a reserve to offset the expenses needed for the development or innovation of technology. These reserves remove funds from the taxable income,

thereby reducing the amount of taxes paid by the company. After a two-year grace period, funds set aside for the reserve must be allocated as income over a three-year period. Under this program, capital goods and capital intensive companies can establish a reserve of five percent, while companies in all other industries are only permitted to establish a three percent reserve.

In CTL Plate, 64 FR at 73181, we determined that this program was countervailable for companies that could claim a five percent tax reserve, but not for companies that could claim a three percent tax reserve. We also determined in CTL Plate that this program provides a financial contribution within the meaning of section 771(5)(D)(i) of the Act in the form of a loan. The benefit provided by this program is the tax savings generated by the reserve differential of two percent.

We verified that neither Hynix nor SEC established a reserve exceeding the three-percent rate. Accordingly, we find that the respondents did not benefit from this program.

2. *Tax Credit for Investment in Facilities for Productivity Enhancement (Article 24 of RSTA /Article 25 of TERCL)*

Article 24 of the RSTA provides tax credits for investments in specified capital equipment. We have previously determined that tax credits received for investments made after April 10, 1998, are not countervailable because the distinction between investment in domestic versus foreign-made goods was eliminated. See Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip From the Republic of Korea, 68 FR 13267 (March 19, 2003) and accompanying March 10, 2003 Decision Memorandum at page 11, Section III.A.8.

We verified that both SEC and Hynix earned credits under Article 24 of the RSTA and that SEC's RSTA Article 24 tax credits originate from investments made after April 10, 1998. Hynix reported no taxable income for the POI and, therefore, it carried its credits forward. Accordingly, we determine that benefits received under this program are not countervailable.

3. *Tax Credit for Investment in Facilities for Special Purposes (Article 25 of RSTA)*

Article 25 of the RSTA provides tax credits equal to three percent of a company's investment in specified facilities related to, among other things, environmental and health and safety measures. The credits are deducted from the company's corporate income tax liability. Article 25 of the RSTA was among the programs found in Cold-Rolled Steel to have eliminated the import substitution tax advantage for eligible investments made after April 10, 1998. Thus, tax credits based on investments made after that date are not countervailable.

Hynix reported no taxable income for the POI and, therefore, claimed no credits and received no benefits under this tax program. SEC claimed credits under this program in its 2001 tax return (for tax year 2000), but not in its 2002 tax return (for tax year 2001). For SEC's tax filing in 2001, we

confirmed that the company both earned and used RSTA Article 25 tax credits. However, SEC did not benefit from this program because the credits it earned and claimed were tied to investments made subsequent to April 10, 1998.

4. Reserve for Overseas Market Development (formerly, Article 17 of TERCL)
  5. Reserve for Export Loss (formerly, Article 16 of TERCL)
  6. Tax Exemption for Foreign Technicians (Article 18 of RSTA)
  7. Reduction of Tax Regarding the Movement of a Factory That Has Been Operated for More Than Five Years (Article 71 of RSTA)
- C. Tax Reductions or Exemption on Foreign Investments under Article 9 of the Foreign Investment Promotion Act (“FIPA”)/ FIPA (Formerly Foreign Capital Inducement Law)
- D. Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates
- E. Export Insurance

The Korean Export Insurance Corporation (“KEIC”) was established pursuant to the Export Insurance Act of 1968 for the purpose of providing export insurance. Insurance policies issued to ROK companies through this program provide protection from risks such as payment refusal and buyer’s breach of contract. Claims are paid from the Export Insurance Fund, which is managed by the KEIC and is funded by contributions from the GOK and the private sector via premium payments. The KEIC determines premium rates by considering numerous factors, including the creditworthiness of the importing party and the term of the policy. Hynix and SEC both participated in this program during the POI.

To determine whether an export insurance program provides a countervailable benefit, we first examine whether premium rates charged are adequate to cover the program’s long-term operating costs and losses. See 19 CFR 351.520(a)(1). In doing so, the Department will analyze both the viability of the program and the overall commercial health of the entity operating the program. In examining whether rates are manifestly inadequate, the Department will examine a five-year period, POI inclusive. See Preamble, 63 FR at 65385.

The GOK reports that the KEIC export insurance program has experienced operating losses for all of these years, and that the GOK has been covering the losses incurred by this program. Therefore, we determine that the premium rates that are being charged are inadequate pursuant to 19 CFR 351.520(a)(1). If the Department determines that premium rates are inadequate, pursuant to 19 CFR 351.520(a)(2), the benefit amount is calculated as the net amount of compensation received

(compensation received less premium fees paid). Thus, consistent with the Final Affirmative Countervailing Duty Determination: Carbon Steel Butt-Weld Pipe Fittings From Israel, 60 FR 10569, 10571 (February 27, 1995), we examined export insurance expressly related to DRAMS exported to the United States.

We verified that SEC did not make any claims or receive any pay-outs from the KEIC related to DRAMS during the POI, and that Hynix did not receive any pay-outs during the POI. Therefore, neither SEC nor Hynix received a countervailable benefit pursuant to this program within the meaning of section 771(5)(E) of the Act during the POI.

#### F. Electricity Discounts Under the RLA Program

The GOK introduced an electricity discount under the RLA program in 1990 to address emergencies in the Korea Electric Power Company's ("KEPCO") ability to supply electricity. Under this program, customers with a contract demand of 5000 kilowatts or more who can curtail their maximum demand by 20 percent or suppress their maximum demand by 3000 kilowatts or more are eligible to enter into a RLA contract with KEPCO. Customers who choose to participate in this program must reduce their load upon KEPCO's request, or pay a surcharge to KEPCO. Customers can apply for this program between May 1 and May 15 of each year. If KEPCO finds the application in order, KEPCO and the customer enter into a contract with respect to the RLA discount. Under this program, a basic discount of 440 won per kilowatt is granted between July 1 and August 31, regardless of whether KEPCO makes a request for a customer to reduce its load. At verification, we confirmed that during the POI, SEC received an RLA discount for July and August 2001. We also verified that Hynix did not participate in the program during the POI.

The Department has previously found this program to be countervailable. See Sheet and Strip, 64 FR at 30636, and Cold-Rolled Steel, 67 FR 62102 and accompanying September 23, 2002 Decision Memorandum at page 18, Section I.M. We found this program specific under section 771(5A)(D)(iii)(I) of the Act because the discounts were used by a limited number of customers. In the current investigation, we verified that the RLA program continued to be used by a limited number of customers during the POI. Accordingly, we find this program to be de facto specific.

In Sheet and Strip and Cold Rolled Steel, we determined that a financial contribution is provided under the RLA program in the form of revenue foregone by the government, with the benefit being the discount received by the customer. We employed that same analysis in the Preliminary Determination. However, SEC contends that the RLA discounts are more properly analyzed as the governmental provision of a good or service, and any benefit should be determined using the adequacy of remuneration standard in section 771(5)(E)(iv) of the Act. In support of its position, SEC points to Thai Hot-Rolled Steel and the Final Affirmative Countervailing Duty Determination: Steel Wire Rod

from Trinidad and Tobago, 62 FR 55003, 55005 (October 22, 1997) (“Trinidad Wire Rod”), where the Department was also examining government-provided electricity.

We have not addressed this argument irrespective of the nature of the financial contribution made under the RLA program because any benefit to the subject merchandise resulting from the program would be so small that there would be no impact on the overall subsidy rate, regardless of a determination of countervailability. Thus, consistent with our practice, we do not consider it necessary to determine whether benefits conferred thereunder to the subject merchandise are countervailable. See, e.g., Live Cattle From Canada; Final Negative Countervailing Duty Determination, 64 FR 57040, 57055 (October 22, 1999).

#### *IV. Program Determined to Not Exist*

We determine that the following program does not exist:

##### Won 680 Billion Bond Guarantee

### **Analysis of Comments**

#### *Comment 1: Direction of Credit*

*Hynix’ Argument:* Hynix first states that it agrees with the Department’s Preliminary Determination findings that the GOK did not direct credit to the semiconductor industry or generally throughout the ROK after 1998.

Hynix next argues that the Department’s Preliminary Determination finding that the GOK directed credit to Hynix and other Hyundai group companies only from 1999 to the end of the POI cannot be supported by the evidence on the record. Hynix contends that the mere existence of a motive to direct credit (because semiconductors are a “backbone industry” according to the Department) does not mean that the GOK actually directed credit. Moreover, according to Hynix, any evidence that the DRAMS industry was important to the ROK would also be taken into consideration by the banks in making lending decisions, as banks would also consider the overall economic context of a company or an industry in making their lending decisions. Additionally, Hynix contends that the Department must examine each program separately to determine whether there is evidence of GOK direction on a program-specific basis because the Department cannot presume that evidence of direction of credit for one program necessarily means that the GOK directed credit for all programs.

According to Hynix, there is no evidence on the record that the GOK directed the banks on how to make their financing decisions for either the May or October restructurings or for the December 2000

syndicated loan. Instead, Hynix contends that, as indicated by record evidence, the banks made their decisions to participate solely on commercial considerations. Hynix contends that all of the “evidence” placed on the record by the petitioner relates to earlier extensions of credit. Regarding the October restructuring, according to Hynix, neither Hynix nor any GOK representative was allowed to participate in the CRPA Creditors’ Councils, and the participation of GOK-owned banks was only done in accordance with their rights as creditor banks. According to Hynix, had banks been acting under to GOK direction for the October restructuring, the banks would have chosen to provide new financing to Hynix, and none would have exercised their creditors’ rights. Even more telling, according to Hynix, was the fact that two GOK-owned banks chose to exercise their creditors’ rights, which they would likely not have done had they been directed by the GOK.

As for the May restructuring, according to Hynix, the only potential “evidence” of GOK involvement was the fact that a regulatory official attended the first meeting of the Creditors’ Council on March 10, 2001, and that the Financial Supervisory Service (“FSS”) carried out regular monitoring of the banks’ involvement in the process. According to Hynix, this limited involvement does not rise to the level of “direction of credit” by the GOK, and the extent of this involvement was explained to the Department in detail in the responses and at verification. Hynix states that the regulatory official’s attendance at the Creditors’ Council meeting related to prior commitments made by the creditors and did not relate to the May restructuring. Hynix contends that the decisions made by the banks to participate in the May restructuring were based on the financial situation of Hynix at that time, which was positive as evidenced by the strong participation in the June GDS offering, as well as on the banks’ own internal analyses of Hynix. According to Hynix, the petitioner’s claims in its case brief of GOK influence in the May restructuring are either flat wrong, hugely exaggerated, or completely misunderstood.

Hynix also argues that there is no evidence on the record to show that the GOK directed banks to participate in the December 2000 syndicated bank loan, and that the only “evidence” submitted by the petitioner relates entirely to D/A financing extensions, which are separate from the syndicated bank loan. Moreover, regarding this “evidence” that was cited by the petitioner, Hynix contends that the Economic Minister’s meeting documents actually demonstrate the limited and modest nature of the GOK’s actions during this time period relating to Hynix, and that these actions represented the natural and ordinary exercise of the GOK’s governing function. Although the FSC had to approve the increase in the credit ceilings for three banks, Hynix states that this was a relatively routine process, and that the FSC never denied an increase in lending ceilings.

Hynix also contends that 1) none of the statements to which the Department cited in its Preliminary Determination as evidence of GOK direction offered conclusive evidence of direction or coercion, and were instead only vague, unsupported assertions; 2) many of these articles do not even talk about GOK coercion of a particular bank relating to Hynix; and 3) such evidence is not sufficient to meet the substantial evidence standard. Hynix states that most of the “evidence” concerning GOK influence or control provided by the petitioner relates to banks that are majority-owned by the GOK, and that such

evidence has no bearing on the banks in which the GOK holds either no shares or minority shares.

Hynix argues that the Department must conduct a bank-by-bank analysis to determine whether there is evidence that each bank was directed by the GOK. Hynix contends that such an analysis should focus on the legal capacity of the GOK to control or direct a bank; the level of foreign influence in the bank; the ramifications of internal ROK financial reforms and their positive results on the bank; and reliable outside commentary on the independence of the banks. Also, citing Plate in Coils, 64 FR at 15542, Hynix contends that it is arbitrary for the Department to decide that only ROK branches of foreign banks can be deemed independent when there are ROK banks that are majority-owned by foreign investors. According to Hynix, in performing such a bank-by-bank analysis, it is clear that the privately-controlled banks (including Citibank, Koram Bank, Shinhan Bank, Hana Bank, Pusan Bank, Kookmin Bank, Housing and Commercial Bank (“H&CB”), Korea First Bank (“KFB”), and KEB) acted independently of GOK influence when participating in the Hynix loans and restructurings. Hynix contends that the record evidence relating to these banks (if any was provided at all) either 1) does not provide substantial evidence of GOK influence or control over the banks; 2) had nothing to do with Hynix; 3) did not refer specifically to the May or October restructuring, or the syndicated bank loan; 4) was based only on speculation; or 5) actually confirms the independence of certain banks. Thus, Hynix argues that loans or other funds from these banks cannot be deemed a financial contribution, and that these banks’ should be used as benchmarks.

In response to the petitioner’s case brief, Hynix (along with the GOK) first argues, as discussed above, that the petitioner has provided no concrete evidence of direction or intervention by the GOK in the Hynix restructuring process from late 2000 through October 2001. Second, Hynix contends that the petitioner’s arguments relating to the CRPA were based on numerous errors of fact and law, as well as on unwarranted inferences and conclusions. Third, Hynix argues that the Memorandums of Understanding (“MOUs”) for banks that were infused with GOK capital were only for banks in which the GOK owned a majority of shares, something that was not the case for many banks on the Creditors’ Council, and that these MOUs focused only on the operation of the banks in accordance with sound business principles. As for the Prime Minister’s Decree, Instruction No. 408 (“Prime Minister’s Decree”), Hynix notes that the purpose of this decree was to limit the methods that can be used by the GOK to deal with financial institutions, not to create loopholes. Fourth, Hynix claims that the petitioner’s statement that the GOK directed credit through its significant ownership of the banks takes a news report of an intent to act in the future, transforms it into current fact, and then uses that fact to infer prior direction of credit. Fifth, Hynix states that there is no evidence on the record that any bank “understood as a directive” comments made by GOK authorities relating to Hynix’ well-being and took actions accordingly. Sixth, Hynix claims that there were no special tax breaks provided to Hynix’ creditor banks. Last, Hynix states that the petitioner ignores record evidence and tries to replace facts learned at verification with speculations and innuendo from press reports and manufactures evidence to try to apply unrelated facts to the October restructuring.

As for any of the other issues on the petitioner’s “laundry list,” the Hynix claims that none of these other



items allegedly showing direction of credit proves its point. For instance, even where the GOK owned a majority share of a bank, record evidence shows that these banks still made their decisions based on commercial considerations. Also, Hynix contends that, even if the Department deems the KDB's lending practices an act of the GOK, there is no record evidence that demonstrates that those practices are evidence of broader control of the financial sector, and this conclusion cannot be inferred from past cases relating to the ROK based on recent CIT findings. Hynix additionally contends that there is no evidence that the GOK was insulating GOK-owned banks from privatization, stating that there was never a plan to privatize the specialized banks.

*GOK's Argument:* According to the GOK, the Department was correct in finding in its Preliminary Determination that, after 1998, economy-wide direction of credit no longer existed in the ROK. However, according to the GOK, there is no concrete evidence on the record to prove that the GOK had any involvement in the Hynix restructurings in May and October 2001 other than mere ownership by the GOK in certain creditor banks. According to the GOK, the restructurings in May and October 2001 were clearly led by private banks with no GOK intervention. The GOK contends that the mere fact that there is some level of GOK ownership in the banks, alone, is not enough to prove that the GOK has provided a financial contribution under the statute, and that there must be an active provision by the government of a financial contribution (as opposed to passive ownership) in order for there to be government entrustment or direction. The GOK states that the only example even suggested by the petitioner of any participation by the GOK in the restructurings was the attendance by a regulatory official at a Hynix Creditors' Council meeting, the purpose of which, the GOK states, was explained to the Department at verification. The GOK claims that this regulatory official's attendance had "nothing to do with any restructuring plan for Hynix," and that the regulator was present simply to "act as a witness" at the meeting so that "creditors could no longer back out" of any prior commitments they had made.<sup>10</sup>

Moreover, according to the GOK, the "evidence" provided by the petitioner of the "GOK's 'master plan'" relating to the Economic Minister's meetings shows no evidence at all of GOK orchestration of the Hynix "bailout." According to the GOK, these documents simply demonstrate the limited and modest nature of the GOK's actions in this case, which were a natural and ordinary exercise of the

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<sup>10</sup>The GOK claims in its case brief that the Department attempts to argue in its GOK Verification Report that there was another instance where an FSC Vice Chairman attended a Creditors' Council meeting in March. We note that, in our GOK Verification Report (see page 19), we were simply trying to point out that, for the "March 2001 meeting in question," according to a document submitted at verification by the FSC, it was an FSC Vice Chairman, not an FSS employee that attended the Creditors' Council meeting. We also note that the document in question was translated by the GOK's translators and not the Department's translator, as intimated by the GOK in its case brief.

GOK governmental functions just like any other government in the world. The GOK claims that these documents confirm that private banks were left to make their own decisions on a purely commercial basis. The GOK points out that there was no mention in the documents about issues that do not “belong” to the government. According to the GOK, the reason that the petitioner has failed to provide any concrete evidence to show an active GOK involvement is because there was no GOK intervention. Based on this lack of evidence, the GOK argues that the Department should find the absence of government direction or entrustment. The GOK also contends that it has in no way withheld any evidence on the GOK’s participation in the Hynix restructuring as claimed by the petitioner, and that the GOK answered all of the Department’s questions relating to the lending limit waiver and the D/A financing.

The GOK contends that, since the end of the financial crisis, any mechanism available to the GOK in terms of government control has ended. The GOK argues that specialized banks or banks with majority ownership are not exempted from the reforms and the new financial system, and must play by the same rules as all other banks. According to the GOK, there is a difference between shareholding and exercise of direct control, and the mere fact of shareholding does not, by itself, prove the exercise of direct control over the bank’s daily business operation. In fact, the GOK points out that GOK officials are prohibited from exercising any form of direct control because of the Prime Minister’s Decree.

The GOK claims that the Department’s Preliminary Determination was largely based on various press reports and GOK official’s statements in which the Department tried to show an alleged motive of the GOK to bailout Hynix because of its strategic importance to the ROK economy. According to the GOK, it was established in the WTO in United States - Measures Treating Export Restraints As Subsidies, Report of the Panel, WT/DS194/R, adopted 29 June 2001. that, in order to meet the threshold of finding governmental action, 1) there must be an explicit and affirmative action, a notion of delegation of command; 2) it must be addressed to a particular party; and 3) the objective of which is a particular task or duty. The GOK contends that neither the petitioner nor the Department has come up with any concrete evidence that shows actual direction or entrustment by the GOK to the banks in the course of the Hynix debt restructuring that would meet this threshold. The GOK argues that it is untenable to make a determination in a legal proceeding based on random remarks and statements reported in newspapers. Regardless of whether the GOK had any alleged motives, the GOK contends that the important issue should be what the GOK actually did or did not do. Moreover, according to the GOK, the petitioner’s arguments in support of the Department’s Preliminary Determination are based on a lengthy series of errors, mischaracterizations, and exaggerations which the petitioner was using in an effort to establish a nexus between the GOK and Hynix. The GOK states that arguments based on such mistakes and innuendo cannot serve to establish direction of credit in a CVD investigation.

*Petitioner’s Argument:* Although it agrees with the Department’s Preliminary Determination finding

that the GOK directed credit to the entire semiconductor industry through 1998 and to the Hyundai Group and Hynix from 1999 through the end of the POI, the petitioner contends that the GOK also directed credit in the ROK economy as a whole from 1999 through the end of the POI, and specifically to the semiconductor industry as discussed below in Comment 2. The petitioner disagrees with the respondents' contentions that the Department preliminarily determined that the GOK did not control the ROK banking sector after 1998, and that the GOK no longer had the ability to control the banking sector based on post-crisis reforms. The petitioner states that the Department made explicit findings supported by compelling evidence that the GOK continued to control the ROK banking sector as a whole through the POI, and that the GOK maintained its grip over the ROK banking sector through its variety of roles, as discussed below.

Regarding direction of credit to Hynix and the Hyundai Group from 1999 through the end of the POI, the petitioner contends that evidence on the record establishes that the GOK took advantage of its multiple roles as decision maker and strategist, legislator, executive, regulator, shareholder/owner, capital injector, guarantor, and lender to devise a system of rewards and punishments, and then implemented this system via its various government roles, to facilitate the direction of credit during the POI. First, according to the petitioner, the GOK, in its role as a decision maker and a strategist, took affirmative steps starting in at least November 2000 to direct credit to Hynix. The petitioner cites to GOK documents relating to a series of Economic Ministers' meetings in late 2000 and early 2001 to support its contention that the GOK, through GOK ministries and the FSS, officially decided to assist Hynix, instructed the KEB on how to proceed, and ordered the KEIC to issue guarantees in connection with the restructurings. The petitioner contends that this documentation proves that the GOK did have a policy of directing credit to Hynix. Furthermore, the petitioner claims that this evidence provides a clear basis for an adverse inference that, to the extent that the KEB coordinated the actions of the creditors, it did so under instructions from the GOK. The petitioner further contends that, in overseeing and coordinating the plan it had formulated to assist Hynix, because the GOK was limited in public actions that it could take due to trade concerns, GOK officials became skilled at compelling decisions and influencing events through carefully worded public statements and comments by the KDB to send signals to the creditor banks that the GOK would not abandon Hynix and that the creditor banks should support Hynix.

In its role as legislator, the petitioner argues that the GOK enacted laws, regulations, and programs that maximized its ability to rescue Hynix from its fate under free market principles.

The petitioner cites to the KDB Fast Track program, the enactment of the CRPA (which the petitioner contends leveraged the GOK's power over the Hynix creditor banks), the Prime Minister's Decree, and the Public Fund Oversight Act (which, according to the petitioner, facilitated the GOK's control over the banking sector through the affirmative protection of the GOK's rights to intervene in the banks and through mandated contractual commitments between the banks and the GOK in exchange for capital injections in the form of MOUs, respectively) as examples of such actions. The petitioner also contends that the GOK, in its role as executive, aided Hynix through selective enforcement of legislation to reward creditors for participating in Hynix bailouts, to insulate Hynix from reform efforts, and to

allow Hynix to bypass legal requirements that it could not otherwise meet. Specific examples for this role were evidence that the FSS instructed creditor banks to classify Hynix' loans as "normal," rewarding certain Hynix creditors with preferential tax treatment, and insulating some of Hynix' largest creditors from privatization. The petitioner next argues that the record is replete with examples where the GOK, in its role as regulator, used its regulatory powers as "sticks" or "carrots" to threaten or entice banks to furnish Hynix with credit, such as using its power to impose sanctions, remove or appoint bank officials, demand attendance at creditor meetings, threaten customer relationships, and merge or close banks unwilling to comply with GOK demands; or making low-interest loans available to banks and financial institutions that lend to important sectors, such as the technology sector. Next, according to the petitioner, the GOK, using its role as a capital contributor to the banks, obtained significant control over day-to-day decisions, including lending decisions, at the Hynix creditor banks, and used its role as bank owner to influence the operations of the banks in

which it holds ownership. Finally, the petitioner argues that the GOK exerts control over the banks via its roles as a guarantor and a lender.

The petitioner refutes the GOK's contentions that the post-crisis reforms dramatically changed the financial system, and states that these reforms did not remove the GOK from the credit decisions of the banks, but actually facilitated the GOK's directed credit activities, as noted above. The petitioner further argues that a lack of independence and accountability, entrenched and unskilled bureaucrats, unfettered discretion with no checks and balances, and conflicting and undefined responsibilities hampered the FSC's responsibility to transform the financial sector. The petitioner also claims that the post-crisis imposition of international standards, such as outside directors, Bank of International Standards ("BIS") capital adequacy ratios, and forward-looking criteria had no effect on the GOK's ability to direct credit, because 1) independent outside directors often have close ties with the GOK or the bank; 2) improvements in BIS ratios, return on investment, and return on assets are nothing more than smoke and mirrors because they reflect the GOK's interference in and manipulation of the financial sector due to recapitalization and the purchase of nonperforming loans; and 3) banks lacked the incentive, skill, experience, and information to properly apply forward-looking criteria in their credit risk analyses.

According to the petitioner, Hynix ignores compelling evidence and claims with absolutely no statutory authority, case law, or other legal support, that the Department erred by failing to perform an event-by-event analysis of direction of credit relating to Hynix. The petitioner contends that, under the Act, a subsidy exists when the government "entrusts or directs a private entity to make a financial contribution" that confers a benefit. The legislative history of the Act directs the Department to broadly interpret the "entrusts or directs" language ("the Committee intends that the term 'entrusts or directs' shall be interpreted broadly to prevent the 'indirect' provision of a subsidy from becoming a harmful loophole to effective enforcement of the {CVD} law.") See S. Rep. 103-412, 103d Cong., 2d Sess. (November 22, 1994) at 91. Likewise, the Statement of Administrative Action accompanying the Act notes that "the Administration intends that the 'entrust or directs' standard shall be interpreted broadly." See

Statement of Administrative Action (“SAA”) accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. 911-955 (1994) at 926. The petitioner points out that the Department has adopted this interpretation of “directs or entrusts” by acknowledging in its regulations that “the phrase ‘entrusts or directs’ could encompass a broad range of meanings.” See Preamble, 63 FR at 65349. According to the petitioner, the bank-by-bank, transaction-by-transaction framework proffered by Hynix creates exactly the kind of “harmful loophole” that the broad “entrusts and directs” language was intended to avoid. Moreover, according to the petitioner, the Department only applies such a framework in a case when the Department determines that the government does not control the banking sector, which is not the case in this proceeding. See Structural Beams, 65 FR 41051.

According to the petitioner, however, even if such a bank-by-bank, transaction-by-transaction framework was applied, the record is replete with evidence showing that the GOK utilized its control over ROK banks to orchestrate and participate directly in each of the bailout programs at issue. For instance, the GOK’s role in the syndicated loan was exemplified, for instance, by the actions taken at the Economic Ministers’ meetings. The actions at the Economic Ministers’ meetings, as well as the regulator’s presence at the March 2001 Creditors’ Council meeting and the FSC’s pressure on Shinhan and Koram Bank, provide evidence of GOK orchestration of the D/A financing. The regulator’s presence at the March 2001 Creditors’ Council meeting is also an example of the way the GOK influenced the May 2001 restructuring. The petitioner points to overwhelming evidence on the Fast Track program to show that this program was utilized by the GOK to funnel funds to Hynix. Finally, the petitioner claims that the GOK was directly involved in the October restructuring through use of the CRPA, use of its regulatory powers, use of statements that were made by high-ranking GOK officials that were designed to bend creditor banks to its will, and use of its tax policy (all of which are discussed above).

The petitioner argues that Hynix’ arguments regarding bank ownership are without meaning because the record conclusively demonstrates that the GOK was able to furnish Hynix with lending during the POI regardless of the banks’ level of GOK or foreign ownership. The petitioner argues that Hynix’ four-pronged framework is unnecessarily narrow in scope, and incorrectly suggests that the exercise of shareholder voting rights is the only vehicle the GOK has to control the banking sector. According to the petitioner, the existence of significant GOK shareholding rights leads to the inescapable conclusion that the GOK has the power to direct the actions of that bank. Moreover, the Kookmin/H&CB prospectuses offer a good example of the GOK’s control over banks with little GOK ownership and substantial foreign ownership according to the petitioner. Additionally, the petitioner contends that the fact that banks were increasing their loss provisions for Hynix at the same time they were providing new loans to Hynix showed that the banks thought Hynix was not viable and highlighted the fact that the banks were not acting based on commercial considerations. The petitioner contends that foreign ownership does not somehow magically transform a financial sector rife with GOK intervention and direction into a market-based sector, and is also not an indication that the GOK is not intervening and directing credit to the banks. The petitioner contends that, if foreign ownership is relevant to the GOK’s ability to direct credit, the GOK’s direction would be well-placed to continue based on the

rapidly diminishing foreign ownership in the ROK financial sector. Based on the above, the petitioner states that the “private” banks cannot serve as a benchmark.

Finally, the petitioner claims that the creditor banks acted solely at the direction of the GOK, and were not acting as rational commercial actors. According to the petitioner, the banks did not utilize commercially reasonable credit analyses and credit risk management models. The petitioner states that even the risk analyses that were performed by the creditor banks to analyze the Hynix restructuring programs in question showed that Hynix was not creditworthy, and do not justify the banks’ actions in the Hynix restructurings.

*Infineon’s Argument:* Infineon Technologies North America Corporation and Infineon Technologies Richmond, LP (“Infineon”), a domestic producer and an interested party in this proceeding, also agrees with the Department’s Preliminary Determination finding that the GOK directed credit to the entire semiconductor industry through 1998. However, Infineon further argues that, despite claimed reforms to the financial system that occurred subsequent to the financial crisis, record evidence establishes that the GOK continued to direct credit and other financial assistance in the ROK throughout the POI. According to Infineon, the GOK’s direct control of, and active shareholder participation in, many financial institutions actually increased following the financial crisis. Infineon claims that the various reforms cited by the GOK do not restrict the GOK’s ability to exert influence through “moral suasion,” and, in fact, the GOK continues to hold extensive power over the ROK financial system. Infineon points out that, if the bank does not meet its MOU targets, the GOK can require that the bank be restructured or the management be changed, which means that the management at government-owned banks must be responsive to GOK directives. Infineon also argues that the GOK plays a direct role in the ROK financial market through the FSC and the FSS, which can induce ROK banks to act in accordance with the GOK’s policies through positive and negative incentives, as well as through their role in the corporate restructuring process. According to Infineon, record evidence shows that the GOK continued to use indirect influence in the post-reform period. Finally, Infineon argues that there is no evidence that the KDB does not still have the power to influence other banks, through its lending practices, by showing that there is an implicit government guarantee of the industries to which it lends.

According to Infineon, the Department should reject the respondents’ repeated denials regarding the existence of the GOK’s direction of credit program as being unsupported by the weight of record evidence. Infineon argues that, based on the Department’s previous directed credit findings and the U.S. Court of Appeals for the Federal Circuit’s (“CAFC”) holding in AK Steel Corp. v. United States, 192 F.3d 1367, 13723 (CAFC 1999) (“AK Steel”), it is not necessary for the Department to conduct an issue-by-issue or a bank-by-bank analysis of the GOK’s direction in this proceeding, and that a more general finding focused on the government’s, and not the banks’, actions is sufficient to find a financial contribution. Moreover, Infineon argues that it is unnecessary for the Department to conduct issue-by-issue or a bank-by-bank analysis because there is a great deal of evidence of the direction of credit to the semiconductor industry as a whole. For instance, Infineon points to the evidence relating to the Economic Ministers’ meetings as conclusive evidence that the GOK was directly engaged in a

comprehensive policy of directing credit to Hynix. Also, the necessity of the credit limit increases for certain banks in portions of the Hynix restructurings demonstrates both the GOK's policy commitment and direct action in manipulating credit for the benefit of the entire semiconductor industry (not just to Hynix). According to Infineon, record evidence does not support the GOK's claims that the FSC's decision to raise the banks' credit limits did not involve any GOK intervention to direct credit to Hynix. Infineon contends that the FSC meeting minutes show that the increase was approved because of the GOK's commitment to the semiconductor industry. Thus, the GOK selectively altered its lending rules in an effort to ensure the survival and continued liquidity of Hynix. Infineon also states that the regulator's presence at the March 2001 Creditors' Council meeting for Hynix, even in a more benign interpretation, shows that there was government interference in what purports to be a private lending process. The press and business reports on the record, most of which Infineon states originate from respected business journals and news sources, also demonstrate an undeniable and striking consistency through their repeated examples of the GOK's continued involvement in direction of credit to Hynix and the semiconductor industry.

Infineon contends that banks were not simply relying on commercial considerations when deciding whether to invest in the ROK semiconductor industry. Infineon states that it was not commercially reasonable for banks to examine the impact of a potential Hynix default on the economy as a whole and on Hynix' suppliers, and that banks would have been concerned with their own profit, not macroeconomic factors, in making their lending decisions. Infineon also argues that any internal analysis conducted by a particular bank would have been skewed by the GOK's repeated interventions in the financial market, which lead the banks to believe that their investments were effectively guaranteed by the GOK's commitment to Hynix' continued existence. Infineon argues that an application of the "prospect theory," as argued by Hynix in relation to the October 2001 debt-to-equity investments, would permanently excuse the continued direction of credit because, under Hynix' theory, once a bank invested any money in a ROK semiconductor manufacturer, that investment could be followed ad infinitum with additional non-countervailable directed equity investments in the hope that the GOK would finally subsidize the company sufficiently for the investor to recover its funds. According to Infineon, in directing credit, a government coerces banks, using a variety of financial and non-financial means to ensure that banks calculate that they would be better off making a "directed" lending decision than not. It is this GOK intervention and alteration of what constitutes rational, market-based investment behavior that is at the heart of this case, according to Infineon, not an inquiry into whether banks are motivated by profit absent such intervention.

*Department's Position:* As discussed in more detail below, in this proceeding, we are dealing with an indirect subsidy under section 771(5)(B)(iii) of the Act, which includes the "entrusts or directs" element. The Department interprets the "entrusts or directs" language to mean that, if a government affirmatively causes or gives responsibility to a private entity or group of private entities to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i) to (iv) of section 771(5)(D), there would be a financial contribution. Thus, when the government executes a particular policy by operating through a private body or when a government affirmatively causes a

private body to act, such that one or more of the type of functions referred to in subparagraph (iv) is carried out, there is entrustment or direction by the government. Moreover, in the case of an indirect subsidy, where the government is acting through a private party, it would make sense that the private party, and not the government itself, would fix the commercial terms. Whether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element that is relevant to the measurement of “benefit,” not “financial contribution.”

Regarding Hynix’ financial restructuring in 2000 and 2001, we disagree with petitioner’s contention that the Department should conclude, consistent with its prior determinations regarding direction of credit in earlier periods, that the GOK continued to direct lending practices throughout the ROK banking system during the POI. In our Preliminary Determination, we detailed the record evidence concerning market-oriented reforms in the ROK financial sector since the 1997 financial crisis. See 68 FR at 16772-73; see, also, GOK Verification Report. These reforms resulted in certain changes to the legal, regulatory, and policy framework which had governed the financial system in the past. The reform process, which was sanctioned by the IMF, was intended to transform the financial sector into a better managed, better supervised, and more market-oriented sector of the economy. While we are not convinced that the ROK financial sector is, in fact, a fully market-based system, record evidence suggests that the reforms removed many of the means (documented in prior Department determinations) by which the GOK controlled ROK financial institutions in the past. Accordingly, it is not appropriate to conclude that the approach taken by the Department in analyzing the GOK’s past direction of credit policies applies to the financial restructuring of Hynix in 2000 and 2001.

We also disagree with respondents’ contention that, in order to determine whether 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. Under respondents’ “framework” of analysis, each of the measures taken by Hynix’ creditors, starting with the syndicated loan in December 2000 and ending with the massive bail-out in October 2001, must be viewed as unconnected, isolated events.<sup>11</sup>

Rather than view each of the measures taken by the financial institutions that participated in Hynix’ restructuring as separate events, these actions are appropriately examined as part of a single program

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<sup>11</sup>Evidence of direction for each and every bank is not a necessary legal requirement; nor is the micro-analysis advocated by the respondents required by our regulations. It is clear from the language of section 771(5)(B) of the Act defining “subsidy” that a subsidy is a program by a government or entrusted or directed by a government. There is no sense in the statute that individual events of a subsidy program need to be evaluated outside of the overall context of the subsidy program. Rather, a subsidy program can include multiple elements and multiple actors, brought together for an overarching government objective.



that occurred over a short, ten-month period. The objective of this program was the complete financial restructuring of Hynix in order to maintain the company as an ongoing concern. Each of the measures taken over the period from December 2000 through October 2001, whether by government entities such as the KDB, FSC, or the Korea Deposit Insurance Corporation, or by the government-owned and controlled creditor banks, reflected a pattern of GOK practices to ensure the continued viability of Hynix. Many of these events were overlapping and had the effect of reinforcing each other with respect to the goal of keeping Hynix operating.<sup>12</sup> As we will detail more fully below, 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 banks. The GOK's presence and policies throughout this restructuring process were clear, and Hynix' creditor banks, whether specialized GOK entities, majority government-owned, or private, were guided by the these governmental policies and objectives.

To determine whether the financial restructuring of Hynix involved a financial contribution on the part of the government, the Department employed a two-part test. First, the Department examined whether the GOK had in place during the relevant period a governmental policy to support Hynix' restructuring to keep it in operation. Second, the Department considered whether evidence on the record establishes a pattern of practices on the part of the GOK to act upon that policy to entrust or direct lending decisions as part of the restructuring. On the basis of this two-part test, we have concluded that Hynix' creditors were subject to the government's entrustment or direction in support of its policies at each stage of the restructuring, absent compelling evidence to the contrary for a particular stage or bank. We address each of these considerations in turn below.

The GOK Policy Toward Hynix: The record evidence shows that the GOK had a policy to prevent Hynix' failure. 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 corporate, labor and financial

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<sup>12</sup>The event-by-event framework advocated by the GOK is further contradicted by statements in its own questionnaire responses. Hynix and the GOK have stressed throughout the course of this proceeding that Hynix was taking part in an overall "restructuring plan". For example, Hynix stated that, in September 2000, "Citibank and SSB, Hynix' financial advisors retained to devise a financial restructuring plan, presented a fully integrated proposal to completely realign the financial structure of Hynix. . .The important point, for purposes of this submission, is that many of the financial transactions that are separately identified in the {Department's} questionnaire (each with their own sub-heading) were, in fact, all part of Citibank and SSB's original integrated plan for a complete financial restructuring of Hynix." See January 27, 2003 questionnaire response at 14 and 15. In a later submission, the GOK states that the December 2000 syndicated loan "was the first step in a several stage financial plan developed and implemented by SSB over the 2000-2001 period." See the GOK's February 3, 2003 questionnaire response at A-1.

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

Explicit support for Hynix was reflected at the highest levels of the GOK. In January 2001, a Blue House official was quoted as stating that “Hyundai is different from Daewoo. Its semiconductors and constructions are {the ROK’s} backbone industries. These firms hold large market shares of their industries, and these businesses are deeply-linked with other domestic companies. Thus, these firms should not be sold off just to follow market principles.”

In September 2002, a National Assembly member chastised the Kim Dae-Joong administration in a press statement for compelling financial institutions to support the Hyundai Group and Hynix since the beginning of Hyundai’s liquidity crisis in mid-2000. The report stated “{f}or two years following the outbreak of liquidity crisis in the Hyundai Group, the government of Dae-Joong Kim has provided astronomical sums of special support to the Hyundai Group, amounting to a total of 33.6 trillion won by mobilizing the resources of financial and government-run institutions.” The official response by President Kim’s office to the National Assembly Report was that “{w}e are doing what is deemed necessary to save companies leading the countries (sic) strategic industries.” The government also had an ongoing policy to support the corporate restructuring process of the ROK’s major business conglomerates, of which the Hyundai Group, which included Hynix, was one of the largest. The GOK and Hynix never refute that there were such policies in place.

GOK Pattern of Practices: Based upon our review of the record, there are two types of evidence that support the conclusion that, pursuant to its policy objective to help Hynix, the GOK guided lending decisions as part of the restructuring process. First, there is evidence of government involvement in the restructuring, particularly through the government-owned or controlled banks that led the creditors committee and provided the vast bulk of the financing. Second, there is additional evidence that the government took steps to direct the lending decisions of the private bank participants.<sup>13</sup>

With respect to evidence of direct government involvement, the GOK took early and affirmative steps to secure Hynix’ survival, despite the company’s severe financial troubles and concerns about its viability as an ongoing concern. Some of these early steps were discussed at a number of Economic Ministers’ meetings in late 2000 and early 2001 where senior government officials determined what measures could be taken by the GOK to assist in the restructuring of Hynix. These meeting signaled

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<sup>13</sup>With programs that involve indirect government involvement over bank lending decisions, most of the evidence of such directions if 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.

the GOK's determination that Hynix would not be allowed to fail. One of these ministers' meetings, held on November 28, 2000, was initiated by the FSS to discuss measures to alleviate the cash crunch of HEL. MOFE transmitted the results of these discussions in an official correspondence to the KEIC and the KEB, advising that the results should be "carried out perfectly."<sup>14</sup>

These results included a "resolution of special approval" by the FSC to increase certain banks' ceiling limits for single borrowers, as requested by the KEB on behalf of Hynix' creditors. At verification, the FSC stated that it approved three credit limit increases for Hynix' creditors "in order to allow them to participate in the Hynix restructuring process." See GOK Verification Report at 16. The first was for the KDB, KEB and KFB to participate in the December 2000 syndicated loan. The second was a blanket waiver provided for any bank that participated in the Fast Track program. The third was a March 2001 waiver for Woori Bank relating to its D/A financing to Hynix. In total, the FSC has approved five cases where an applicant bank applied to exceed its credit ceiling, four of which related to Hynix and other Hyundai Group companies.

As noted above, the government identified these companies as being part of the ROK's "backbone industries" that should not be liquidated simply to follow "market principles." Record evidence indicates that such "market principles" were not applied by the FSC in waiving the credit ceiling for three of Hynix' creditors participating in the December 2000 syndicated loan. As part of its justification for that approval, the FSC Commissioners noted the following factors:

{T}he semiconductor industry is a strategic industry; after Hynix' merger with {LG Semicon} in 1999, the company accounted for 20 percent of the world semiconductor market and four percent of the ROK's export; Hynix employs 24,000 employees in the industry, and other involved companies exceed 2,500 with over 150,000 employees; to support the syndicated loan and D/A financing would improve the ROK's international competitiveness; therefore, for the promotion of the electronics industry policy, the FSC finds it is in the best interest to increase the ceiling."<sup>15</sup>

These factors are a reflection of the government's economic and social policy concerns regarding a company that accounted for a significant portion of the ROK's exports and whose existence was important for the country's international competitiveness. These are not normal commercial considerations.<sup>16</sup> In raising the credit ceiling for certain key creditors, the GOK took the first significant

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<sup>14</sup>See the petitioner's March 14, 2003 submission at Volume I-9.

<sup>15</sup>See GOK Verification Report at 16.

<sup>16</sup>In May 2001, a senior KEB official echoed the importance attached to Hynix by the GOK, stating that "{i}f Hynix is placed under receivership, {the ROK's} exports will be severely battered {because} Hynix accounts for 4 percent of exports. As far as I know, the government is now working

step to help alleviate Hynix' cash crunch. This affirmative action ensured the participation of certain key creditors in the syndicated loan, which was the first major part of the financial restructuring package. As explained by KEB at verification, absent this waiver by the FSC, the bank would not have been able to provide the loan. In a sense, therefore, this action ensured the successful "kickoff" of Hynix' financial restructuring.

In addition to the FSC action, the ministers also determined that the KEIC should resume insurance for D/A financing for HEI. In a November 30, 2000 communication, MOCIE instructs the CEO of the KEIC that "it was decided at the Economic Ministers' Meeting to provide temporary support of export insurance for the D/A transactions between the main branch offices of {HEI}. Please take actions accordingly." See the petitioner's April 14, 2003 submission at Volume I-9. At a subsequent Economic Ministers' meeting held in January 2001, the Ministers decided 1) to "{h}ave the {KEIC} insure {HEI} D/A acquired by creditor banks by June 30, 2001, up to a total of 600 million dollars;" and 2) "{a}s for the shortage of reserve payment capacity of the KEIC fund that might occur in relation to this matter, support will be provided from a separate source of funding." *Id.* In a number of subsequent communications from MOCIE, the KEIC was instructed to "take actions" in accordance with the Ministers' meetings. These documents demonstrate that the GOK took an early interest in Hynix, and that it was determined to take direct and authoritative steps to assist the company with its financial restructuring. The GOK ministries provided clear instructions to the FSC and KEIC to provide such assistance directly to Hynix, and to take measures that would facilitate the new loans from the company's key creditors.

The KDB Fast Track program was another crucial component in Hynix' financial restructuring because it 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. This program lasted from January to August 2001, overlapping also with the May 2001 restructuring program and feeding into the October 2001 restructuring.

The KDB is a fully government-owned bank that has in the past been found by the Department to serve a key role in GOK policy objectives. See, e.g., Certain Steel, Structural Beams, Cold-Rolled Steel, and Plate in Coils. This view was confirmed by the independent experts interviewed by the Department. According to one expert, "the KDB is a policy arm of the government, and if it posts a big loss, it is covered by the government. As such, it has been the lender of last resort since the financial crisis." See Private Financial Experts Verification Report at 10. Another expert explained that the government was aware of the Hynix workout process and could influence the government-owned banks and the KDB. See Private Financial Experts Verification Report at 4.

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out a series of powerful measures to ensure the survival of {Hynix}."

KDB officials explained at verification that it was necessary to create the Fast Track program because the CBO program alone could not handle the large volume of bonds that were maturing in 2001. These officials also stated their opinion that it was purely coincidental that most of the participants in this program were Hyundai related companies, including Hynix, because any companies' creditor banks could request to participate. We find this fact to be more than coincidental. Without the Fast Track program, it is arguable that these companies maturing bonds could not have been restructured, which would have prevented the placement of new debt and thus called into question their entire restructuring program. The Fast Track program was thus vital to the success of Hynix' and other Hyundai companies financial restructuring, and the KDB's involvement sent a clear signal that the government stood behind the program and would take dramatic steps to ensure the restructuring effort moved forward.

That the government's efforts were aimed at a limited set of companies was echoed in the press at the time. For example, a January 2001 article in the Korea Times stated that "cash-starved {ROK} companies claimed that the government's measures were only aimed at certain larger companies such as {HMM}, HEI, and Korea Industrial Development." And a March 2001 Korea Herald article noted that "{o}nce again, the government appears to have backtracked on reform pledges, as it allegedly forced creditors to extend trillions of won in fresh financial aid to three Hyundai Group firms - {HEI, HEC, and HPC}."'<sup>17</sup>

The GOK also intervened in Hynix' financial restructuring through the dominant role played by government-controlled and owned banks in Hynix' Creditors' Councils. 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. For the May restructuring, these banks accounted for over 70 percent of the voting rights of the Creditors' Council. In October, government-owned and controlled banks provided over 90 percent of new financing, and accounted for over 80 percent of the debt that was exchanged for equity. These banks also accounted for over 50 percent of the voting rights in the October Creditors' Council, and possibly much higher.<sup>18</sup> As such, these banks thus were in a position to set the

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<sup>17</sup>In our Preliminary Determination, we determined that the KDB Fast Track program was de facto specific to Hynix and other Hyundai companies, and was thus intended to benefit these companies. The GOK contends that, regardless of how many companies participated, the measure was based on purely commercial considerations. We disagree and have already noted that extensive record evidence shows that the GOK was motivated by a desire to ensure Hynix' continued viability, which was in a state of technical insolvency by no longer being able to repay its debt. As such, the government actions were essential to keeping the company alive and in ensuring the successful orchestration of the Hynix' financial restructuring by the creditor banks.

<sup>18</sup>See Hynix Verification Report, Exhibit 5, and June 16, 2003, Memorandum to the File.

terms of the financial restructuring via their control of votes in the Hynix Creditors' Council.<sup>19</sup> The GOK's ownership or control of these banks, which held a majority throughout all critical phases of the Hynix bailout, allowed the GOK to entrust the financial aspects of the bailout to these GOK owned or controlled banks, operating through the Hynix creditors council.<sup>20</sup>

Through its control and influence over these banks, including Woori Bank, ChoHung Bank, Seoul Bank, and KEB, and its direct control over GOK banks such as the KDB and IBK, the government

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<sup>19</sup>According to KEB officials discussing the May restructuring at verification, "if 75 percent of the creditors in terms of outstanding debt approve a resolution, the dissenting creditor banks had no choice but to follow the decision of the meeting." See Hynix Verification Report at 15. Moreover, under the CRPA, all creditor banks were obligated to participated in the workout system, which provided the dominant GOK-owned and controlled with the ability to establish the financial restructuring terms over many more creditors. This Act was introduced by the National Assembly "to make sure that the banks could not avoid participating in workouts." See GOK Verification Report at 8.

<sup>20</sup>The GOK contends that its ownership in and control over certain banks had no effect on their lending decisions. Record evidence indicates, however, that these banks were very much subject to government influence. For example, the clear consensus that emerged from the independent financial sector experts interviewed by the Department at verification was that the GOK can and does influence these banks. One expert stated that "the government can influence those banks in which it has significant ownership." Another noted that, while the government involvement is much lower than before the crisis, it was not the case that there is none or that indirect orders are not given, and that as a shareholder, "the GOK has the right to be involved" in the banks. Yet another stated that in a "nationalized banking system, it is difficult to expect the banks to make independent decisions." Another stated that the government did have some influence over the activities of nationalized banks, which, while "pursuing their interests mostly on a commercial basis. . . will take into account the government's position." See Private Financial Experts Verification Report. Numerous press reports also echoed this view. For example, a January 2001 Wall Street Journal article states that ROK banks have "been more accustomed to following government orders than making sound credit decisions." In February 2001, the managing director at UBS Warburg in Seoul stated that "the impression that we get is that while the government claims {the banks} are totally independent, behind-the-scenes pressure is being applied so that they lend to certain entities." In July 2002, a Credit Suisse First Boston senior economist in Hong Kong stated that "{t}he government has changed its policies quite a bit, but it still may assert influence. . . Nobody can rule out intervention." And according to a March 2002 New York Times article, "{m}any analysts say that privatization is needed to foster management independence and lending discipline. 'There's a suspicion that the government mucks around with the banks,' said an analyst at the IMF. With one-quarter of {ROK} companies losing money, he said, banks often face political pressure to keep them on life support." See, also, Preliminary Determination, 68 FR at 16774-16775.

was able to establish its dominant position over Hynix' Creditors' Councils, influence the outcome of the council meetings, and entrust the continuation of its policies to the council. GOK-controlled and owned banks had a blocking majority in all of the Creditors' Council meetings that were held for the May and October restructurings, which meant that these banks had significant control over the plans that were approved by the councils, and could derail any plans with which they did not approve.

In the October restructuring in particular, the GOK-controlled and owned banks had a great influence over the types of plans that were approved. Decisions made by the October Creditors' Council were subject to the newly enacted CRPA. Under this Act, banks holding 75 percent of a company's debt may set the financial restructuring terms for all of a company's creditors. Hynix' government-owned and controlled creditors accounted for a substantial majority of the company's outstanding debt at that time, an amount sufficient to set the terms for all banks and ensure compliance with GOK policy objectives. As a result, 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.<sup>21</sup>

The independent experts interviewed by the Department noted the important role played by these banks in Hynix' restructuring and the GOK's influence in this process through them. According to one expert:

{T}he government was aware of the {Hynix} workout process and could influence the government-owned banks and the {KDB}. In the creditors' meetings, the other state-owned banks and the specialized banks persuaded other creditor banks to participate in the various restructuring decisions. At one point, however, a number of commercial banks, including Kookmin, Hana, and Shinhan, were no longer willing to provide fresh capital to Hynix and decided to take losses on their exposure instead. The expert stated that had this happened before the financial crisis, the GOK would have forced all of Hynix' creditors to provide fresh capital to the company. In this case, however, the GOK influenced only government-owned banks. According to the official, the future fate of Hynix now rests with the state-owned banks, i.e., the KEB, KDB, Chohung, and Woori. He further noted that management level officers at the KEB, Hynix' lead

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<sup>21</sup>The nature of these terms, and our conclusion that they were not based on normal commercial considerations, is discussed in the "Analysis of Programs" section of the notice, and in Comments 5 through 8.

bank, talk with government officials, so there is an indirect channel through which the government can influence these creditors.<sup>22</sup>

As we have previously noted, the banks that took losses at the time of the October restructuring did so on the terms established by the government-owned and controlled banks. Moreover, banks such as Kookmin, chose to swap debt for equity and there is there is compelling record evidence that these private banks were subject to government influence. Importantly, the expert highlights that the GOK maintained a strong presence over Hynix' financial restructuring through its influence over the government-owned and controlled creditors.

The role of the KEB deserves particular mention here. As Hynix' lead bank, and with the largest exposure to the company, its own viability was at stake in the restructuring process. The GOK and Hynix have argued that all of Hynix' decisions were made independent of government influence. However, record evidence illustrates that the KEB acted in accordance with the GOK's policy objectives. According to one expert interviewed by the Department, the KEB is still considered a public bank because the GOK owns most of its shares, notwithstanding the government's efforts at reform. In this expert's view, while Commerzbank has a significant influence on the KEB's lending decisions, "there is a sense that the KEB's credit risk committee is subject to government influence." Moreover, past GOK influence over the KEB, which was formerly a specialized government bank, cannot be dismissed. Even after acquisition of shares by Commerzbank in 1998, it is unlikely that the culture of a GOK specialized bank has changed significantly, especially since the GOK remains the single largest shareholder with about 43 percent of the shares.

Information examined at verification also indicates that the KEB took into account economic and social policy considerations (*i.e.*, non-commercial considerations) in concluding to participate in the May and October restructuring of Hynix. This information pertains to the KEB's internal evaluation for participating in the May 2001, restructuring package, and the September 14, 2001 meeting documentation (agendas and meeting minutes) pertaining to Hynix' October restructuring. The latter, we note, was not limited to KEB, but pertained to all creditors. These considerations confirmed the rationale used by the FSC Commissioners in approving a waiver of the credit ceiling limit for the KEB and other banks so that they could participate in the December 2000 syndicated loan, the first measure in the restructuring process. These documents indicate that the Hynix' lead creditor bank, the KEB, in part justified its participation in the May restructuring for reasons patently not connected to commercial

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<sup>22</sup>While this expert did not state that bank not owned by the government were subject to the GOK influence, record evidence discussed below shows that private banks were also subject to GOK direction and pressure. Moreover, as we have explained, because the financial restructuring terms were being set by the government-controlled and owned banks, the private banks were left with few viable alternatives other than to act in accordance with the terms established by the government-owned and controlled creditors.



considerations, but rather that were aligned with the social and economic policy concerns of the GOK. They also show that similar concerns were present at the October restructuring for the creditors council, led by the KEB.<sup>23</sup> Moreover, by adopting what are essentially economic and social policy concerns in support of the bank's decision to participate in the May and October restructuring, the very commercial nature which Hynix states motivated the KEB is fundamentally called into question.

There were also numerous press reports at the time that noted the GOK's authoritative pressure on the government-owned and controlled banks to support the financial restructuring process of Hynix. For example, according to a January 2002 Business Week article, the GOK forced Woori Bank, KEB, and ChoHung Bank to pump billions of won into Hynix. In an October 2001 Korea Times article, a senior official at the KEB was quoted as saying “[a]s far as I know, the government is now working out a series of powerful measures to ensure the survival of {Hynix} in order to prevent the occurrence of another mishap, following the collapse of Daewoo Group.” Finally, a Morgan Stanley executive director and a ROK official stated in a September 2001 Asiamoney article regarding ongoing discussions relating to a potential debt-for-equity swap involving Hynix and its creditors (which eventually took place in Hynix' October 2001 restructuring) that “if creditor banks go down that road, there would be speculation that the decision was made in conjunction with the government.” The Morgan Stanley analyst continued, stating “[a]lthough Hynix argues that the creditors arrived at their decision {to participate in the debt-to-equity conversion} purely on economic grounds, the fact that most of them are state-owned does infer government intervention.”

In addition to the evidence of direct government involvement, record evidence shows that ROK banks without substantial government ownership were subject to direction, and made loans in accordance with government policy objectives.<sup>24</sup> Such government guidance came about in a number of ways. The

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<sup>23</sup>This information, cited in the proprietary version of the Hynix Verification Report, cannot be cited here because Hynix requested that it be treated as business proprietary.

<sup>24</sup>For this final determination, we found that the lending decisions of Citibank were not directed by the GOK. As explained above and in the Creditworthiness Memo, we have also found that Citibank's participation does not constitute dispositive evidence of Hynix' creditworthiness, because we found that these loans were part of larger financing in concert with GOK or GOK-directed participation and, thus, possibly covered by an implicit government guarantee, within the meaning of the Department's regulations, as noted above. We further considered that in past proceedings the Department found programs with funding from the KDB, such as the Hynix restructuring program, were commonly viewed by financial institutions in the ROK as having the government's tacit approval, which effectively provided these programs with an implicit government guarantee. See Creditworthiness Memo at 2. Additionally, we cited to certain portions the March Affidavit from Citibank which appeared to provide further support for a finding of implicit guarantee. Consequently, we preliminarily found that the Citibank loans were covered by an implicit government guarantee and, therefore, determined that these loans did not constitute dispositive evidence of Hynix' creditworthiness.

lead role and extensive participation of the government owned or controlled banks, particularly the policy lending banks such as the KDB, sent a clear signal of GOK support for the restructurings. As noted above, the vast bulk of the financing, and virtually all of the new loans in the October package, came from these banks. This provided a strong incentive for the other banks to comply with the GOK policy and lead. The GOK in this manner encouraged and guided the actions of the private banks.

Moreover, evidence indicates that the GOK also took affirmative steps to influence the lending decisions of the private banks. The record reflects varying opinions on the role of the private banks, with many experts interviewed suggesting that the GOK no longer had control over the private banks the way it had in the past. However, at least one expert did comment that government influence over the private banks has continued. See Private Financial Experts Verification Report at 7-9.

There is other, credible evidence to support the view of continued government influence. Most significantly, in a September 2001 filing with the U.S. Securities and Exchange Commission (“U.S. SEC”), Kookmin Bank/H&CB, two of Hynix’ creditor banks that were merging, stated that:

The {GOK} has promoted, and, as a matter of policy may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programs for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with {Kookmin’s} credit review policies. However, we cannot assure you that government policy will not influence {Kookmin} to lend to certain sectors or in a manner in which {Kookmin} otherwise would not in the absence of the government policy.<sup>25</sup>

Kookmin/H&CB filed a similar prospectus with the U.S. SEC in June 2002. As discussed in more detail below, we find Kookmin’s U.S. SEC filing very telling with regards to GOK influence over bank lending decisions.

Hynix and the GOK attempt to discredit the meaning of the Kookmin U.S. SEC prospectus by arguing that the language was not meant to imply GOK control over Kookmin’s lending decisions, that it relates to potential future actions, and that Kookmin’s statements are totally unrelated to the Hynix restructuring. The timing of the September 2001 U.S. SEC prospectus, however, clearly links the statements about government influence over bank lending decisions to the POI. Moreover, the plain reading of these documents, along with documents examined at

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<sup>25</sup>See the petitioner’s March 28, 2003 submission at Attachment A.

verification, connect the government's influence over Kookmin and the government objective to rescue Hynix from financial collapse. Kookmin's reference to "troubled corporate borrowers" and "technology companies" alone establish such a link.

We noted earlier that, for this type of program, which involves the government's direction of bank lending decisions, it would be expected that much of the evidence of such direction would be from secondary sources. Kookmin's U.S. SEC prospectus, on the other hand, is direct evidence that such direction occurred and provides crucial evidence of the government's role in directing lending decisions. In order to be listed on a U.S. stock exchange, companies must comply with stringent transparency rules. These rules are designed to protect investors, and companies cannot afford to hide certain risks from their investors. To do so would create a serious litigation and liability risk for the company. In this instance, Kookmin was signaling to its investors that it must assume risks in making lending decisions not based on commercial consideration, but on direction by the GOK and reflective of the GOK's economic and social policy objectives. Kookmin had no choice but to reveal these risks to its investors. We note that no other ROK bank was subject to these same stringent transparency rules because no other ROK bank was listed on a U.S. stock exchange during the POI.

The GOK and Hynix have attempted to demonstrate that the participation of creditors in the Hynix restructuring was without government direction and commercially based in part because highly credible and independent banks such as Kookmin participated. That Kookmin, a bank held up as an example of independence, was subject to direction is confirmed by its own U.S. SEC filing. Moreover, the nexus described above regarding Kookmin's lending to Hynix and the government's policies to ensure that banks "participate in remedial programs for troubled corporate borrowers" is also evident from the loan approval documents the Department examined for Kookmin's internal approval of the December 2000 syndicated loan. This document, which cannot be quoted here because of the request that it be treated as business proprietary, echoes the government's objectives cited in the U.S. SEC prospectus.<sup>26</sup>

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<sup>26</sup>The GOK contends in its case brief that the Department mischaracterized in its GOK verification report the explanation provided at verification of the regulatory official's presence at the Creditors' Council meeting by referring to the regulator's presence as having to do with banks' participation in the "restructuring plan" for Hynix. The GOK claims that the regulatory official's presence at the March Creditors' Council meeting "had nothing to do with any restructuring plan for Hynix." However, as we noted at length above, Hynix and the GOK have stressed throughout the course of this proceeding that Hynix was taking part in an overall "restructuring plan" that was being coordinated and proposed by SSB and Citibank, and the May and October restructurings were just pieces of the "restructuring program" being undertaken for Hynix. Thus, contrary to the GOK's claims, the participation by the regulatory official did, in fact, relate to part of the overall "restructuring plan"

Numerous press reports from the time of the Hynix restructuring also support the conclusion that there was a pattern of practices by the government to direct banks lending decisions with regard to Hynix. For example, according to documents presented by the FSC to the National Assembly that were obtained at verification, an FSC Vice Chairman attended a March 2001 Hynix Creditors' Council meeting at the request of the lead creditor bank "to urge creditor banks to execute the resolutions made by creditors." Further, a June 2001 Dow Jones International news article, reported that KorAm Bank, a bank without substantial GOK ownership, reversed its decision not to participate in the Hynix June 2001 convertible bond offering that was part of the May restructuring program after the FSS warned of a possible sanction against KorAm if it did not participate. It was also reported in a July 2001 Korea Times article that, with regard to corporate restructuring packages, an official at the MOFE stated that "we've decided to force all creditor financial institutions {both local and foreign} to take part in {creditor} meetings in order to prevent some of them from refusing to attend and pursuing their own interests by taking advantage of bailout programs."

There were also numerous statements on the record relating to the GOK's pressure on KFB (which was, at that time, 51 percent owned by Newbridge Capital, a U.S. company) to participate in the Fast Track program. Numerous press reports indicate that the KFB resisted the purchase of Hynix bonds in January 2001 because it considered Hynix to be a high credit risk. According to a January 29, 2001 Wall Street Journal article, ROK banks have "been more accustomed to following government orders than making sound credit decisions." It further notes that, when KFB refused to participate in a GOK debt restructuring program (that was focused primarily on Hyundai Group companies) at the request of the FSS, the FSS applied pressure to KFB and "strongly urged" KFB to participate in the plan lest it risk losing some of its clients. Commenting on this, an executive at a GOK-owned bank said that the nationalized banks were "green with envy," as "nobody wants to increase their exposure to these corporations that still have a long way to get their acts together." The article states that the FSS asked creditor banks to participate in this program, and only KFB refused.

We disagree with the GOK's and Hynix' contentions that that such reports are nothing more than speculation with regards to government influence of commercial banks in the ROK. KFB's reluctance to participate in the GOK-sponsored bail-out of Hynix, a company which we have shown had strong government backing, became a major issue in the ROK press and financial community. Such strong resistance was likely possible in large part because of the bank's majority foreign ownership and foreign management team which was not accustomed to following government directives. As a securities analyst stated, "KFB's rebellious move was possible as the bank is now controlled by the foreign management." Most of the local banks, according to the analyst, "are under the government's influence {for whom} such a move by the

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that was being put into place for Hynix according to the GOK and Hynix' explanations.

KFB is unimaginable.” See The Daily Star, January 6, 2001.

Finally, an April 2001 Korea Herald article notes that the FSS threatened to fine Hana Bank if it failed to provide emergency liquidity to HPC, which was a part of the Hyundai Group that was going through the corporate workout process. Hana Bank was also an important Hynix creditor. Moreover, while this article discusses HPC, as we outlined above, the GOK’s policies during this period were aimed at the corporate and financial restructuring of the entire Hyundai Group, including Hynix’ predecessor, HEI, which was part of that group.

As the discussion above indicates, the record establishes that there was a governmental policy in place to promote the restructuring of Hynix, and the GOK acted pursuant to this policy to take affirmative measures to support that objective by directing lending decisions. In the absence of convincing evidence to the contrary, we find, and it is reasonable to conclude that this policy and pattern of practices continued throughout the entire restructuring process through its logical conclusion.

The principal factor to which the GOK and Hynix point as evidence that no direction occurred or at least ended by the later stages of the restructuring is the fact that four banks, two of which were 100 percent government-owned, completely severed their ties from Hynix and the restructuring process in October 2001. According to respondents, this provides a clear indication that any direction, even if it existed, was not successful.

We do not find this to be compelling evidence that 1) there was not a pattern of practices on the part of the GOK to entrust or direct bank lending decisions, or 2) that such practices were not successful. First, these four banks accounted for only a very small amount of Hynix’ outstanding debt. Therefore, their participation was not crucial to the success of Hynix’ financial restructuring and cannot be considered dispositive of whether the government’s policy objective and its direction of ROK banks ended. Moreover, as detailed above, 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. These creditors held the vast majority of Hynix’ outstanding debt and effectively controlled the voting rights in the Creditors’ Councils. At the same time, these creditors were entrusted by the GOK to maintain GOK policies and were performing GOK-sanctioned financial support activities, as well as causing other banks to provide the same support.

Accordingly, the Department finds that the GOK has entrusted or directed financial institutions to carry out the GOK subsidy program to bail out Hynix. In so doing, the GOK both entrusted and directed various GOK financial institutions. As outlined above, the GOK gave authoritative instructions and directives to financial institutions, and made it well known that it fully backed the bailout program. Moreover, once the Hynix Creditors’ Council was formed and had a majority of GOK-owned or controlled banks, the GOK entrusted those banks with continuing

the bailout process to its conclusion. Accordingly, we find that the GOK's entrustment or direction to these institutions allowed the GOK to execute its bailout policy program, thus providing a financial contribution to Hynix within the meaning of sections 771(5)(B)(iii) and 771(5)(D)(I) of the Act.

***Comment 2: Specificity Relating to Direction of Credit***

*Hynix' Argument:* As discussed above, Hynix contends that the record evidence does not support a finding of direction of credit specifically to Hynix or generally to the semiconductor industry ("the industry") during the period 1999 through the POI. Additionally, Hynix contends that the Department's specificity finding in the final determination can only be based on the direction of credit to Hyundai Group companies, if there is direction of credit at all. Hynix argues that, because Hynix was functionally separate from the Hyundai Group in December 2000, and May 2001, and was legally and functionally separate from the Hyundai Group in October 2001, any direction of credit to other Hyundai Group companies (e.g., HMM and HPC) during the POI would confer no benefit on Hynix. In support of its claim that Hynix was functionally separate from the Hyundai Group in December 2000, and May 2001, Hynix states that by December 2000, 1) HEI's legal separation from Hyundai Group had been scheduled for June 2001; 2) the Hyundai Group did not hold any directorships in HEI; 3) Hyundai Group waived all rights to participate in the management of HEI and to its voting rights; and 4) the syndicated loan agreement provided that if Hynix became a member of Hyundai Group after the targeted separation in June 2001, it would constitute an event of default. In addition, Hynix states that by May 2001, 1) Hyundai Group affiliates' ownership in Hynix had fallen below 20 percent; 2) Hyundai Group had agreed that all transactions between the Hyundai Group companies and Hynix would be at arms length; 3) Hynix had its own separate management which precluded the Hyundai Group's ability to influence Hynix' operations; and 4) HEI had changed its name to Hynix. In support of its claim that Hynix was functionally and legally separate from the Hyundai Group in October 2001, Hynix states that by August 2001, 1) a separation agreement had been signed by Hynix and the Hyundai Group; 2) Hynix' separation from Hyundai Group was officially recognized by the Korean Fair Trade Commission; and 3) the Hyundai Group's stock in Hynix was below 10 percent.

Hynix contends that the petitioner has failed to provide evidence supporting its claim that the GOK directed credit to the industry as a whole from 1999 to June 2002. While it does not disagree that the industry is important to the ROK economy and that it accounts for a significant portion of ROK exports, Hynix does not agree that this alone is proof of the GOK's direction of credit to the industry. Hynix states that the industry's importance is only a possible motive, and nothing more. According to Hynix, record evidence demonstrates that the radio, television and communications sector (which includes semiconductors) in the ROK, received 2 to 2.5 percent of overall lending in the ROK from 1992 to 2001. Thus, the semiconductor industry's portion is even smaller. Meanwhile, Hynix notes, the semiconductor industry's sales revenues

constitute 3 to 7 percent of gross domestic product (“GDP”) in the ROK. According to Hynix, this evidence does not support a finding that lending to the industry was directed by the GOK. Hynix contends that even if the petitioner’s information on the magnitude of loans Hynix and SEC received from GOK-controlled bank was correct, which Hynix argues it is not, it does not provide sufficient evidence of direction of credit to the industry. Lastly, Hynix contends that the conclusions in Professor Darby’s April 9, 2003 expert report (“Darby Report”) (see, the petitioner’s April 14, 2003 submission at tab 74), rely solely on the Hynix bailout to arrive at a conclusion that the GOK directed credit to the entire industry while ignoring record information demonstrating significant changes in the ROK banking sector since the 1997 financial crisis. According to Hynix, examples of such information include the improved return on investment, return on equity and operating profits in the banking sector. Hynix contends that, if the GOK were still directing credit to companies irrespective of their performance, then these improvements could not have occurred.

*SEC’s Argument:* SEC contends that the record evidence does not support a finding that the GOK specifically directed credit to the ROK semiconductor industry generally, or to SEC, through 1998, or from 1999 through June 30, 2002, as required by section 771(5) and 771(5A) of the Act. According to SEC, the information on which the Department relied to find direction of credit through 1998 is general in nature, without any specific evidence of such practices. In addition, SEC contends that the information upon which the Department relied to find no direction of credit to the semiconductor industry from 1999 through the POI is no different than the information relating to its pre-1999 finding in the Preliminary Determination. Citing to AK Steel, SEC claims that the petitioner’s arguments fall short of meeting the evidentiary burden for establishing specificity. SEC notes that the court, in AK Steel, stated that the Department was “unable to identify a single piece of direct evidence in support of its theory” that the GOK actively engaged in directing credit to the ROK steel industry. See SEC Case Brief at 15-16. SEC contends that, given the evidentiary burden established in AK Steel, the record evidence in this case does not support a finding that the GOK directed credit to the ROK semiconductor industry or SEC for both time periods, because it lacks such direct evidence. Moreover, SEC contends, the Department cannot rely on the record information pertaining to the GOK’s historical treatment of the semiconductor industry in the 1970s, the 1980s, and the 1990s to conclude that the GOK directed credit to the semiconductor industry from 1993 through June 30, 2002. As noted in AK Steel, this information merely provides a “background against which to assess the GOK’s subsequent conduct,” according to SEC. See SEC Case Brief at 19-20. Specifically SEC contends that the petitioner never identifies actions taken by the GOK in the 1990s and through the POI to direct credit to the industry.

SEC contends that the petitioner never demonstrated the “sheer magnitude” of loans extended from GOK controlled/owned banks to the semiconductor industry during the POI. The fact that SEC is the largest ROK semiconductor producer and that it received no loans from GOK-owned or controlled banks during the POI alone demonstrates that no direction of credit to the

semiconductor industry occurred during the POI, according to SEC. SEC also argues that POI loans to Hynix are irrelevant to a semiconductor industry-oriented specificity analysis. Similarly irrelevant to this analysis are other types of alleged GOK assistance to the industry, such as “grants, special tax programs, tariff reductions. . .and even equity infusions” that the petitioner claims demonstrate the GOK’s direction of credit to the semiconductor industry. See SEC Case Brief at 21-23. SEC contends that the Department relied extensively on background information in its Preliminary Determination with respect to its pre-1999 specificity finding, in contradiction to AK Steel. For example, the Department cited the GOK’s “Seven Year High Technology Development Plan,” adopted in 1990, which called for USD 1.83 billion in funds for development, tax incentives, and the building of an industrial estate for the assembly of semiconductors, computers and optical equipment, in its Preliminary Determination. SEC claims that this information is irrelevant to the question of the specificity of direction of credit under AK Steel because it pertains to alleged forms of financial assistance other than directing financial institutions to provide credit to the industry. Moreover, SEC notes, the Department identified the MOTIE selection of five industries, including semiconductors, “to receive government support.” According to SEC, MOTIE handles R&D programs and does not have any supervisory authority over ROK financial institutions. That SEC received three small R&D loans under the HAN program does not establish that the GOK directed credit to the industry because they are irrelevant to receiving preferential loans, which are specific by definition.

According to SEC, the petitioner fails to explain the relevance of the industry’s export orientation and importance to the ROK economy to the question of direction of credit and specificity. SEC contends that the Department’s Preliminary Determination appropriately disregarded the petitioner’s claim that the GOK directed credit to the industry from 1999 to June 2002, because of its export volumes, size of operations and importance to the ROK economy.

SEC claims that there is no record evidence supporting the petitioner’s assertion that SEC depended heavily on the KDB for credit in 1993 through 2002. According to SEC, the petitioner overstated SEC’s outstanding loan balance from the KDB by including 236.8 billion won in syndicated foreign currency loans and certain capital leases in the KDB “total” of 264.6 billion won. SEC contends that the syndicated loans were from a large consortium of foreign lenders, which merely included the KDB, and the capital leases were commercial loans with London Interbank Offered Rate (“LIBOR”)-plus rates from the Korea Development Leasing Corporation, which is not owned or controlled by the GOK. Furthermore, SEC contends that the petitioner’s data on SEC’s total loans does not reflect SEC’s financial structure. According to SEC, a more appropriate picture includes one trillion won in bonds (labeled as debentures) and 1.23 trillion won in foreign currency bonds, which were outstanding at the end of 2001. SEC notes that, even using the petitioner’s KDB loan figure of 264.6 billion won and the correct amount of SEC’s financing (i.e., the denominator), SEC’s percentage of outstanding financing from the KDB equals three percent of SEC’s outstanding liabilities, which clearly is



not a majority. Moreover, SEC claims that other loans and bonds from arguably GOK owned or controlled banks amount to less than one percent of SEC's outstanding financing in 2001. With respect to the petitioner's figure for SEC's loans from the KEB, SEC contends that the KEB acted as an agent for itself and four foreign banks. According to SEC, these loans carried an interest rate of LIBOR-plus, which means that they were commercial loans and not directed by the GOK. See SEC Case Brief at 25-30.

According to SEC, the petitioner contends that the KDB extended a disproportionate share of credit to the industry. SEC contends that the petitioner's argument is premised on the nonsensical belief that if, for example, the KDB accounts for ten percent of credit extending in the entire ROK economy, then any ROK company's KDB financing should be ten percent. SEC further contends that this approach clearly dismisses all of the other financial instruments available to SEC, such as bonds and foreign loans. By the petitioner's rationale, if, for argument's sake, SEC had only one small loan from the KDB in 2001 (in addition to the bonds financing it actually had), then SEC would have received 100 percent of its loans from the GOK. Therefore, SEC argues, the Department should reject the petitioner's claim that SEC depends heavily on financing from the KDB.

SEC argues that its lower cost of borrowing than other ROK companies does not prove that the GOK directed credit disproportionately to the industry. According to SEC, the petitioner failed to identify the companies in its comparison industry segment (i.e., the manufacturing sector). Therefore, SEC contends, it is impossible to determine the credit ratings of the comparison companies. SEC argues that its lower cost of borrowing is attributable to its credit rating and the strength of the company relative to others in the manufacturing sector.

Finally, SEC contends that directed credit does not constitute an export subsidy, as contended by the petitioner, and that the Department has never linked direction of credit to an export subsidy. SEC claims that the petitioner's argument has no merit.

SEC contends that the petitioner's attempt to establish specificity for the alleged GOK's direction of credit to the semiconductor industry through 1998 is based on irrelevant historical anecdotes and is legally inadequate. Because the Department relied on this information in the Preliminary Determination with respect to its pre-1999 specificity finding, SEC contends that its finding is necessarily defective. Second, SEC contends that the petitioner has not provided one piece of evidence to convince the Department to reverse its preliminary determination that the GOK did not direct credit specifically to the semiconductor industry as a whole. In support of its argument, SEC argues that, given SEC's size relative to other ROK semiconductor producers, an absolute precondition for finding GOK direction of credit to the industry after 1999 is SEC's receipt of preferential loans that other ROK companies would not have access to. In fact, SEC states, the Department verified that SEC received only four loans after 1999, which were all tied to non-subject merchandise. Given this fact, SEC contends that the

petitioner's argument regarding post-1998 specificity is untenable.

SEC contends that MOCIE's November 2002 announcement of the "2010 Trade Policy Vision" does not provide evidence of the GOK's direction of credit to the industry during the period 1999 to June 2002, because it does not pertain to that period, nor does it establish that the GOK directed credit to the industry at any time prior to November 2002, or that it has committed to do so in the future. According to SEC, the same can be said about all of the press articles and other material the petitioner cites in its case brief. SEC also contends that the petitioner's reference to the nano-technology R&D program is irrelevant because no current or future semiconductor product incorporates nano-technology.

According to SEC, the fact that the industry is "strategic" to Korea's exports does not establish that the industry benefitted from direction of credit from 1999 to June 2002. SEC also argues that the record clearly indicates that the KDB was an extremely minor source of financing for SEC from 1999 through June 2002, which is a fact that the petitioner has not attempted to rebut. With respect to the petitioner's claims that SEC received 74 percent of its long term loans from "banks or other institutions with high levels of GOK ownership," SEC argues that this claim completely ignores SEC's significant reliance on bond financing from 1999 to June 2002. Once these bonds are considered, SEC's financing from allegedly GOK- owned and controlled institutions is a very minor part of SEC's overall financing after 1998. Therefore, SEC concludes, these banks did not lend a disproportionate amount of funds to SEC. Lastly, SEC contends that the Darby Report is nothing more than an "agglomeration of unsupported personal opinions. . .and erroneous assertions, such as the claim that SEC 'received enormous assistance in terms of preferential credit.'" As such, SEC contends that the Darby Report fails to provide evidence of post-1998 specificity.

*Petitioner's Argument:* The petitioner states that the Department was correct in preliminarily finding that GOK reforms "have yet to fully erase the GOK's direction of the banks, nor have they prevented the GOK from acting, through financial institutions involved in the ROK market, to ensure that Hynix received necessary financing." See Preliminary Determination, 68 FR at 16775. According to the petitioner, not only did the GOK have the ability to direct credit to Hynix during the POI, the GOK was also highly motivated to direct Hynix' financial restructurings during the POI because the 1997 financial crisis created a significant potential for Hynix' failure. Furthermore, because Hynix' failure could have brought down the entire semiconductor industry, the petitioner contends, the GOK considered Hynix too important to the ROK economy to fail and motivated the GOK to direct credit to Hynix. The petitioner states that the importance assigned to Hynix by the GOK is certainly understandable, given that Hynix accounted for four percent of Korea's exports and employs 22,000 people. See the petitioner Case Brief at 57.

According to the petitioner, the Hyundai Group's importance to the GOK is revealed in a

statement made by a Blue House official: “Hyundai is different from Daewoo. Its semiconductors are constructions are Korea’s backbone industries. These firms hold large market shares of their industries. These firms should not be sold off just to follow market principles.” See Preliminary Determination, 68 FR at 16775. The petitioner argues that the fact that Hynix’ financial troubles appear on the agenda of high level GOK meetings and that a significant portion of Hynix’ loans were made by the GOK-owned KDB further supports a finding that the GOK considered Hynix “too big to fail.” See the petitioner’s Case Brief at 58. In addition, the petitioner argues, numerous statements on the record suggest that the GOK would not leave Hynix’ financial future “blindly to the creditor group” because it was so concerned about the possible repercussions of Hynix’ collapse. See petitioner’s Case Brief at 60-61. The petitioner also contends that the GOK’s determination to keep Hynix alive was well publicized by the Minister of Finance when he stated in July 2000, “there would be no more bankruptcies of *chaebol* like Daewoo’s fall in 1999.” See petitioner’s Case Brief at 62. The petitioner, citing various sources including a Grand National Party report, also claims that the GOK was motivated to direct credit to Hynix because of the increased financial burden Hynix faced after it was forced to merge with LG Semicon by the GOK. See petitioner’s Case Brief at 64.

According to the petitioner, the Department should find in its final determination that the GOK directed credit to Hynix, the Hyundai Group and the entire semiconductor industry, including SEC, during the POI. The petitioner believes that the record evidence in this case supports the Department’s preliminary finding that the GOK has a long and well documented history of aiding the ROK semiconductor industry because it was considered a “strategic” industry by the GOK. The petitioner contends that the GOK directed credit to the semiconductor industry after 1998 and throughout the POI because the GOK continued to treat the semiconductor industry as a “strategic” industry. The petitioner argues that this designation afforded the entire semiconductor industry the same treatment it received through 1998-directed credit, preferential loans, R&D funding, etc. In support of its argument, the petitioner claims that in November 2002, the GOK again designated semiconductors as one of eight key industries in its “2010 Trade Policy Vision,” under which one trillion won would be provided for R&D programs. See petitioner’s Case Brief at 120. In addition, the petitioner cites the GOK’s 10-year nano-technology R&D program, established in July 2000, as another example of the GOK’s efforts to support the development and competitiveness of ROK semiconductor producers after 1998. Among many other quotes, the petitioner points to a MOCIE official’s statement in October 2000 that, “the {semiconductor} industry deserves to be nurtured, both by the government and the private sector, as one of the nation’s key strategic industries.” See petitioner’s Case Brief at 121-123 and, generally, the petitioner’s April 14, 2003 submission, Volume I.

As further evidence that the GOK directed credit to the semiconductor industry from 1999 through the POI, the petitioner argues that the KDB has continued its long history of supporting

semiconductor producers. See petitioner’s April 14, 2003 submission at attachment G. According to the petitioner, the KDB was the single largest source of long-term loans to Hynix (44 percent) and SEC (56 percent) outstanding during the POI. (See petitioner’s April 14, 2003 submission at attachment A.) Furthermore, the petitioner argues that GOK owned or controlled banks accounted for 64 percent of Hynix’ and 74 percent of SEC’s long term loans outstanding during the POI. The petitioner contends that this information demonstrates the GOK’s continuing financial support to the industry as a whole, not just to Hynix or the Hyundai Group. The petitioner also argues that the Darby Report concluded that “the GOK had directed credit and continued to direct credit throughout the POI to the {ROK} semiconductor industry in general, and to {SEC} and Hynix in particular.” See petitioner’s Case Brief at 128. According to the petitioner, the Darby Report lends further credence to its argument that the GOK was motivated to, and had the resources to direct credit to the ROK semiconductor industry after the ROK financial crisis.

The petitioner argues that the KDB and BOK’s claim that they do not maintain lending information specific to the semiconductor industry is not credible because they maintain such data for the broader “Radio, Television and Communication Equipment” sector, which includes semiconductors. Therefore, the petitioner contends, the Department should apply adverse facts available and find that the semiconductor industry benefits disproportionately from KDB lending. The petitioner argues that such disproportionate lending demonstrates the GOK’s direction of credit specifically to the semiconductor industry from 1999 through the POI.

The petitioner states that a de facto specificity finding requires the Department to determine that a subsidy is not widely or evenly available in accordance with section 771 (5A)(D)(iii) of the Act. The petitioner then states that, while the Department may find a subsidy to be specific to a group of companies based on a limited number of recipients, “there is no requirement that the members of a group share similar characteristics.” See Preamble, 63 FR at 65357 and 19 CFR 351.502(b). Citing to the SAA at 932, the petitioner argues that the Department does not need to establish that any government intent to target these companies or treat them as a group existed. Therefore, the petitioner contends, Hynix’ separation from the Hyundai Group is irrelevant to the specificity analysis. Furthermore, the petitioner argues, that Hynix separated itself from the Hyundai Group does not mean that the GOK ceased to target Hynix and other Hyundai Group companies.

The petitioner contends that the record evidence demonstrates that the magnitude of Hynix’ POI restructuring was significantly larger than the average for other companies’ debt restructurings. In addition, the petitioner contends that Hyundai Group, including Hynix, accounted for a significant amount of the total debt restructured under the CRPA. Given this predominant use of the debt restructuring laws by Hynix and/or Hyundai Group companies, the Department should continue to find specificity to Hynix and the Hyundai Group. The petitioner contends that even if the Department found no specificity with respect to the Hyundai Group,

there is overwhelming evidence that the GOK directed credit specifically to Hynix. See petitioner's Rebuttal Brief at 54-55.

*Infineon's Argument:* Infineon contends that additional record evidence and findings at verification demonstrate that the GOK continued to designate the ROK semiconductor industry as "strategic" from 1999 through the POI and that the GOK continued to support the industry because of this designation. For example, Infineon argues that the Hynix verification report confirms the semiconductor industry's designation as a "key" industry under the Operation G-7/HAN program. According to Infineon, this confirms ROK financial experts' views that the KDB preferred to lend to the industry throughout the 1990s. Infineon also contends that the GOK's support for the industry is evidenced by the FSC's approval to increase lending limits, which allowed creditors to participate in the syndicated loan, Fast Track program and D/A ceiling increases for Hynix. Specifically, Infineon notes that FSC meeting minutes state, "for the promotion of the electronics industry policy, the FSC finds it in the best interest to increase the ceiling." See GOK Verification Report at 17. In addition to the GOK, creditors such as Citibank, the KDB and KEB, were committed to Hynix' restructurings because of its importance to the ROK economy and the GOK, according to Infineon. See Infineon Case Brief at 11-12. Infineon also contends that lending data from the KDB and KEB support this conclusion.

Furthermore, Infineon claims that lending from the KDB is important because it indicated to "{ROK} companies {that} projects funded by the KDB receive tacit government approval" throughout the POI. (See Structural Beams Direction Memo, the public version of which is included as an appendix to the Direction Citations Memo.) Similarly, Infineon contends that loans from the KEB signal government approval to creditors because of the GOK's ownership in KEB.

Infineon then argues that the Department's preliminary specificity finding includes Hynix because Hynix was a "current or former Hyundai Group compan{y}."

Infineon also argues that the record evidence of the GOK's "aggressive targeting" of the industry meets the evidentiary standard in AK Steel. In particular, Infineon points to the participation of the FSS in the Creditors' Council meetings and the GOK's explanation for increasing credit limit ceilings in support of its argument. Moreover, Infineon argues, the record evidence shows that the industry was a strategic industry in the GOK's view and that the GOK targeted subsidies to companies in strategic industries that needed them. Infineon contends that, whether only one respondent received a particular benefit under the direction of credit umbrella or not, does not disprove that the GOK directed credit to the industry.

*Department's Position:* First, regarding the period through 1998, as discussed in the "Direction of Credit and Other Financial Assistance" section, above, there is a plethora of

record evidence demonstrating that the semiconductor industry was favored by the GOK in pursuing its industrial policies, particularly during the 1990s. This evidence also indicates that the GOK earmarked vast sums of money, through GOK-owned or controlled banks, for product and technology development programs and export promotion programs specifically designed for the semiconductor industry. This practice began during the industry's infancy in the 1970s and continued through 1998. This is not a novel conclusion. Rather, as noted above, there was significant record evidence in Structural Beams showing that the GOK allocated credit to important, or "strategic," industries such as steel and semiconductors through 1998.

Citing AK Steel, SEC claims that the record evidence does not meet the evidentiary requirements to establish specificity to the semiconductor industry. In addition, Hynix contends that lending data to the "Radio, Television, and Communication Equipment" ("RTC") sectors does not support a semiconductor-based specificity finding. We disagree with SEC's characterization that AK Steel prohibits the Department from considering historical practices and circumstantial evidence. First, lending to RTC sectors alone cannot establish or disprove specificity, in and of itself. We note, however, that despite numerous requests prior to and during verification, the GOK was unable to provide KDB and other banks' lending data (pre-1999) for the semiconductor industry. Ideally, we would have this data to consider as part of our specificity analysis, particularly because of the importance of KDB lending to "key" industries in the ROK during this period. Second, in Thai Hot-Rolled Steel, the Department stated "there are other facts on the record. . .that outweigh the value of the proposed GDP analysis in determining {specificity}." Similarly, there are several other factors on this record that outweigh the lending data with respect to specificity. In particular, we find that the evidence discussed above outweighs the ROK-wide lending data on the record. Moreover, in AK Steel, the CAFC noted that specificity "must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case." The facts and circumstances of this case are compelling: the GOK widely controlled lending in the ROK through GOK-owned banks and through other, GOK-directed banks, and the GOK considered semiconductors a "strategic" industry. These facts dictate a finding of specificity to the semiconductor industry through 1998, irrespective of what the overly broad lending data on the record indicates.

In addition, section 771(5A)(D)(iii)(IV) of the Act states, that in determining whether a subsidy is specific, in law or in fact, to an enterprise or industry, the Department need only find that "the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others." The record evidence clearly shows that the GOK favored the semiconductor industry and exercised calculated discretion in financing, and otherwise assisting, semiconductor producers through 1998 using a wide variety of financing mechanisms, including directing ROK banks to lend to the industry.

We next considered specificity for the period of 1999 through June 2002. As noted in the “GOK’s Involvement in the ROK Lending Sector from 1999 through June 30, 2002” section above, record evidence does not support a finding of specificity to the semiconductor industry for this period. While the record evidence relating to the pre-1999 period identifies the semiconductor industry, as a whole, as the target of GOK directed credit, the evidence for this period (e.g., official statements from the Blue House and a National Assembly member) overwhelmingly relates to the Hyundai Group and Hynix in particular. This evidence is further supported by the KDB lending and CRPA debt restructuring data, which is discussed in the BPI Memo. In addition, the fact that SEC received a relatively insignificant portion of its financing after 1998 and throughout the POI from ROK lending banks despite its position as the largest ROK semiconductor producer suggests that the GOK was not directing credit to the semiconductor industry as a whole after 1998. Therefore, for the period 1999 through June 30, 2002, we continue to find, as discussed above in the “Direction of Credit and Other Financial Assistance” section, that the GOK did not direct credit to the semiconductor industry or to SEC, but that the GOK did entrust or direct credit and other assistance to Hynix and the Hyundai Group companies from 1999 through the end of the POI.

***Comment 3: Application of Commercial Benchmarks to Determine the Amount of Benefits to Hynix***

*Hynix’ Argument:* Hynix argues that in past ROK cases where the Department has found directed credit, e.g., Cold-Rolled Steel, the Department used loans made by branches of foreign banks as benchmarks for the directed loans. In this case, however, Hynix claims that the Department incorrectly analyzed Citibank’s lending activities in the context of Hynix’ creditworthiness and incorrectly found that Citibank had acted under an implicit guarantee.

Under the statute, according to Hynix, the Department is required to look to a comparable commercial loan that the borrower could actually obtain to determine whether a benefit is received. As Hynix has argued elsewhere, certain of Hynix’ creditors were purely private banks, some with foreign ownership. Thus, Hynix argues, their loans could serve as commercial benchmarks. Hynix points to the Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium From Germany, the Netherlands, and the United Kingdom, 66 FR 65903 (December 21, 2001), at Comment 8 of the accompanying Issues and Decision Memorandum (“Uranium from Germany”) as an example of a case where the Department used a loan from a private shareholder as a benchmark for determining whether loans from the government shareholder were countervailable.

The Department’s regulations (see 19 CFR 351.505(a)(2)(ii)) also permit the Department to use loans from government-owned banks as benchmarks, according to Hynix. Hynix acknowledges language in the Preamble (see 63 FR at 65,363-65,364) indicating that where a firm receives a package of loans from commercial banks and the government, the Department

will look for any special features of the loan package that cast doubt on the commercial nature of the commercial banks' loans. However, in this case, Hynix claims, there was no direct government lending and the loan packages had no special features. Hynix presents a comparisons of what it claims are commercial benchmarks and the terms of the government-provided loans at issue.

*Petitioner's Argument:* The petitioner disagrees with Hynix that the company's private and privately-controlled creditors' loans should be used a benchmarks for the Hynix restructuring activities being investigated in this case. As argued elsewhere, the petitioner contends that the GOK exerted control over the banks, even those with little government ownership levels and high foreign ownership levels. Moreover, as a result of this control, these banks were not acting as rational commercial actors.

*Department's Position:* Under 19 CFR 351.505(a)(1), the Department will determine the existence and amount of the benefit by comparing the amount the recipient pays on the government-provided loan with the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market. We have determined that all loans received by Hynix in the AUL period, except those received from Citibank, were provided directly by the GOK or by ROK banks that were directed by the GOK. Under 19 CFR 351.102, we state that the term "government-provided" is used as shorthand for the act or practice that is alleged to be a countervailable subsidy (which, as set forth in the statute, includes indirect subsidies). Therefore, all but the Citibank loans are "government-provided" loans for purposes of our regulation.

Although the Citibank loans could potentially be used as benchmarks in this situation (because they are not "government-provided"), the Department has determined that the Citibank loans are not dispositive of Hynix' creditworthiness and cannot be used as a benchmark for 2000 through June 2002. Consequently, in accordance with 19 CFR 351.505(a)(3)(iii), the Department calculated an uncreditworthy benchmark using the formula specified in that regulation. (See Comment 5 regarding the role of Citibank's loans in Hynix' creditworthiness analysis.)

Regarding the Cold-Rolled Steel and Uranium from Germany precedents cited by Hynix, none of the respondents in those cases were found to be uncreditworthy. Therefore, it was appropriate for the Department to consider whether actual loans to those companies could be used as benchmarks.

#### ***Comment 4: Direction of Credit Through the GOK's Control of the Bond Market***

*Petitioner's Argument:* According to the petitioner, the Department has found that the GOK controlled ROK banks and the market for loans in the ROK through the POI, and that such



control was specific to the semiconductor industry through 1998. The petitioner argues that record evidence shows that the corporate bonds issued during the 1990s and through the POI are in reality virtually identical to commercial loans and should be similarly countervailed. According to the petitioner, the ROK bond market operates in a fundamentally different manner than western bond markets in that, in western markets, bondholders bear all of the risk with the bonds, whereas in the ROK, for much of the 1990s, Investment Trust Companies (“ITCs”) and guarantors effectively insulated final investors from any direct risk. The petitioner claims that these ITCs acted as de facto banks, in that they accepted deposits from investors, invested the deposits in bonds, and provided guaranteed returns to the investors without the risks normally associated with bond investments. Both the ITCs and the banks were subject to GOK regulation, control, and direction according to the petitioner. Additionally, although interest rate controls on corporate bonds were relaxed after the financial crisis, the petitioner contends that evidence it has placed on the record shows that the GOK continued its intervention in the bond market after the financial crisis, and that the “market interest rates” that were put into place were based on a bond market that was shaped in large part by the GOK. The petitioner also claims that the ITC’s, like the banks, were subject to GOK management and control, and the GOK effectively insured ITCs, like banks, against failure.

According to the petitioner, even after more overt forms of control and influence of lending through bonds subsided in the late 1990s, the GOK still remained highly involved in the bond market. The petitioner contends that the GOK stepped in to bail out the ITCs from their high-risk strategy of insulating final investors from the performance of the bonds, which confirmed long-standing public perceptions that the GOK was standing behind the ITCs, and in doing so effectively nationalized two ITCs.

The petitioner contends that, consistent with its policy of targeting the semiconductor industry as a strategic sector, the GOK continued to provide support to both Hynix and SEC with respect to their bond offerings. The petitioner states that the KDB acted as the lead or a substantial underwriter on three SEC bond offerings in October and November 1998 and October 2001, and also guaranteed a January 2001 bond offering. According to the petitioner, as an underwriter, the GOK or other GOK-controlled entities involved purchased SEC’s bonds. The petitioner points out that, according to a 2001 Asian Development Bank Institute paper on the record, most corporate bonds purchased by financial institutions are held by them, and there is record evidence according to the petitioner that a portion of SEC’s August 2001 bond offering was purchased by a GOK entity. The petitioner notes that the Department has already found that the GOK instituted the KDB Fast Track program and that that bond-related program involved government direction or influence over Hynix-issued bonds.

Based on the above analysis and record information, the petitioner claims that the GOK has directed credit to the semiconductor industry through the bond market as well as through bank

financing, and, thus, the Department should countervail all SEC and Hynix bonds outstanding during the POI.

*SEC's Argument:* According to SEC, the Department has already considered the issue of whether the GOK controlled the ROK bond market based on a new subsidy allegation made by the petitioner. In doing so, the Department declined to initiate an investigation of this allegation based on a lack of evidence to support the allegation. SEC claims that, since the Department rejected its new subsidy allegation on this issue, the petitioner has engaged in a concerted effort to supplement its original defective allegation. According to SEC, these belated submissions, which were filed only after verification preparation and actual verification had started, are an untimely attempt to cure the defects the Department found in the original allegation. Moreover, according to SEC, all of these new documents submitted by the petitioner were available to the petitioner at the time the allegation was made. SEC states that the petitioner has essentially re-filed its new subsidy allegation at a time when it would be impossible for the Department to verify or examine anything filed by the petitioner. Also, because the petitioner never stated its intention to re-file the allegation, none of the parties in the proceeding had adequate notice that the petitioner would seek to renew this allegation. SEC argues that, if the Department considers the petitioner's arguments on this matter at this point in the proceeding, it will eviscerate the Department's previously-established new subsidy allegation deadline. SEC claims that the regulations governing those deadlines will become meaningless in all other investigations. Based on these arguments, SEC states that it has no obligation or need to reply to any of the substantive allegations in the petitioner's case briefs on this matter, other than to state that SEC rejects entirely the claim that its bond issues were influenced by the minor participation of the KDB as an underwriter for some issues, and that the identity of the bond purchasers somehow matters (as discussed below in Comment 21).

*Department's Position:* We agree with SEC. As pointed out by SEC, the petitioner first made its allegation that the bond market in the ROK was controlled by the GOK on February 20, 2003, 40 days before the preliminary determination in this proceeding. We addressed this and several other new subsidy allegations made by the petitioner in a March 7, 2003, memorandum to Susan Kuhbach entitled New Subsidy Allegations ("New Subsidy Allegations Memo"), which is on file in the Department's CRU. In the New Subsidy Allegations Memo, we declined to initiate an investigation of the petitioner's allegation relating to the ROK bond market based on a lack of evidence and support for the allegation. Since that time, although the petitioner has supplemented the record with further general information relating to the ROK bond market, the petitioner has not made any attempt to re-file its allegation on this topic, and has provided no notice that it intended to renew its allegation. Instead, the petitioner waited until it filed its case brief, which was barely three weeks before the final determination, to again present arguments relating to this issue.

Pursuant to 19 CFR 351.301(d)(4)(A), the deadline for filing new subsidy allegations in a CVD

proceeding is no later than 40 days prior to a preliminary determination. The new subsidy allegation deadline in this proceeding (as extended by the Department) was February 20, 2003, more than three months before the petitioner ostensibly revised its allegation on this issue in its case brief. Thus, the petitioner's new subsidy allegation was untimely. Additionally, in addressing this issue in its case brief, the petitioner did not state that it was refiling its original allegation, and did not allege the elements necessary for the imposition of the duty imposed by section 701(a) of the Act.<sup>27</sup> Moreover, by waiting until its case brief to renew its arguments on this matter, the petitioner has essentially precluded the Department from examining this issue in a thoughtful and meaningful manner because the petitioner provided the Department only three weeks to consider the issue had it chosen to do so. Finally, by waiting until three weeks before the final determination to provide arguments on this topic, the petitioner precluded the other parties in the proceeding from being able to meaningfully comment on the "allegation" that was made. Therefore, based on the above, we decline to investigate this matter for the final determination.

***Comment 5: Hynix Creditworthiness***

*Hynix' Argument:* Hynix argues that the Department's implicit guarantee finding, which led to the Department's rejection of the company's Citibank loans as dispositive evidence of the company's creditworthiness, is conceptually wrong and factually incorrect. The respondent remarks that, at verification, Citibank officials pointedly denied any implicit or explicit GOK guarantees behind Citibank's loans, stating that for a private bank, the presence of an implicit guarantee does not work and is not recognized in the bank's internal guidelines.

Hynix claims that the Department misinterpreted the Citibank affidavit placed in the record by the respondent in March 2003. The "non-financial factors" cited by the Department in its preliminary analysis referred not to the GOK but to other Hynix creditors, particularly a show by the ROK banks that they were willing to fight for Hynix' survival. Citibank's participation in the restructuring programs, according to the officials, was based on detailed analysis and commercial considerations; projects were evaluated on their own merits, and Citibank never believed there was an implicit guarantee from the government. Had there been such a guarantee, the respondent points out, Citibank should not, as it did, have lost a substantial amount of money in those programs.

Noting that KDB participation was also central to the Department's implicit guarantee finding, Hynix asserts that the assumption that the KDB's presence indicates a GOK guarantee no

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<sup>27</sup>Section 771(5) of the Act defines the elements of a countervailable subsidy as a subsidy which 1) provides a financial contribution from a governmental authority, 2) confers a benefit, and 3) is specific.

longer has any basis. Specifically, the respondent points to the case of Daewoo which, despite having KDB as the lead creditor, was allowed to go into bankruptcy. The respondent highlights the fact that, according to an IMF working paper submitted by the petitioner, the fall of Daewoo was an important break from the past, a strong signal that no *chaebol* was too big to fail. Also, the respondent argues that if KDB participation signaled an implicit guarantee from the GOK, then the KFB would not have refused to participate in the Fast Track program. Similarly, ITCs balked at joining the May restructuring bond issue unless the terms were eased. In the October restructuring, four banks, including two that were government-controlled, specifically chose to exercise their appraisal rights, which required them to write off large portions of unsecured debt, and several banks, including Kookmin, refused to issue new loans. Finally, prior Department decisions found that KDB participation provided an implicit guarantee only for other domestic banks, which would not include Citibank (citing to Structural Beams Direction Memo, the public version of which is included as an appendix to the Direction Citations Memo.)

Hynix argues that the Department correctly dismissed the notion that SSB's role as financial advisor meant Citibank's loans were not comparable commercial loans provided at arms-length. The respondent claims that the bank's role as financial advisor to Hynix is irrelevant to the Department's evaluation of benchmarks. This is because the Department has in the past disregarded alternative or supplemental motivations or interests on the part of an investor (citing to Certain Steel Products from Austria; Final Affirmative Countervailing Duty Determination, 58 FR 37,217 (July 9, 1993) ("Certain Steel from Austria")), and the same should hold true for private creditors, the respondent asserts. Additionally, Hynix claims that the Department normally considers only the special features of a particular loan package, *i.e.*, only the circumstances on which the transaction is contingent, not other circumstances relating to other transactions with other contingencies and requirements (citing to the Preamble, 63 FR at 65363). Thus, the respondent argues that Citibank's position as financial advisor is irrelevant to assessing Citibank's loans for the purposes of a benchmark or creditworthiness analysis.

Rebutting the petitioner's arguments, Hynix asserts that the Department cannot dismiss Citibank's loans on the grounds that they are relatively small. According to Hynix, one loan from a foreign lender, such as Citibank, is sufficient to establish creditworthiness (citing to Structural Beams Direction Memo, the public version of which is included as an appendix to the Direction Citations Memo.) Moreover, citing to the Preamble, 63 FR at 65367, Hynix claims that the small size of a loan is not by itself sufficient to prevent its use for analysis. In any case, Hynix contends that Citibank's loan was significant by any measure.

Regarding the other parts of the Department's preliminary finding of uncreditworthiness, Hynix asserts that, contrary to the Department's analysis, all of the company's financial indicators, except the current and quick ratios, showed positive trends until 2000. For example, the times interest earned increased steadily and substantially during 1997 through 1999, up 30 percent in

1997 and another 30 percent in 1999. The net profit margin, return on assets, and return on equity all showed steady improvement, as well. The debt to equity ratio dropped sharply and steadily over the period, shrinking by a third from 1997 to 1998 and by two-thirds in 1999, and reaching levels comparable to the average for ROK companies. Hynix claims that evidence on the record shows the company was outperforming some of its peers in the period leading up to the October 2001 restructuring.

Hynix further argues that the Department's preliminary analysis, and the Saunders analysis submitted by the petitioner, suffer the same shortcomings, relying unduly on past indicators and failing to consider the industry's highly cyclical nature. An analysis of Hynix, according to the respondent, should take the industry context into account, *i.e.*, the prevailing market trend and rates of growth or decline. This is because the performance of the company can be expected to go up or down with the market, as could be seen in Hynix' deterioration in 2000, when the industry entered a severe down cycle, on the heels of the Asian economic crisis. Considered in this context, the performance of Hynix was typical for the industry and likely to be temporary. In such an environment, the respondent argues, the financial ratios did not reflect the company's potential performance.

Finally, according to Hynix, the analyses put forward by the petitioner and used by the Department in the Preliminary Determination disregarded key facts: that the October 2001 restructuring set Hynix back on its feet, that the industry was expected to rebound, and that the company was operationally competitive and well-positioned to benefit from the rebound. The respondent claims that there was nearly universal consensus that the market would improve; the question was not if, but when. Aside from its financial structure, the respondent continues, Hynix was very competitive and technologically strong. The respondent also faults Saunders's focus on the company's debt burden and the resulting cash flow and liquidity problems; these indicators, the respondent asserts, were not meaningful after the October restructuring, since the whole purpose of the restructuring was to relieve those problems.

*Petitioner's Argument:* The petitioner (as well as Infineon) expressed general agreement with the Department's preliminary analysis of this issue, including our conclusions with regard to Hynix' poor and deteriorating financial condition during the AUL period, and the company's uncertain prospects going forward, as well as the Department's findings that Citibank loans to Hynix were provided under an implicit government guarantee and, consequently, did not qualify as comparable commercial loans that would constitute dispositive evidence of the company's creditworthiness. In this regard, the petitioner specifically points to the Preamble, 63 FR at 65367, where the Department discusses implicit guarantees and their relevance to a creditworthiness determination. The petitioner further points to evidence obtained at verification from an independent financial expert, who stated that there was an implicit guarantee that Hynix would not fail. Moreover, according to the petitioner, there is no evidence that Citibank performed any risk analysis before lending to Hynix.

The petitioner contends that there are additional reasons, beyond the implicit guarantee, that Citibank's loans should not be considered dispositive evidence of Hynix' creditworthiness. First, according to the petitioner, Citibank had a profitable and long-standing relationship with the Hyundai group of companies, including the fact that Hynix retained Citibank as its exclusive financial advisor along with Citibank's sister company, SSB. The petitioner asserts that Citibank stood to profit more in fees from this relationship than from the interest on what the petitioner considers to be the relatively small loan it extended to Hynix. Thus, according to the petitioner, Citibank's lending to Hynix was far from the arms-length commercial investment contemplated by the Department's regulations for the purposes of a creditworthiness analysis. Second, the petitioner contends that the amount of money loaned by Citibank was insubstantial, representing only a minute fraction of the amount loaned to Hynix during the period.

Infinion also offered comments aimed at reinforcing the Department's preliminary rejection of Citibank's lending. Infinion pointed in particular to, *inter alia*, the FSC's raising of lending limits and encouragement of continued investment in Hynix as evidence that the government was determined to ensure the company's liquidity and survival, and that Citibank recognized that the GOK's policy commitment to the survival of the industry effectively underwrote, protected and provided a guarantee of its loans to Hynix.

*Department's Position:* The Department's analysis and conclusions regarding Hynix' creditworthiness is included in the "Creditworthiness" section above, where some of these contentions are addressed, *e.g.*, the significance of the KDB's participation in financing projects. Here we address a few specific points contended by the parties not fully addressed there.

With respect to the respondent's comments regarding Hynix' financial indicators, the Department undertook a detailed examination of these factors in its preliminary Creditworthiness Memo, where we applied a year-by-year approach to analyzing certain financial ratios during the AUL, consistent with the guidance provided by the Preamble to 19 CFR 351.505(a)(4)(i). *See Preamble*, 63 FR at 65367. Since that examination was based on historical data, our findings regarding Hynix' financial condition in those years continue to be relevant and we continue to rely on those findings for the final determination. *See Creditworthiness Memo* at 3-5. In that examination, we found that Hynix' times-interest-earned ratio was sub-par (*i.e.*, below 1.0, or inadequate coverage) for 1997 and 1998, but improved somewhat in 1999, and that Hynix' net profit margin, return on assets, and return on equity ratios were negative in both 1997 and 1998, and barely positive in 1999.

The Creditworthiness Memo did not consider Hynix' debt-to-equity or debt-to-assets ratios because the company underwent significant asset revaluations and debt for equity swaps as part of its restructuring program, and such measures dilute the probative value of these particular indicators. Similarly, we disagree with the respondent's comment about Hynix' relative

performance in the period leading up to October 2001; we generally disregarded indicators that reflected the effects of the various restructuring measures taken by Hynix, because those were part of the very programs under investigation in this proceeding. This is consistent with the Department's practice of not using the debt under investigation for benchmark purposes. The respondent contends that the Department's analysis should have considered the cyclical nature of the industry in order to place Hynix' performance in context. However, it is not the Department's normal practice, and generally not within the Department's capacity, to make a full assessment of the macroeconomic environment and to make forecasts on future performance.

Additionally, the Department finds that the relevant evidence on the record is insufficient for such an analysis. Moreover, the Department believes that cyclicity is a common feature in virtually all industries, and that prudent enterprises plan accordingly and make the appropriate provisions in anticipation of inevitable downturns, which is why some companies that are as much subject to the vagaries of the market continue to thrive while others founder. This contrast was evident when comparing Hynix and SEC, both of which operated in the same market. In this regard, we note the respondent's comment that, despite indicators, Hynix was well-positioned to take advantage of the anticipated recovery of the market. The same logic, however, can be applied in reverse—that a prudent company would have been well-positioned for the downturn in the first place. Hence, we do not believe that this cyclicity invalidates the probative value of the indicators we examined.

#### ***Comment 6: KDB Fast Track Program***

*Petitioner's Argument:* The petitioner contends that, although the Department properly determined in the Preliminary Determination that the thirty percent of the Hynix eligible Fast Track bonds that were purchased by the KDB and Hynix creditor banks were countervailable, record evidence now shows that the remaining 70 percent of the Fast Track-eligible bonds that were placed into the CBO and CLO programs through the Fast Track program are also countervailable.

According to the petitioner, the Fast Track program was established because Hynix and the other Hyundai companies were unable to unload their debt into the existing CBO and CLO programs due to the limit on a single company's bonds that could be included in each CBO. According to the petitioner, the purpose of the Fast Track program was to provide the immediate liquidity to Hynix and other Hyundai group companies that they were unable to obtain on the commercial market or in the CBO/CLO programs. Moreover, the petitioner contends that there were instances, as established at verification, where the KDB held on to Hynix bonds for some time before transferring them into the CBO program because of single-company limits on each CBO. According to the petitioner, the Fast Track program itself provided a significant benefit to Hynix by permitting it to avoid an otherwise certain default on

its maturing bonds, and was a benefit that was not available to other participants in the CBO and CLO programs.

The petitioner claims that the benefit to Hynix did not stop even after the bonds were sold in to the CBO funds, however. According to the petitioner, the GOK has claimed that the limit on a single company's bonds in each CBO was ten percent. However, record evidence obtained at verification shows that there may have been an even lower limit for companies with a lower corporate bond rating, which the petitioner claims was the case for Hynix. Thus, the petitioner claims that, although the GOK and Hynix stated that the ceiling limit applicable to Hynix was ten percent and that ten percent was the limit that was applied to Hynix bonds for each CBO, record evidence shows that Hynix should actually have had a lower limit. Moreover, the petitioner claims that, because Fast Track program companies tended to be more distressed and have higher levels of debt and risk, the KCGF had to increase its guarantee ratio on the CBOs from 34 percent to 53 percent once the Fast Track bonds were included in the CBO pools. The petitioner claims that, without this increased guarantee that was necessary due to the inclusion of the Fast Track companies, the CBOs would not have been attractive to individual investors. Thus, the petitioner claims that the increased CBO guarantee was also a benefit attributable to the Fast Track companies. Even Hynix' inclusion in the program appears to be arbitrary, according to the petitioner, based on the eligibility criteria obtained at verification.

The petitioner further claims that, even for the Fast Track bonds that were eventually placed in the CBO program, it appears that the GOK or GOK-directed institutions retained control of the bonds after they were placed in the CBO program based on actions taken relating to the bonds subsequent to their placement into the CBO program (which are proprietary in nature and, thus, will not be discussed here). This is another example of where Fast Track CBO bonds are different than regular CBO bonds, according to the petitioner.

Due to the fact that 1) the KDB purchased all Fast Track Bonds from Hynix before they were transferred into the CBO program, 2) Hynix could not have sold the same amount of bonds into the CBO program because of the single-company limits, 3) Hynix appears to have been unable to sell any bonds directly into the CBO program, 4) the KDB's service as a bond "parking lot" before the bonds could be placed into the CBO program allowed Hynix to avoid default on the bonds, 5) the KDB delayed the transfer of the bonds into the CBO program, 6) the KCGF increased the guarantee on the CBOs to account for the Fast Track bonds, 7) the GOK retained control over the Fast Track bonds even after they were placed in the CBO program, and 8) each of these benefits was available only to Fast Track participants, the petitioner argues that the Department should find all Hynix Fast Track bonds to be countervailable, regardless of their final destination.

Moreover, the petitioner claims that all Fast Track bonds should be countervailed using an



uncreditworthy benchmark rate, even though the nominal maturity of the bonds was only one year. According to the petitioner, the actual circumstances surrounding the bonds do not support the use of a short-term benchmark. According to the petitioner, the interest rate obtained by Hynix appears to be based on the lowest available bond rate for investment grade companies, BBB-. Furthermore, the petitioner argues that the minimum additional premium that was added to the base interest rate would hardly reflect Hynix' ability to obtain comparable financing on the market. The petitioner claims that it is inconceivable that Hynix would have been able to sell its bonds in the market at the rate it received under the Fast Track program, especially considering that the reason that Hynix had to participate in the Fast Track program in the first place was because it could not obtain financing on the open market. Thus, the petitioner claims that the use of an average money market rate or the formula used by the KDB to select the rate for the Fast Track bonds as a benchmark rate would be inconsistent with the rate that Hynix would actually have been able to obtain on the open market. Therefore, the petitioner states that a long-term uncreditworthy benchmark interest rate should be utilized to reflect the actual situation of Hynix on the open market.

According to the petitioner, the fact that Hynix argues that it incurs a cost in participating in the Fast Track program because it has to redeem 20 percent of its bonds in order to participate is irrelevant, as it cannot be that fulfillment of an existing and mature obligation would be considered an additional cost to Hynix. The petitioner argues that the fact that Hynix had to redeem some of its bonds in order to participate did not increase the actual cost of participating in the program. Using the program dramatically lowered the cost to Hynix by allowing it to escape inevitable default, according to the petitioner.

*Respondents' Arguments:* The GOK argues that the Fast Track program never sought to single out particular companies or groups of companies, and that the petitioner continues to mischaracterize this program by stating that is the case. The GOK contends that the Fast Track program actually imposed significant costs on the participants in the program because they had to buy back 20 percent of their maturing bonds, pay market interest rates, and pay an additional penalty that increased the effective interest rate. This is the reason why the program had so few participants according to the GOK, and is also why the Department should find that no benefit was provided by this program.

According to both the GOK and Hynix, regardless of the petitioner's arguments about the countervailability of the Fast Track bonds, the bottom line is that these bonds provided no benefit to Hynix and, thus, are not countervailable. Hynix and the GOK note that the petitioner does not contest that these bonds had a one-year maturity, and that the applicable interest rate attached to these bonds was higher than the appropriate short-term benchmarks. Hynix and the GOK argue that the petitioner's attack on this program with erroneous and irrelevant facts is an attempt to distract attention from this fundamental point.

Regarding the petitioner's arguments, Hynix and the GOK first state, in response to the petitioner's claim that a benefit somehow arises from the KDB's role in purchasing all of the initial Fast Track bonds, that the real issue is that the KDB was not simply covering Hynix' debt for free, and that there were real costs and consequences in being involved in this program. Additionally, the GOK and Hynix argue that the petitioner's argument that Hynix could not have sold the same amount of bonds into the CBO program itself due to the concentration limits and because of its own credit problems is either speculative and immaterial or untrue, as Hynix never breached its concentration limits. As for the petitioner's claim that a benefit is provided to Hynix via the KDB's role as a "parking lot" for bonds before they are transferred into the CBO program, Hynix and the GOK contend that it is likely that other companies bonds that were being held by securities firms before being incorporated into the CBO program were also subject to the same wait as were Fast Track bonds, and that all bonds (Fast Track or otherwise) were incorporated into the CBO program as fast as possible. Regarding the GOK's claim that there was an increase in the KCGF's guarantee that was caused by the Fast Track bonds, the GOK and Hynix contend that there is no evidence on the record that shows that there was an increase in the guarantee level based on the inclusion of Hynix' bonds in the CBO, or that Hynix was the cause, target of, or benefitted from the increased KCGF guarantees. Finally, as for the petitioner's claim that the GOK somehow retained control over the Fast Track bonds after they were transferred into the CBOs, Hynix and the GOK argue that all Hynix creditors were involved in the October restructuring package including the Fast Track bondholders, which would mean that those bonds would be refinanced just like any other outstanding Hynix debts.

Hynix and the GOK state that the petitioner cannot support its claim that the Fast Track bonds were unlike the bonds of other CBO companies. Moreover, Hynix and the GOK claim that the Department should continue to treat Hynix' Fast Track bonds as short-term financing, as nothing in the petitioner's case brief supports treating the bonds as long-term bonds. Hynix and the GOK argue that most of the petitioner's arguments are not relevant to whether the bonds were long- or short-term, and that not even the petitioner challenges that these bonds were one-year bonds.

*Department's Position:* We agree with the respondents. There is no information on the record, other than the allegations made by the petitioner, that indicates that the Fast Track CBO bonds were treated any differently than were the other CBO bonds for non-Fast Track companies. Both the CBO and Fast Track programs were established to assist companies with maturing bonds. There is no evidence on the record that Hynix did not have a ten percent ceiling limit per CBO, or that Hynix ever breached its CBO ceiling limit. Also, there is no indication that Fast Track CBO bonds received any sort of special treatment that could not also have been received by other non-Fast Track CBO companies. Moreover, we established at verification that the CBO programs were available to any company with maturing bonds, and saw no indication that the CBO program was de jure or de facto specific. Thus, we continue to

find that the Fast Track bonds that were transferred into the CBO program were not specific and, thus, not countervailable.

Also, we disagree with the petitioner that we should calculate the benefit from the Fast Track bonds using an uncreditworthy benchmark rate rather than a short-term rate for the final determination. As all of the parties agree, the original Fast Track bonds were one-year bonds. According to 19 CFR 351.505(a)(2)(iv), the Department will treat as a short-term loan a loan that is one year or less. Moreover, as we noted in the Preamble to the Department's regulations, 63 FR at 65366, because short-term lending is inherently less risky than long-term lending, the use of an uncreditworthy long-term benchmark rate in this situation would overcompensate for the commercial default risk. Finally, as noted in Comment 19, below, we have already changed the short-term benchmark rate for won-denominated loans for the final determination to a benchmark rate that takes into account differences in credit ratings and financial situations of different companies. Thus, there is no need to calculate the benefit from the Fast Track bonds using an uncreditworthy benchmark.

***Comment 7: Hynix October 2001 Debt-to-Equity Conversion***

*Hynix' Argument:* Hynix contends that the shares purchased by Citibank in the October 2001 debt-for-equity swap ("debt swap") constitute a significant amount of shares purchased by a private investor within the meaning of 19 CFR 351.507(a)(2)(iii) and, therefore, the Department should use Citibank's purchase price as a benchmark for calculating a benefit to Hynix. Hynix argues that Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy, 60 FR 31992, 31994 (June 19, 1995) ("Pipe from Italy") is cited in the Preamble at 63 FR at 65367 as an example of what the Department has considered a significant investment made by a private investor. Hynix further argues that Pipe from Italy does not establish a minimum threshold for determining whether the amount of shares purchased by a private investor is significant. In fact, Hynix asserts, the Department has never established such a minimum threshold.

According to Hynix, the intent of the significant investment requirement under 19 CFR 351.507(a)(2)(iii) is to ensure that the private investment accurately reflects the actions of a reasonable investor, and not those of an investor simply trying to establish a private benchmark price. Therefore, Hynix contends, the determinants of a significant investment must also include the amount of money invested by a private investor, not just the private investor's level of participation in an equity infusion. According to Hynix, thousands of individual private investors cumulatively purchased 18.3 percent of the newly issued shares for a total of 26.148 billion lira, or USD 15,259,876 in Pipe from Italy. (The Government of Italy purchased the remaining 81.7 percent.) Based on its own analysis, Hynix states that the maximum amount of money invested by the single largest private investor in Pipe from Italy was USD 213,596, which resulted in a 1.4 percent ownership stake. In contrast, the amount of money Citibank invested

in Hynix in the debt swap and Citibank's resulting 2.4 percent ownership stake in Hynix are significantly greater than the investments of the largest private investor and all of the private investors combined, in Pipe from Italy. Lastly, Hynix claims that Citibank's participation in the debt swap is not the "exceptional situation {in which} the Department could find the volume of a firm's traded shares so low as to preclude the use of those shares as a benchmark." See Countervailing Duties; Proposed Rule, 62 FR 8818, 8832 (February 26, 1997) ("Proposed Rule"). Therefore, Hynix concludes, Citibank's investment in the debt swap constitutes a significant private investment under 19 CFR 351.507(a)(2)(iii), in accordance with Department precedent established in Pipe from Italy, and by any other standard.

Citing Geneva Steel v. United States, 20 Court of International Trade ("CIT") 7, 28; 914 F. Supp. 563, 584 (January 3, 1996) ("Geneva Steel") and the Proposed Rule at 62 FR at 8832, Hynix contends that the Department prefers to use a private investor's share purchase price as a benchmark for measuring subsidies instead of turning to an equityworthiness analysis, when such prices are available and not "deficient, tainted or distorted." Hynix argues that this preference is rooted in the belief that "market-driven share prices, when available and useable, provide the best gauge as to the usual investment practice of private investors. . ." (See Proposed Rule at 62 FR at 8832.) In the same vein, Hynix argues that 19 CFR 351.507 directs the Department to examine actual investment practices, rather than establish its own rules on how investment decisions should be made. Because Hynix issued identical shares for the same price to all participants in the debt swap, including Citibank and the GOK, Hynix argues that Citibank's investment meets all of the requirements of 19 CFR 351.507 for use as the private benchmark price. Given the Department's preference for private investor prices, the significance of Citibank's investment and that Citibank's share price is otherwise useable under 19 CFR 351.507, Hynix contends, the Department must use Citibank's share price as a benchmark for calculating a benefit conferred on Hynix as a result of the debt swap and cannot rely on an equityworthiness analysis with respect to the debt swap.

Secondly, Hynix argues that, if the Department is not satisfied that Citibank's investment by itself is significant, the Department should treat the investments of the seven additional banks that were either majority-owned by foreign investors and/or wholly privately owned (i.e., zero GOK ownership), which participated in the debt swap, as useable private investments for purposes of establishing a benchmark price. According to Hynix, combining Citibank's shares with either 1) the shares purchased by the wholly private banks or; 2) the shares purchased by the wholly private banks and the foreign controlled banks would satisfy the Department's significant private investment requirement and the other requirements for use as a benchmark price under 19 CFR 351.507.

If the Department does not use the available benchmarks, Hynix argues that the Department should revise its equityworthiness analysis. Hynix contends that the Department relied exclusively on Hynix' past financial performance and rates of return on equity in its

equityworthiness analysis and, therefore, incorrectly concluded that Hynix was unequityworthy at the time of the debt swap. According to Hynix, past and current financial indicators fall drastically short of reflecting the universe of information available to Hynix' investors for consideration at the time of the equity infusion. Hynix argues that the Department must examine this universe of information to determine whether the decision to invest was consistent with the usual investment practice of private investors. Furthermore, Hynix argues that the Department must examine the actual investment practice of private investors in its analysis, in accordance with 19 CFR 351.507(a), rather than establish its own view on how investors should act. (See also Proposed Rule at 62 FR at 8832.) Citing Stainless Steel Plate in Coils from South Africa; Final Affirmative Countervailing Duty Determination, 64 FR 15,553, 15,558 (March 31, 1999) ("South Africa Plate In Coils"), Hynix claims that the Department has consistently analyzed a government's equity infusion from the perspective of a reasonable investor. In addition, Hynix contends that limiting an equityworthiness analysis to financial indicators falls drastically short of the requirements set forth in 19 CFR 351.507(a)(4), which instructs the Department to consider 1) objective market studies and economic forecasts prepared prior to the government equity infusion; 2) current and past financial indicators; 3) rates of return on equity; and 4) equity investments made by private investors. When all of these factors are considered, Hynix contends that it was equityworthy in October 2001.

Hynix argues that each participant in the debt swap was acting in a manner consistent with the usual investment practice of private investors. According to Hynix, three objective market studies were independently prepared prior to the October restructuring to provide Hynix' creditors with assessments of Hynix' financial condition and the potential benefits to be gained from the restructuring. Hynix contends that in its equityworthiness analysis, the Department failed to consider the SSB, Arthur Anderson, and Monitor Group studies, which the creditors did indeed consider before making their decisions on which action to take in October 2001. According to Hynix, these studies gave Hynix' creditors a commercially sound expectation of receiving a reasonable return on their October investment within a reasonable period of time. Hynix states that the studies discussed Hynix' financial and operational strengths and weaknesses, assessed various scenarios for Hynix' future performance, and provided a sensitivity analysis. The reports concluded that the October restructuring would improve Hynix' liquidity and capital structure; that the recovery of the DRAMS market was a "question of not if, but when;" and that Hynix was operationally and technologically competitive. Therefore, Hynix argues, the creditors reviewed these studies and included them in their decision making process, which demonstrates that the debt swap was consistent with the usual practice of private investors. Furthermore, Hynix argues that the Department's regulations do not permit it to ignore these studies, or second guess their conclusions. The expert opinions of SSB, the Monitor Group and Arthur Anderson, while not necessarily perfect or, in hindsight, completely accurate, constitute the information that was available to Hynix' creditors at the time of the equity infusion.

Citing Certain Steel from Austria and Steel Wire Rod from Venezuela; Final Countervailing Duty Determination, 62 FR 55,016 (October 22, 1997), Hynix argues that the Department does not distinguish between inside and outside investors in applying the “reasonable investor test.” Therefore, Hynix contends, that Hynix’ existing creditors were “inside” investors in the debt swap does not undermine their ability to act as reasonable investors.

Hynix contends that past financial performance is of little help to investors in assessing future prospects of a company in a severely cyclical industry such as the DRAMS industry. Citing Certain Steel from Austria at 58 FR at 37,246, Hynix notes that the Department has recognized the limited utility of examining the past financial performance of a firm undergoing a major restructuring in assessing that firm’s future performance and the need to adjust such indicators in its analyses. Therefore, Hynix argues that its net income and return on equity in 1997 through 2001 do not provide any insight into the post-restructuring prospects of Hynix. (Hynix notes that the Department incorrectly stated that Hynix’ return on equity in 1999 was negative three percent; the correct figure is positive three percent.) Furthermore, Hynix contends that the Department should place more emphasis on the totality of indicators in its analysis. For example, Hynix’ operating margin (earnings before interest and taxes divided by net revenues) and production costs were lower than that of its peers. Hynix contends that these financial indicators establish that, at the time of the equity investment, Hynix was positioned to reap substantial benefits during the expected upswing in the industry, which would compel reasonable investors to invest in Hynix. In addition, eliminating Hynix’ cash flow and liquidity problems through the October restructuring would allow for even greater financial performance in an industry recovery, according to Hynix. Therefore, Hynix concludes, Hynix’ losses in 2000 and 2001 are not dispositive of Hynix’ unequityworthiness, particularly when considered among the three other equityworthiness factors.

Hynix states that a significant portion of the converted debt was converted by wholly private creditors. According to Hynix, their investments, in addition to privately-controlled banks’ participation in the debt swap provides compelling evidence that Hynix was equityworthy in October 2001.

Citing Certain Steel from Austria at 58 FR at 37,249, Hynix states that the Department concluded that a “rational investor. . .does not let the value of past investments affect present or future investment decisions” and considers only “the marginal return expected from each additional equity infusion.” Hynix contends that this evaluation is based on the Expected Utility Model, which incorrectly assumes that a rational investor will ignore sunk costs and consider only the future costs of an investment decision. According to Explaining Investment Practices, modern economic theory (“the Prospect Theory”) and empirical evidence suggests that investors are willing to take greater risks to avoid the prospect of a loss and are more likely continue an endeavor after they have committed time and money, despite a theoretical “rational decision maker’s” inclination to abandon an endeavor. In this vein, Hynix argues that the

Department should consider, in its analysis, the facts and circumstances Hynix' creditors faced at the time of the debt swap when considering each option under the October restructuring. According to Hynix, each creditor faced the decision of accepting a certain substantial loss or converting existing debt to equity and, thus, gaining the chance of making a reasonable return on their investments. Hynix concludes that this approach satisfies the Department's requirement to consider the actual, usual practice of private investors and proves that Hynix' creditors were acting with the expectations of a reasonable return on their investment.

*Petitioner's Argument:* According to the petitioner, Hynix failed to demonstrate that there were actual private investor prices for the October debt swap that could serve as a viable benchmark because all of the ROK banks were directed to participate by the GOK. The petitioner contends that Citibank cannot be treated as a private investor because of its role as Hynix' financial advisor, underwriter and lender. According to the petitioner, Citibank's actions in the October restructuring do not reflect those of an objective private investor because of its relationship with Hynix. Moreover, the petitioner argues that Citibank's participation was far too small to be considered significant and, therefore, cannot serve as a viable benchmark. The petitioner also contends that the June 2001 GDS issuance cannot be "used as a measure of what a private investor would pay for Hynix stock in October 2001," as the Department found in the Preliminary Determination.

The petitioner contends that Hynix was not equityworthy at the time of the October debt swap. First, the petitioner states that Hynix had negative net margins in almost every year from 1997 to 2001; Hynix' net margin in 2001 was 93.8 percent, more than double the median net margin of its competitors. The petitioner argues that other indicators of Hynix' dire financial straits in 1997 through 2001 were its current, debt-to-equity, and current liabilities-to-net worth ratios. According to the petitioner, Hynix does not dispute the poor state of these past and present financial indicators and, claiming that they are of limited utility in evaluating Hynix' future prospects, asks the Department to abandon its established conventional equityworthiness analysis. The petitioner contends that, even if the Department adopted this approach, it would find that Hynix' future prospects in October 2001, were equally dismal. The petitioner continues its argument stating that Hynix' overwhelming debt obligations, its reduced ability to invest in research and development and capital improvements, and record low DRAMS prices, among other factors demonstrate Hynix' weak future prospects. In addition, the petitioner argues that Hynix' return on equity from 1998 to 2001 was consistently negative; Hynix' return on sales fell dramatically in 2001 to negative 36.1 percent; and Hynix' return on assets was equally dismal from 1998 to 2001, falling to negative 10.7 percent in 2001. Therefore, the petitioner concludes, no private investors would have reasonably expected to receive any rate of return from an investment in Hynix.

The petitioner contends that Hynix' creditors did not conduct any objective analyses prior to the equity infusion to assess potential risks or an expected rate of return. The petitioner argues

that SSB, Monitor Group and Arthur Anderson were nothing more than hired guns to help the GOK direct the continuing bailout of Hynix and did not provide objective analyses. According to the petitioner, the Department correctly found SSB's projections relating to the GDS offering were unjustifiably optimistic and were inconsistent with non-affiliated parties' projections on the DRAMS industry. (See Preliminary Determination, 68 FR at 16777.) For example, the petitioner notes that the DRAMS market advisor was exceedingly pessimistic on the industry in June 2001. (See petitioner's Case Brief at 86.) The petitioner also contends that the Monitor Group was acting, not as a neutral and independent evaluator of Hynix' future, but as a retained consultant. In addition, the petitioner argues that the Arthur Anderson study could not have properly informed the Creditors' Council of Hynix' value as a going concern in October 2001 because of the serious methodological flaws in its analyses which ignored widely accepted commercial principles and render the report extremely suspect. In addition, the petitioner states that the Arthur Anderson study was not published until after October 2001 and, therefore, it was impossible for the Creditors' Council to have considered its conclusions prior to the October 2001 equity infusion. Therefore, the petitioner concludes, Hynix' contention that the Arthur Anderson study allowed Hynix' creditors to conclude that Hynix was worth more as a going concern is untenable.

The petitioner contends that none of the three "options" available to Hynix' creditors under the October restructuring afforded the ability to act in a manner consistent with reasonable commercial practices. The petitioner further contends that a profit-oriented commercial bank would not have found any of the three options to be commercially reasonable because they were all cloaked in the same "save Hynix" mentality characteristic of the earlier restructurings that the GOK directed for Hynix. The petitioner also argues that the intent of the October restructuring was to secure Hynix' future and not to force every creditor to put all of its money in Hynix. Therefore, the petitioner argues, that certain GOK owned or controlled banks, or, for that matter, all banks, did not choose option one does not mean that the GOK was not directing all creditors.

According to the petitioner, the Department should not apply the Prospect Theory because it has already examined and rejected this theory in several prior determinations. See, e.g., Certain Steel from Austria, where the Department stated that a private investor "will look upon any past investments, including {its} own, as sunk costs irrelevant to his analysis of whether to make additional investments." See, also, British Steel Corp. v. United States, 632 F. Supp. 59 (CIT 1986) ("British Steel"), where the court stated, "{s}imply put, it would be unrealistic to expect a private investor to supply operating funds to a loss incurring firm merely to permit the firm to continue operations to minimize its losses. . .it would not be commercially reasonable for an investor to provide funds {to minimize losses} without adequate assurance of the future profitability of the enterprise. . ." Furthermore, the petitioner contends that the Expected Utility Model is still the predominant theory for assessing reasonable commercial behavior, which the author of Explaining Investment Practices concedes. The petitioner also contends that, under



the Prospect Theory, the more bankrupt a company becomes, the more additional lending and investment will become commercially justified. This, according to the petitioner, turns the equityworthiness doctrine on its head and, therefore, the Department should reject the application of the Prospect Theory in its analysis. As an additional reason for rejecting the Prospect Theory, the petitioner argues that its application is limited to the behavior of individual investors, not commercial lending banks.

*Infineon's Argument:* When evaluating whether creditors' equity investments under Hynix' October restructuring were "inconsistent with the usual investment practice of private investors," Infineon contends that The Department should not apply the untested Prospect Theory, introduced by Hynix. In doing so, Infineon argues, the Department would have to incorrectly conclude that throwing good money after bad, in an effort to recover lost investments, is a standard investment practice of rational investors. Infineon contends that rational investors ignore "sunk costs" and base their investment decisions on the future prospect of gains, not on recovering earlier losses. Infineon also argues that, Hynix' approach ignores the underlying belief of Hynix' creditors that the GOK would eventually provide enough subsidies to Hynix for them to recover all of their investments in and loans to Hynix. Infineon then argues that even one of the authors of Prospect Theory was skeptical of the theory's ability to explain real world behavior. See Infineon Rebuttal Brief at 17. Infineon argues that the Department should adopt this skepticism. Lastly, Infineon argues that rational investors do not enjoy the flexibility normally afforded by free market principles when a government is directing or coercing their investment decisions. Infineon contends that an example of this is KFB's decision to lend to Hynix after meeting with GOK officials.

Infineon argues that all parties that converted their debt to equity in the October restructuring, including Citibank, were directed by the GOK and, therefore, none of the private creditors' investment is a viable benchmark. Furthermore, citing Geneva Steel, Infineon contends that Citibank's participation in the debt swap cannot serve as a viable benchmark because Citibank's participation was influenced and tainted by the GOK's involvement. (See Infineon Case Brief at 12-17.) In addition, Infineon contends that Citibank's participation was tainted by its role as Hynix' financial advisor.

Should the Department determine that Citibank was not directed by the GOK, Infineon contends that Citibank's participation in the debt swap was not significant and, therefore, cannot serve as a viable benchmark. Infineon argues that Citibank's October investment of 2.4 percent does not amount to a significant investment when compared to the 18.4 percent private investment that the Department found to be significant in Pipe from Italy. Furthermore, Infineon argues that the only equitable means of determining whether an investment is significant is to consider the percentage of the company purchased, not the amount of money invested.

Infineon contends that the Department should affirm its preliminary finding that Hynix received a

countervailing equity infusion in October 2001 because Hynix was unequityworthy and Hynix' creditors failed to conduct a pre-infusion objective analysis. Infineon argues that the Department conducted a complete and thorough equityworthiness analysis to arrive at its Preliminary Determination that Hynix was unequityworthy. Specifically, The Department included evidence of the worsening of the DRAMS market throughout 2001 and beyond in its analysis. Furthermore, Infineon argues that the Department assigned the appropriate weight to Hynix' past financial performance in its analysis. See General Issues Appendix ("GIA") in Certain Steel from Austria, where the Department explained that, "we tend to place greater reliance on past indicators as they are known with certainty and provide a clear track record of the company's performance, unlike studies of future expected performance which necessarily involve assumptions and speculation."

Infineon also argues that the GOK failed to conduct an objective analysis of Hynix prior to its October 2001 equity infusion, in accordance with 19 CFR 351.507(a)(4)(ii). Infineon contends that the Arthur Anderson study was not prepared until after the October 2001 equity infusion. Furthermore, Infineon contends that the SSB studies do not address the type of information that an independent commercial investor would examine prior to any investment, such as expected returns on investment.

*Department's Position:* According to 19 CFR 351.507, the first step in determining whether an equity investment decision is inconsistent with the usual investment practice of private investors is examining whether, at the time of the infusion, there was a market price paid by private investors for similar newly-issued equity. However, pursuant to 19 CFR 351.507(a)(3), if a private investor's purchases of newly issued shares is not significant, the Department will not use the market price paid by the private investor for comparison purposes.

Citibank was one of Hynix' creditors that opted to swap debt for equity in the October 2001 debt restructuring. As discussed above, we have determined that Citibank's participation in the Hynix restructuring was not directed by the GOK. Therefore, we must consider whether Citibank's decision to swap debt for equity demonstrates that the other creditors' decision to swap their debt for equity was consistent with the private investor standard in section 771(5)(E)(i) of the Act. Pursuant to 19 CFR 351.507(a)(2)(iii), if a private investor's purchases of newly issued shares are not significant, the Department will not use the market price paid by the private investor for comparison purposes. Although we cannot reveal the actual portion of the equity purchase accounted for by Citibank because it is proprietary, we find, consistent with Pipe from Italy, that Citibank's purchase was insignificant. (We note that Infineon is incorrect in asserting that Citibank accounted for 2.4 percent of the debt swap.) Moreover, we find that Citibank's participation in the October restructuring, in value terms, is small relative to the total value of debt converted to equity by GOK owned, controlled, or directed banks.

Additionally, as discussed above in Comment 1, we have found for this final determination that all other Hynix creditors were directed by the GOK to provide loans and other assistance to Hynix. Thus, they are not appropriate for use as a private investor benchmark in this instance.

Finally, as discussed in the Preliminary Determination, because of the extreme differences in the condition of the global DRAMS market as a whole, and Hynix' financial state at the time of the two equity infusions, we continue to find that the GDS issuance in June 2001 does not support a conclusion that the October 2001 equity purchase (*i.e.*, debt-to-equity conversion) was consistent with the usual investment practices of private investors (*see* section 771 (5)(E)(i) of the Act). As we stated in the Preliminary Determination, the earlier, rosy expectations for a rebound in DRAMS demand and prices in June 2001, which were necessary for Hynix to improve its position, were not achieved. Therefore, we have not considered the GDS issuance in our analysis of the usual investment practices of private investors. Nor have we used the prices paid for the GDS as a measure of what a private investor would pay for Hynix' stock in October 2001.

Thus, because we did not have actual private investor prices to use as a comparison to the price paid by Hynix' other creditors, we examined other indicators of Hynix' equityworthiness, pursuant to 19 CFR 351.507(a)(4). First, we considered studies prepared by SSB and the Monitor Group. Based on an extensive review of the SSB studies, we find that the studies were not prepared to answer the question of whether Hynix was equityworthy leading into the October 2001, equity infusion. Nor do the studies address other factors, such as investors' expected return on their investment and Hynix' future financial prospects, factors that a private investor would normally examine prior to any investment. Rather, these studies specifically address the financial mechanisms available to save Hynix from collapse. Furthermore, we find that the SSB studies relied on the assumption that the DRAMS sector would quickly recover from its worst downturn while, at the same time, there was a consensus among independent analysts worldwide that the DRAMS industry was in dire straits and that a recovery was not imminent. According to Dow Jones International, by September 2001, Hynix' GDSs had lost 72 percent of their issuance value, a loss of USD 900 million to investors, a clear indication of private investors' pessimism on the DRAMS industry. According to the Wall Street Journal, DRAMS prices were below cost industry-wide and in an October 8, 2001, article, the Wall Street Journal stated, "{a}lthough chip makers worldwide are taking a loss with each chip they sell, Hynix, according to industry analysts, is in the worst financial shape. In early September, Hynix' future looked shaky. Now, as the global economic outlook gets grimmer, {Hynix'} looks worse." Morgan Stanley Dean Witter ("MSDW"), in July 2001 stated, "{i}n view of the weakness in {DRAMS} fundamentals, {Hynix'} loss of competitiveness in the {DRAMS} business by not investing effectively and its huge debt, we see no reason to be positive on the stock." This contradictory assessment raises skepticism concerning the credibility of SSB's analyses. Therefore, we find that the SSB study does not constitute a credible analysis of Hynix' future financial prospects. In addition, we find that Monitor Group study cannot serve

as an objective analysis of Hynix' future financial prospects because it is narrowly focused on Hynix' operating capabilities and efficiencies, and did not address Hynix' future prospects, expected return of equity invested or any other factor that private investors would normally consider prior to an equity infusion. We need not reach a consideration of the Arthur Anderson report because the only conclusive record evidence suggests that the December 2001 report was not available to the Creditors' Council prior to the October debt swap.<sup>28</sup> See 19 CFR 351.507(a)(4)(ii).

Second, we considered Hynix' current and past financial indicators. From 1997 through 2001, Hynix reported losses in every year except 1999. In 2000, Hynix' net income was negative 28 percent, and in 2001 its net income was negative 127 percent. Hynix return on equity was negative in 1998 (negative six percent), 1999 (positive three percent), 2000 (negative 40 percent), and 2001 (negative 97 percent) according to its financial statements. MSDW estimated Hynix' return on equity for 2002 at negative 76 percent. Additionally, for the years 1997 through 2001, Hynix' debt-to-equity ratios ranged from 688 percent in 1997 to 129 percent in 2001. These above-cited figures clearly demonstrate Hynix' poor condition throughout the late 1990s and through 2001.

With respect to Hynix' argument concerning the Prospect Theory, we do not believe that its application is appropriate in this case. As noted by the petitioner, the Expected Utility Model remains the predominant economic theory for explaining normal commercial behavior. Furthermore, as noted by the petitioner, the Department has a long-standing practice of applying the Expected Utility Model in the equityworthiness analysis, and has rejected the Prospect Theory in several cases. See, e.g., Certain Steel from Austria, British Steel, and Steel Wheels from Brazil; Final Affirmative Countervailing Duty Determination, 54 FR 15523, 15530 (April 18, 1989), which state that "a rational investor does not let the value of past investments affect present or future investment decisions."

Therefore, based on the factors discussed above, we determine that Hynix was unequityworthy at the time of the October 2001 debt-to-equity swap.

#### ***Comment 8: Hynix October 2001 Debt Forgiveness***

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<sup>28</sup>Moreover, the Arthur Anderson analysis was developed from a creditors perspective, not that of an equity investor, and, consequently, we find that substantial additional analysis would be required before an equity investment decision could be made. In other words, the Arthur Anderson report falls short of addressing all of the factors that an investor would consider before making an equity infusion. Furthermore, we found considerable flaws in the methodologies used by Arthur Anderson to evaluate Hynix' value as a going concern.

*Hynix' Argument:* Under the October restructuring, banks that chose Option 2 swapped debt for equity, did not extend any new loans, and were required to forgive a certain percentage of their secured and unsecured debt. Therefore, Hynix argues, those banks effectively paid a higher price per-share for their equity (the debt converted plus the debt forgiven) than those banks that chose Option 1 in the October restructuring. Hynix contends that Option 2 is the exact scenario addressed in 19 CFR 351.508(a), which states, “{i}n situations where the entity assuming or forgiving the debt receives shares in a firm in return for eliminating or reducing the firm’s debt, the {Department} will determine the existence of a benefit under 351.507 (equity infusions).” Hynix argues that the Department should treat the combined amount of debt swapped and debt forgiven for each bank that elected Option 2 as an equity infusion in accordance with 19 CFR 351.508(a).

Hynix argues that the Department should not countervail the debt forgiven under Option 3 in the October restructuring because the creditors that elected to walk away from Hynix were obviously not acting under the direction of the GOK. If however, the Department countervails any of the loans forgiven, Hynix contends that the Department can only countervail loans forgiven by GOK-owned banks, not the debt forgiven by privately-held creditors, in accordance with 19 CFR 351.508(a). According to Hynix, the Department cannot countervail debt forgiven by private banks because they were acting independently from the GOK, in accordance with Department precedent set in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany: Final Affirmative Countervailing Duty Determination, 58 FR 6233, 6234 (January 27, 1993).

*Infineon's Argument:* Citing Steel Wire Rod from Germany: Final Affirmative Countervailing Duty Determination, 62 FR 54990, 54992 (October 22, 1997), Infineon argues that the Department has found debt forgiven by private banks as part of a government-led debt restructuring is countervailable where the government requires, or induces through implicit or explicit guarantees, banks’ participation. According to Infineon, the GOK used both of these measures to ensure Hynix’ creditors participation in the October restructuring. Therefore, Infineon argues, the Department should continue to countervail all of the debt forgiven as part of the October restructuring.

*Department's Position:* We disagree with Hynix on both points. Hynix’ creditors did not forgive debt under the October restructuring in exchange for equity. In fact, creditors did not receive anything in exchange for the 72 percent of unsecured debt that they forgave. Rather, creditors received equity in exchange for the 100 percent of secured and 28 percent of unsecured debt. Therefore, we continue to countervail the 72 percent of unsecured debt forgiven under 19 CFR 351.508. Moreover, as discussed in the “Direction of Credit and Other Financial Assistance” section above, because we have continued to find that the GOK directed Hynix creditor banks (with the exception of Citibank) to provide loans and other assistance to Hynix (regardless of the banks’ ownership), we continue to treat debt forgiven

under the October restructuring as a grant, in accordance with 19 CFR 351.508.

***Comment 9: Hynix Five-Year Interest-Free Loan Stemming from October 2001 Restructuring***

*Petitioner's Argument:* Under Option 3 of Hynix' October restructuring, creditors were able to collect payment of 100 percent of their outstanding secured debt and 25 percent of their unsecured debt amounting to 80.1 billion won. According to the petitioner, this debt was converted to zero coupon (i.e., interest-free) debentures with a five year maturity. The petitioner contends that, for the final determination, the Department should countervail this 80.1 billion won as an interest-free loan.

*Respondents' Arguments:* According to Hynix, the debentures issued to creditors electing Option 3 in the October restructuring are not interest-free instruments. Rather, Hynix contends, these debentures are sold at a discount and mature at their face value, similar to U.S. Government savings bonds. Hynix argues that a profit is realized by the creditors between the discount price and the pay out at maturity, which represents the interest income.

*Department's Position:* There is no record evidence indicating a discount price or interest rate applicable to the five year debentures issued in connection with the October 2001 debt forgiveness. Therefore, we find that the five year debentures were countervailable as interest-free loans and are countervailing these loans accordingly for the final determination.

***Comment 10: Hynix October 2001 Retroactive Reduction of Accrued Interest as Part of Debt-Equity Swap***

*Petitioner's Argument:* According to the petitioner, the interest rate on all of the debt instruments converted to equity under the October restructuring was retroactively adjusted to interest rates agreed in the October restructuring for purposes of calculating the amount of interest liability that was to be converted to equity. The petitioner contends that the Department should treat the difference between the actual interest liability using the original interest rate and the revised interest liability calculated with the October 2001 interest rate (i.e., the amount converted to equity), as a grant.

*Respondents' Arguments:* The respondents did not submit arguments concerning this issue.

*Department's Position:* We agree with the petitioner to the extent that some, not all, interest debt that was to be converted to equity was retroactively recalculated using interest rates agreed to in the October restructuring. For each debt instrument that had interest converted to equity, we calculated the difference between the interest liability that was converted to equity

and the interest liability that should have been converted if the interest rate stated in the original terms, or the terms of the most recent refinancing (but prior to the October agreement), had been applied. Therefore, we are countervailing for the final determination the total difference in interest liabilities as a grant, in accordance with 19 CFR 351.508.

***Comment 11: Hynix Benefit from CBs Arising Between Issuance and Conversion Stemming from October 2001 Restructuring***

*Petitioner's Argument:* The petitioner contends that the structure of the debt-to-equity swap for Hynix conferred three separate benefits. First, the petitioner contends that the convertible bonds issued by Hynix were effectively a loan to Hynix from December 2001 until the equity positions were set in May or June 2002; second, the bonds were converted into equity; and third, any interest that was accrued from December 2001 through May/June 2002 was converted into equity. The petitioner contends that the conversion price would have been reduced by 3.13 percent based on the 6.5 percent annual interest rate on the convertible bonds during the time between December 2001 through actual conversion during which no interest was paid. Thus, the petitioner contends that, in addition to the debt to equity conversion countervailed in the Preliminary Determination, the Department should also countervail the benefit related to the interest that accrued from December 6, 2001 through May 31, 2002 that was effectively converted into equity upon conversion of the CBs. The petitioner also contends that the Department should countervail as a loan benefit the difference between the nominal rate of the bonds (6.5 percent) and the benchmark rate for Hynix as an uncreditworthy company. The petitioner contends that this would not be double-counting the benefit, as each of these measures is a separate and unique benefit.

*Hynix' Arguments:* Hynix first agrees with the petitioner that the equity conversion did not occur until May/June 2002. According to Hynix, the Department found at verification that the convertible bonds that were issued in December 2001 were not converted until May/June 2002, and, thus, should not be countervailed as an equity infusion until 2002, and any benefit should only relate to 2002. Hynix also agrees that, for the period between the issuance of the CBs and their conversion, the Department should treat these bonds as loans and apply the appropriate benchmark to calculate the benefit. In the alternative, Hynix contends that the Department should, if it disagrees with the petitioner and Hynix, not countervail the interest rate associated with the bonds, which served as a discount to the conversion rate. According to Hynix, the discount could not be utilized before a floor price was reached. Second, Hynix contends that any discount does not reflect a benefit to Hynix in terms of the equity swap. Hynix contends that a discount reflects a situation where Hynix would have to issue more shares, not less shares.

*Department's Position:* First, we disagree that the equity infusion did not occur until 2002. In accordance with 19 CFR 351.507(b), the receipt of benefit occurs on the date on which the

firm received the equity infusion. Because Hynix recognized the equity infusion in its 2001 audited financial statement and the convertible bonds that were agreed to and issued carried an obligation to convert as of June 1, 2002, we find that the date on which Hynix received the equity infusion occurred in 2001. Therefore, we continue to treat the equity infusion itself as we did in the Preliminary Determination.

Because the benefit is being recognized as an equity infusion in December 2001, it makes no sense to also countervail the CBs. If we were to do so, we would effectively be saying that Hynix was borrowing money that was already given to it. Thus, we are not countervailing these items for the final determination.

***Comment 12: Treating Loans to Hynix in Excess of Banking Act Exposure Limitations and D/A Financing as Grants***

*Petitioner's Argument:* The petitioner argues that the Department should treat the waivers received by Hynix creditor banks from the FSC of the banks' single-lender credit ceiling limits for Hynix as countervailable grants for the final determination.

According to the petitioner, without these waivers, Hynix' creditors would not have been able to extend credit to Hynix because of otherwise applicable single-lender limits. The petitioner states that these lending limit exceptions are also clearly de facto specific to Hynix and Hyundai Group companies because the number of companies that benefitted from lending limit exceptions granted by the FSC is extremely small. Further, of the five exemptions that were granted, four related to Hynix or Hyundai Group companies. Moreover, the petitioner claims that one of the lending limit exceptions for Hynix was directly limited to its export potential, which establishes that these waivers are specific as export subsidies. Although the GOK has attempted to characterize these waivers as bank-initiated and a reflection of the banks' own judgement, the petitioner points out that internal GOK documents show that the lifting of the ceilings was one of the "{m}easures to alleviate the cash crunch of {HEI that was i}nitiated by the {FSS}."

Thus, according to the petitioner, the record shows that creditors could not have extended the related financing to Hynix without the FSC waivers. The petitioner contends that the waivers permitted and entrusted banks to provide otherwise prohibited financial contributions to Hynix, financing that could not have been extended to Hynix without the specific authorization of the GOK. The petitioner argues that, because these financial contributions would have been prohibited entirely without the specific waiver by the FSC, they should be treated as grants. Moreover, because in some instances the GOK and Hynix have not provided details regarding the precise terms and nature of the waivers for Hynix, such as with the Fast Track program where a blanket waiver was issued, the petitioner states that the Department should conclude that all of the banks participating in the Fast Track program could do so only pursuant to the



waiver. Also, for the syndicated bank loan, the petitioner states that the Department should countervail the entire 300 billion won participation of KEB, KFB, and the KDB because the actual waiver amounts reported by the various parties on the record are incomplete and inconsistent. For the Fast Track program, the petitioner states that the Department should countervail the full amount of the KDB Fast Track program, 1.208 trillion won, as a grant because the respondents did not provide detailed information on the blanket waiver granted for this program and the banks that needed to utilize the blanket waiver.

Finally, the petitioner contends that the Department should countervail all D/A financing that was provided pursuant to the D/A limit extensions as grants. The petitioner points out that record evidence indicates that at least two banks would have needed ceiling increases for their increased D/A financing, and that both Hynix and the GOK made statements suggesting that the D/A lending was subject to GOK controls and financial ratio requirements. Thus, the petitioner contends that the Department should countervail as grants all D/A financing provided to Hynix pursuant to the USD 600 million increase. Because Hynix provided only monthly balances under the original and extended ceilings, in order to calculate the amount of the countervailable grant, the petitioner suggests that the Department should first determine the average balance of the D/A financing under the extended portion of the D/A ceiling from January through the end of November (the time at which the D/A financing was restructured). The Department should then assume that the average D/A maturity was 90 days (based on record information), which would mean that each D/A revolved 3.7 times in the 333 days between January 1 and November 30, 2001. The petitioner states that the Department should multiply the average balance of the D/A financing by 3.7 to determine the increased financing available to Hynix as a result to the USD 600 million increase in the D/A ceiling.

Regarding the D/A financing, the petitioner further argues that, if the Department does not treat the ceiling extension D/A financing as a grant as discussed above, the Department should instead do so because the increase in the D/A ceiling would not have occurred absent explicit GOK direction of Hynix' creditor banks and the KEIC to support such financing, as discussed above in Comment 1. According to the petitioner, it is abundantly clear from record evidence that the D/A financing increase would not have been available to Hynix absent direct and persistent GOK intervention. Thus, the Department should treat the D/A increase as a grant using the above-noted methodology.

*Respondents' Arguments:* According to the GOK and Hynix, the petitioner has completely exaggerated and distorted the role of the lending limits for banks. The GOK and Hynix state that the facts on the record show that the FSC's decision on this matter actually played a limited role in the transaction. Specifically, the GOK and Hynix state that not all banks participating in the syndicated loan were subject to these lending limit issues, and only KDB, KEB, and KFB had to request an increase in their ceilings. Moreover, the GOK and Hynix argue that only a certain portion of these banks' loan obligations triggered this need for a ceiling

increase, not the entire loan. Finally, the GOK and Hynix contend that, in the end, all participants were paid market-based interest rates on market-oriented loan terms. The GOK and Hynix contend that the GOK's approval does not provide any preferential treatment for those loans extended by the three banks.

Hynix further argues that a grant implies the provision of funds with no strings attached, which is not the case in any of these situations, as each of these situations involved creditors that treated the provision of loans as a debt with an obligation of repayment. Moreover, Hynix states that the petitioner's argument that lending made pursuant to these waivers is an export subsidy is a stretch, as the petitioner selected that one statement for one of the waivers as evidence, when there were numerous other factors other than Hynix' importance to the economy as a significant exporter that were taken into consideration by the FSC in granting the waivers. Additionally, Hynix states that there is no reason for the Department to use adverse inferences and assume that Hynix' creditors exceeded the lending limits for certain financing. For the syndicated loan lending limit, Hynix states that there were many reasons why the increases were needed, and they did not provide varying rationales for why these increases were needed. Furthermore, Hynix states that they provided all information requested by the Department regarding the increases and were never uncooperative.

Hynix also states that it would be excessive and illogical to countervail all financing provided instead of only that which was in excess of the lending limits. According to Hynix, there is no nexus between the GOK action and the financial contribution that was made below the actual limits. For example, for the syndicated loan, Hynix states that the FSC reported the total amounts by which the KDB, KEB, and KFB would exceed the lending limits. Although the petitioner has tried to question this data that was provided by the FSC, Hynix contends that record evidence shows that the "evidence" provided by the petitioner (which is proprietary and, thus, will not be discussed here) is actually rationally explained. For the D/A financing waiver, Hynix contends that record evidence shows that only one bank applied for and received a waiver for their D/A financing. Hynix argues that the petitioner is making baseless claims concerning the inability of other banks to offer D/A in light of lending limits and cites to no credible evidence to support its allegations.

For the Fast Track bonds, Hynix states that there is no basis for the Department to find a financial contribution on the full amount of the Fast Track bonds based on a lending limit waiver for the entire program. First, Hynix points out that 70 percent of the Fast Track bonds were bundled into CBOs and, thus, would not need to be included in a lending limit waiver. Thus, only the 30 percent of the Fast Track bonds that went to the KDB or to the other creditors should be included in the context of the lending limit issue according to Hynix. Also, while Hyundai Group companies were involved in the Fast Track program, two other companies not affiliated with the program were also included according to Hynix. There is no evidence on the record according to Hynix to differentiate between these companies and the banks that

financed their Fast Track bonds to determine which creditors, if any, actually exceeded the lending limit based on 25 percent exposure to the Hyundai Group. Hynix states that the only reasonable inference that can be made is that lending by the KEB and KDB, both of which purchased Fast Track bonds, exceeded their lending limit based on their prior waiver application related to the syndicated loan, as well as Woori Bank, as it also applied for a waiver related to Hynix in March 2001. With these facts, Hynix claims that the Department may discern from the record the total value of the Fast Track bonds purchased by these banks, and from that can discern the total amount of Hynix Fast Track bonds that should not be considered a GOK financial contribution on the basis of a lending limit waiver for the Fast Track program.

Finally, in response to the petitioner's claim that D/A financing was ordered by the GOK and should be treated as a grant, Hynix states that the petitioner does not at any time cite to any evidence of a direct order from the GOK to Hynix creditors to provide D/A financing. Hynix claims that the petitioner is stretching events well beyond their capacity to support an argument. As discussed above, Hynix explained that the Economic Ministers asked the KEIC, another GOK agency, to offer insurance on D/A financing up to USD 600 million. Hynix states that the GOK never ordered the banks to provide such funding, and states that the decision to do so was entirely up to the banks.

*Department's Position:* We disagree with the petitioner that we should treat the D/A financing, the Fast Track bonds, and the syndicated loans for certain banks as grants. All three of these types of financing had obligations of repayment according to record evidence, and all three are already being countervailed as loans in accordance with 19 CFR 351.505(a) as is appropriate for instruments for which repayment is required. There is no indication on the record that the event upon which repayment depends was not a viable contingency, as discussed in 19 CFR 351.505(d)(2), which would be a situation in which the Department would treat a loan as a grant. Moreover, record evidence does not indicate that either Hynix or the GOK withheld information requested by the Department for which the use of facts available or adverse facts available would be justified in these instances. Thus, we are continuing for the final determination to treat these types of financing as loans, rather than grants, consistent with our treatment of these financing instruments in the Preliminary Determination.

### ***Comment 13: D/A Interest Rates***

*Petitioner's Argument:* The petitioner argues that, in the Preliminary Determination, the Department had to use the interest rate paid by Hynix on its usance loans as the presumed interest rate for Hynix' D/A financing because Hynix failed to report the actual interest rate related to these loans. The petitioner states that, during verification, the Department obtained general information specific to the D/A interest rate financing from bank credit evaluation reports that were conducted relating to Hynix. The petitioner argues that the information obtained by the Department from Hynix regarding D/A interest rates was not representative of

anything other than the specific, narrow transactions to which it related, so the Department should, instead, utilize the interest rate from the bank credit evaluation report that related to the overall D/A line should it decide not to treat the D/A financing as a grant.

*Hynix' Argument:* Hynix disagrees with the petitioner. According to Hynix, the petitioner misinterpreted the information relating to the D/A financing that was obtained from the bank credit evaluation document, and the information to which the petitioner is referring is not the D/A interest rate. Thus, Hynix contends that the Department should utilize the effective interest rate information obtained from Hynix at verification.

*Department's Position:* We agree with Hynix. We confirmed at the Hynix verification a sample of the actual interest rates that applied to Hynix' D/A financing. Therefore, we are using this actual interest rate information to calculate the benefit from Hynix' D/A financing for the final determination.

#### ***Comment 14: Hynix Sales***

*Hynix' Arguments:* According to Hynix, the Department's regulations and practice require the Department to include the POI sales of Hynix' majority owned subsidiaries in its subsidy calculations. Hynix contends that 19 CFR 351.525(b)(6)(iii) requires the Department to attribute the alleged subsidies received by Hynix to Hynix' consolidated sales. In support of its argument, Hynix cites Stainless Steel Plate in Coils from Belgium; Final Results of Countervailing Duty Administrative Review, 66 FR 45,007 (August 27, 2001), in which the Department attributed subsidies received by a majority shareholder of a producer of subject merchandise to its subsidiary; and Certain Pasta from Italy; Final Results of Countervailing Duty Administrative Review, 66 FR 64,214 (December 12, 2001), in which the Department attributed subsidies to a producer's parent company and another subsidiary of the parent company. Hynix states that the Department verified its majority ownership in the four subsidiaries that Hynix spun-off prior to and during the POI. In addition, Hynix states that the Department verified the subsidiaries' POI sales figures that Hynix inadvertently omitted from the sales data it reported in its January 27, 2003 questionnaire response. These sales figures were reported in Hynix' April 14, 2003 submission.

*Petitioner's Argument:* The petitioner contends that the bailouts of Hynix were directly related to its position as a significant semiconductor manufacturer and, therefore, the Department should find that the bailouts were tied to the production or sale of semiconductors. Furthermore, the petitioner argues that the circumstances surrounding the bailouts indicate that the GOK intended, and Hynix understood, that the subsidies were aimed at strengthening Hynix as a semiconductor producer. Therefore, the petitioner contends, these benefits should be attributed to Hynix' semiconductor sales alone, not its semiconductor and non-semiconductor sales. The fact that Hynix spun-off non-core businesses and that 80 percent of its sales were

from its semiconductor division at the beginning of the POI further support this finding, according to the petitioner.

*Infineon's Argument:* Infineon argues that the subsidies that the GOK provided to Hynix were not intended to benefit non-ROK production or, in some instances, non-subject merchandise. For example, Infineon argues that the VAT exemption program was received by “factories for memory production.” Therefore, Infineon states, the Department should ensure that it uses the appropriate sales denominator in its countervailing duty calculations in the final determination, in accordance with 19 CFR 351.525(b).

*Department's Position:* We agree with Hynix. The Department does not normally treat debt forgiveness or equity infusions as “tied” subsidies. In accordance with 19 CFR 351.525(b)(6)(iii), we find that the countervailable subsidies received by Hynix should be attributed to Hynix’ consolidated sales, which include the sales of its majority-owned subsidiaries that were spun-off prior to or during the POI. Thus, we are using Hynix’ consolidated sales as the denominator in Hynix’ calculations for the final determination.

#### ***Comment 15: Hynix Short-Term Financing***

*Hynix' Argument:* Hynix contends that the Department fundamentally misunderstood the nature of Hynix’ short-term usance and overdraft financing in the Preliminary Determination. Specifically, Hynix argues that, in the Preliminary Determination, the Department treated the usance and overdraft financing lines for Hynix as long-term loans following the extension of the renegotiation dates for this type of credit from one year to beyond one year. According to Hynix, however, the fact that the renegotiation dates on the ceilings for these credit lines was extended beyond one year does not change the fundamentally short-term nature of these types of credit. Hynix contends that overdraft financing is based on daily usage and repayment, a fact which Hynix states was confirmed by the Department at verification. Regarding usance financing, Hynix contends that this financing is short-term in that it is only available for a 90 to 180-day transaction period. Thus, according to Hynix, a short-term benchmark should be applied to these credit lines throughout the POI.

Hynix contends that short-term interest rates should be applied to Hynix’ D/A financing, as well. According to Hynix, the Department verified that this type of financing is usually only available for a 90 day period and, although it can be extended, the Department learned at verification that ROK law limits the financing period for D/A financing to no more than 360 days, and saw no instance where D/A financing was extended past the 360 day limit. Thus, Hynix contends that a short-term benchmark should be applied to Hynix’ POI D/A financing, as well.

*Petitioner's Argument:* The petitioner first disagrees with Hynix regarding its arguments for

usance and overdraft financing. According to the petitioner, the Department's verification report for Hynix does not confirm that none of the overdraft or usance loans were outstanding for more than one year as claimed by Hynix, but only corrects and confirms the monthly balance under the ceiling; moreover, the report does not confirm any details relating to the usance financing. As Hynix has not placed any evidence on the record since the Preliminary Determination to establish that the loans were not outstanding for more than one year, the Department is faced with essentially the same evidence it had at the time of the Preliminary Determination, and should, thus, affirm its preliminary finding on these programs.

Even if the Department does find evidence that the loans were short-term financing, the petitioner claims that the Department should, nonetheless, countervail the financing using long-term benchmarks. According to the petitioner, there is no rational explanation on the record to explain why the creditors would extend the credit ceilings as they did unless Hynix intended to treat the credit line as a long-term loan. According to the petitioner, there is effectively no difference between long-term loans and a credit line guaranteed to be available. Thus, the petitioner states that the Department should 1) take the lowest balance from the beginning of the first ceiling extension in May and presume that to have been a long-term loan, 2) take the lowest balance between the May and October bailouts and presume that to have been a long-term loan, 3) and then take the lowest balance from the October bailout through the end of the POI and presume that to have been a loan for the entire POI, and 4) assume that the difference between the lowest balance for a particular period and the average balance should be countervailed as short-term loans.

Regarding Hynix' D/A financing, the petitioner refers to its arguments in Comments 12 and 13, above.

*Department's Position:* We agree with Hynix. Regarding overdraft and usance financing, at verification, we confirmed that Hynix categorizes these two types of financing in its computer system and in its financial statements as short-term borrowings. Additionally, we saw no indication at verification, and there is no evidence on the record, that would lead the Department to believe that these short-term loans should properly be otherwise treated as long-term loans. Therefore, we are treating these loans as short-term loans for the final determination. Regarding D/A financing, as also discussed above in Comments 12 and 13, we agree with Hynix and are continuing to treat these loans as short-term loans for the final determination.

***Comment 16: Ministerial Errors In Certain Hynix Preliminary Determination Calculations***

*Hynix' Argument:* Hynix contends that the Department should fix four ministerial errors that were made in the Preliminary Determination calculations for Hynix which were identified by Hynix in its ministerial error allegations and addressed by the Department in its April 16, 2003 memorandum to Louis Apple entitled “Ministerial Error Allegations for Preliminary Determination” (“Ministerial Errors Memo”), which is on file in the Department’s CRU. Specifically, Hynix contends that the Department should 1) eliminate any interest payments made subsequent to the POI; 2) correct improper classifications of certain loans identified as long-term loans that were actually short-term loans; 3) apply the 1998 creditworthy benchmark for certain interest payments made on bonds issued before the POI that were subsequently refinanced during the POI; and 4) exclude debt forgiven by a foreign bank from its debt forgiveness calculation.

*Petitioner's Argument:* For the foreign loan that Hynix claims should be excluded from the debt forgiveness calculation, the petitioner claims that the loan was given during a time when the Department determined that direct foreign lending to Hynix was countervailable as directed credit to the semiconductor industry. The petitioner contends that the restructuring of a loan is countervailable as directed credit if the Department has determined that the loan that was restructured was initially given under government direction. In support of its statement, the petitioner cited to the Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Structural Steel Beams from the Republic of Korea, 64 FR 69731, 69736 (December 14, 1999), in which the Department stated the following: “{r}egarding previously disbursed long-term loans that were later refinanced under the restructuring program. . .we preliminarily determine that they are specific and confer a benefit because they only converted interest due on loans originally provided during a period in which we determined that the GOK directed credit specifically to the Korean Steel Industry.” According to the petitioner, since the foreign bank in question was initially directed by the GOK, the forgiveness should also be countervailed as being the result of government direction.

*Department's Position:* On items one and two listed above by Hynix, we agree with Hynix and intend to fix these ministerial errors from the Preliminary Determination in the final determination. Regarding the third item, applying the 1998 creditworthy benchmark for certain interest payments made on bonds issued before the POI that were subsequently refinanced during the POI, as we noted in our Ministerial Errors Memo, instead of applying the 1998 benchmark as suggested by the respondents, we instead are not countervailing these interest payments as we have not found interest payments on bonds that were issued prior to Hynix’ inclusion into the Fast Track program to be countervailable.

As for the fourth item, excluding debt forgiven by a foreign bank from the Hynix debt forgiveness calculation, we disagree with the petitioner that this debt should be kept in the debt forgiveness calculation because the loan was provided during a time when the Department

determined that direct foreign lending to Hynix was countervailable as directed credit to the semiconductor industry. First, the precedent to which the petitioner cited in its argument was a preliminary determination in that proceeding. In the final determination in that proceeding, we countervailed the loans to which the petitioner referred as part of the direction of credit program that was in place during that time period. Second, as we noted in the Preliminary Determination, 68 FR at 16776, we treated Hynix loans that were refinanced as part of one of the restructuring packages as new loans at the time of the restructuring. We similarly considered other financial contributions made as part of the restructuring programs to be new financial contributions attributable to each restructuring. Thus, we considered the forgiveness of the debt from the foreign bank in question to be part of a new transaction, a transaction which occurred subsequent to the time that we determined that direct foreign loans obtained from foreign banks were not countervailable as directed credit. Thus, we agree with Hynix and are excluding the debt forgiven by the foreign bank in question from the Hynix debt forgiveness calculation.

***Comment 17: Use of LG Semicon Bonds as Hynix Benchmarks***

*Hynix' Argument:* Hynix contends that, for the final determination, the Department should not utilize as benchmarks bonds that were issued by LG Semicon that were absorbed by Hynix at the time of the merger and that were still outstanding during the POI. According to Hynix, the Department utilized such bonds in calculating Hynix' 1997 and 1998 long-term, fixed-rate weighted-average benchmarks that were used in the Preliminary Determination. According to Hynix, use of these bonds does not accurately reflect what was available to HEI in the market at the time of issue of these bonds. Hynix contends that a more appropriate benchmark for these two years would be a weighted-average rate of only HEI's bonds in 1997 and 1998, respectively, exclusive of any LG Semicon bonds.

*Petitioner's Argument:* The petitioner disagrees with Hynix that the Department should eliminate LG Semicon bonds from the Hynix benchmarks for 1997 and 1998. According to the petitioner, all of the 1997 and 1998 bonds identified by Hynix were outstanding during some or all of the POI. Since the calculated benchmark would be applied to all of these loans to determine a benefit, it is proper and fair to include these bonds in the weighted-average calculation. To exclude LG Semicon bonds would leave the Department to apply an HEI-specific benchmark to LG Semicon bonds, which would be no more reasonable than applying an LG Semicon-specific benchmark to HEI bonds.

*Department's Position:* We agree with Hynix. According to 19 CFR 351.505(a)(3)(i), the Department will normally rely on the actual experience of the firm in question in selecting a comparable commercial loan for use as a benchmark. In this instance, we are examining the experience of Hynix, not LG Semicon, and the interest rates that Hynix could have obtained on the market during that time for use in determining how much interest Hynix (not LG Semicon)



should have paid, versus what it actually paid, during the POI. Therefore, for the final determination, we are calculating the Hynix benchmarks for 1997 and 1998 using only the Hynix bonds, and not the LG Semicon bonds, to derive the long-term, fixed-rate weighted-average benchmarks for those two years.

***Comment 18: Calculation of Uncreditworthy Benchmarks***

*Hynix' Argument:* Hynix argues that, while it is the Department's normal practice pursuant to 19 CFR 351.505(a)(iii) to calculate uncreditworthy benchmark rates using the average cumulative default rates in Moody's study of historical default rates (which relates to U.S. market default history), the Preamble to the Department's regulations states that, if default data related to the foreign market in question exist and indicates that the default experience in the country in question differs significantly from that of the United States, the Department would consider using the default rate from the country under investigation. (See 63 FR at 65365.)

According to Hynix, because it has presented such data on ROK default rates (specifically, data on default rates for corporate bonds in the ROK as published by ROK bond rating agencies and also compiled by the KCGF), and such data is more accurate concerning ROK default rates than the Moody's data used in the Preliminary Determination, the Department should use the ROK data instead of the Moody's data if the Department continues to need to calculate an uncreditworthy benchmark rate for Hynix for the final determination. According to Hynix, this ROK default rate data is more accurate because it is based on the ROK market experience and focuses on bonds of maturities more similar to the Hynix bonds. Moreover, Hynix claims that the ROK data is more contemporaneous than the Moody's data, as the Moody's data is based on default histories through 1997, whereas the ROK data covers 2000 and part of 2001. Thus, use of the ROK data would be more appropriate to use than the Moody's data according to Hynix.

*Petitioner's Argument:* The petitioner objects to using the ROK default rate data offered by Hynix for benchmark purposes because it is unreliable. The ROK data, according to the petitioner, is anomalous, contrary to basic reason, and inconsistent with the Department's methodology. For example, the Korea Corporation Evaluation Company showed a default probability for CCC-rated companies that is lower than for AA-rated companies (citing to Hynix March 4, 2003, QR at Exhibit 18). The BIS, the petitioner continues, has also criticized ROK default rates as reflecting a long tradition of window-dressing of the financial statements of firms, dubious audit practices, and inadequate accumulation of historical data. Furthermore, the petitioner claims that the GOK continued in the POI to attempt to influence the credit rating results of the ROK agencies. Therefore, the petitioner urges the Department to continue using the average default rates from Moody's, consistent with the Department's usual practice.

The petitioner notes that in Hynix' proposed calculation of the default rate using the ROK data,

Hynix uses a three-year default rate, rather than the five-year rate used by the Department in the Preliminary Determination. The petitioner concurs in using the three-year rate as it better approximates the maturity of the Hynix debt in question.

*Department's Position:* While Hynix is correct that the Department will consider using default information from the country in question, it is not sufficiently clear based on record information that the data referenced by Hynix is comparable to the Moody's data normally used by the Department. In particular, as stated in 19 CFR 351.505(a)(3)(iii), the Moody's data shows a cumulative default rate, whereas the ROK data does not indicate whether the reported rate is cumulative. Therefore, we have not considered the ROK default rates further. However, we agree that we should use the three-year cumulative default rate, as the loans in question typically have a three year term. (See Preamble, 63 FR at 65365.)

### ***Comment 19: Other General Benchmark Issues***

*Petitioner's Argument:* The petitioner argues that the Department should adjust non-company specific benchmarks to reflect the credit ratings of SEC and Hynix at the time the loans were received. The petitioner also contends that the Department should select a benchmark that reflects the borrowing rate available to corporate borrowers rather than financial institutions.

Specifically, first, for long-term won-denominated loans, the petitioner points out that, in the Preliminary Determination, the Department used, in instances where no company-specific benchmark existed prior to 2000, the national average of the yields on three-year won-denominated corporate bonds for AA- bonds as reported by the BOK. According to the petitioner, use of AA- rates is not appropriate because neither SEC nor Hynix were AA- rated companies subsequent to 1992. The petitioner points out that the BOK's own newer data for AA- and BBB- companies shows a difference of approximately four percent between rates for those types of companies. Because the AA- bonds reported by the BOK are not by themselves "comparable commercial loans" as stipulated by 19 CFR 351.505(a)(1) due to the difference in bond ratings and spreads between the benchmark and the respondents, the petitioner contends that the Department should use other record information more appropriate for BBB+ or below-rated companies like SEC and Hynix to adjust the AA- rated benchmark. Specifically, the petitioner states that the Department should use data from Lehman Brothers showing spreads for three-year USD corporate bonds bearing various different ratings to derive spreads that can be added to the AA- bond rate reported by the BOK. According to the petitioner, the use of a rating-specific benchmark is more accurate, and is also consistent with the Department's practice in other cases where the base rate published by the government reflects a rate only higher-rated companies would be able to receive. See, e.g., Final Affirmative Countervailing Duty Determination: Stainless Steel Bar from Italy, 67 FR 3163 (January 23, 2002).

Next, for short-term won-denominated loans, the petitioner states that, in the Preliminary Determination, the Department utilized a money market rate from the IMF's International Financial Statistics Yearbook that was the rate on short-term lending between financial institutions. Because this is a rate between lending institutions, the petitioner contends that it would not reflect what is available to corporations. Instead, the petitioner argues that the Department should use the BOK short-term benchmark for A1-rated commercial paper ("CP") and add to it a spread for a B-rated company (based on Standard and Poor's ("S&P") long-term ratings of Hynix as being between B and "selective default" during the POI). According to the petitioner, adding a spread to a short-term benchmark more reasonably reflects commercial realities in this instance and is also consistent with the Department's regulations. The petitioner notes that, although it is not the Department's policy to include a risk premium in the short-term benchmark because it would "overcompensate for the commercial default risk" (see Preamble, 63 FR at 65364), adding a spread to the BOK CP rate in this situation is a reflection of the actual commercial valuation of the additional risk related to the lower credit rating. Moreover, according to the petitioner, the CP market is usually only available to highly-rated companies, and such base rates would normally not be available to Hynix or SEC.

For short-term dollar-denominated loans, the petitioner states that, in the Preliminary Determination, the Department utilized a certificate of deposit rate that reflected the rate a bank would pay a depositor and, thus, would not reflect the borrowing rate a company would be able to obtain commercially. Instead, the petitioner contends that the Department should use the U.S. lending rate, which, according to the IMF's International Financial Statistics Yearbook, is defined as "the bank rate that usually meets the short- and medium-term financing needs of the private sector."

Finally, for the 1996 long-term dollar loan benchmark for SEC, the petitioner states that, in the Preliminary Determination, the Department used a rate that, according to the petitioner, did not reflect the rate that SEC could have obtained on the commercial market in 1996 and was inappropriate according to 19 CFR 351.505(a)(2). Thus, the petitioner contends that the Department should instead utilize the IMF's International Financial Statistics Yearbook lending rate for the United States for 1996.

*Hynix' Argument:* Hynix first states that the petitioner has made several disingenuous statements about long-term won-denominated benchmarks, and that the Department should not embrace the severe distortions the petitioner has proposed. Hynix first argues that the petitioner has exaggerated the magnitude of any problem because most of the Hynix loans were issued in 2000 or later anyway. Hynix also argues that the use of the benchmarks proposed by the petitioner for these types of loans would not make sense in a situation where a company was found to be uncreditworthy because use of such data would be double-counting the uncreditworthy premium the Department would already add on. Next, Hynix argues that, if a

spread is to be added on, the spread should reflect data from the ROK and not spread data from the United States or another country that does not reflect the ROK experience. Finally, Hynix claims that the petitioner is playing mathematical games with its spread calculation, and that the effect is severely distorted if the percentage is applied to a larger base number.

Regarding the petitioner's recommended short-term benchmarks, Hynix contends that the petitioner's argument about adding a credit-risk spread to Hynix' short-term financing is wrong. According to Hynix, the spread on commercial paper relates to unsecured borrowing, whereas the vast majority of Hynix' short-term borrowing is secured. According to that fact, Hynix contends that the Department's Preamble should apply because the risk of default is minimal. Hynix states that the petitioner's approach would only make sense if Hynix were issuing commercial paper, which was not the case.

*Department's Position:* First, for short-term dollar-denominated loans, based on the description of these rates as provided in the IMF's International Financial Statistics Yearbook, we agree with the petitioner that the lending rate is more appropriate than the certificate of deposit rate for this particular benchmark. We note that, although not made in this context, this argument is also applicable for the short-term benchmarks for other foreign-currency loans for which we utilized a money market benchmark rate in the Preliminary Determination. Thus, for the final determination, we are using the lending rate as reported in the IMF's International Financial Statistics Yearbook as the benchmark rate for short-term dollar-denominated loans, as well as for all other foreign-currency short-term loans.

For long-term won-denominated loans, we agree with the petitioner that 19 CFR 351.505(a) stipulates that the Department should use as a benchmark a loan that is comparable to the loan being investigated in terms of structure, maturity, and currency. We note in the Preamble to our regulations (see 63 FR at 65363) that we will consider other factors in determining whether a loan is comparable on a case- and fact-specific basis. In this instance, we agree with the petitioner that a benchmark rate for a lower-rated company might be more comparable to the loans that were obtained by Hynix and SEC in certain years in the period before 2000. Specifically, because record information does not indicate that the use of an AA- rate is any more appropriate than use of a BBB- rate for Hynix in the years in which use of a national average corporate bond rate is necessary, we are not altering the benchmark that we used for Hynix for long-term won-denominated loans in years prior to 2000 for which a company-specific benchmark was not available. Similarly, record evidence also does not indicate that the BBB- rate is more appropriate for SEC's earlier pre-2000 loans. For SEC's later pre-2000 loans (as well as its loans in 2000 or later in which a company-specific benchmark is not available), however, record information does indicate that it would be more appropriate to utilize a BBB- rate than an AA- rate. However, it would be inappropriate to adjust an ROK interest rate utilizing spread information that does not represent the lending experience of lenders in the ROK as the petitioner proposes (i.e., to add a spread based on the experience of

lenders in the United States instead of the ROK). Therefore, we are instead basing the premium that we are adding to the AA- corporate bond rates reported by the BOK for SEC's loans for which a BBB- rate should be applied on the average difference between the AA- and BBB- rates reported by the BOK from 2000 through the POI, 3.53 percent. We are also using the BOK BBB- corporate bond rate for SEC's loans received in 2000 or later for the final determination for the years in which we have no company-specific benchmark information.

For the 1996 long-term dollar loan benchmark for SEC, we agree that the company-specific corporate bond reported by SEC in 1996 is not the best available information for use as a long-term dollar benchmark for the year in question. This is because SEC has reported in its loan database a loan from an ROK branch of a foreign bank that has more similar characteristics to the loans for which the benchmark is needed than does the corporate bond used by the Department as a benchmark in the Preliminary Determination. Thus, we are utilizing the loan from the ROK branch of a foreign bank instead of the corporate bond in question for the final determination, which is appropriate based on the Department's finding in the instant proceeding that, because the GOK does not exercise direct or indirect control over ROK branches of foreign commercial banks, such loans are generally appropriate for use as a benchmark. See, also, the related discussion in the "Discount Rates and Benchmarks for Loans" section, above.

Finally, for short-term won-denominated loans, we agree with the petitioner that the money market rate used in the Preliminary Determination is not appropriate for use as a benchmark for these types of loans based on the description of these rates as provided in the IMF's International Financial Statistics Yearbook. However, we disagree with the petitioner that we should utilize the BOK's CP rate plus a spread as a benchmark for short-term won-denominated loans. According to record information, the BOK's CP rate does not appear to represent the type of financing obtained by Hynix, as the CP rate is an unsecured rate, whereas record information indicates that Hynix' short-term won denominated lending was secured lending, types of lending that would carry different interest rates. Instead, for the final determination, we are utilizing the ROK lending rate as provided in the IMF's International Financial Statistics Yearbook which, as noted by the petitioner, is "normally differentiated according to the creditworthiness of borrowers and objectives of financing" and, thus, would account for differences in credit ratings of a company.

#### ***Comment 20: SEC Creditworthiness***

*SEC's Argument:* SEC argues that the allegation of the company's uncreditworthiness was untimely, and that the Department should rescind its investigation of the issue. SEC notes that the uncreditworthiness allegation regarding Hynix was brought at initiation, and that the petitioner had access to the SEC's financial data and other evidence well before April 7, 2003, when it raised the same allegation regarding SEC for the first time. The allegation was also filed

after the Preliminary Determination had been issued.

SEC claims that the lateness of the allegation has prejudiced SEC's interests because it forced the Department to expedite its initiation decision without giving SEC a formal opportunity for comment and rebuttal. The extremely short period hindered SEC's ability to gather all relevant evidence and limited the Department's analysis. Additionally, since the Department was unable to issue a preliminary analysis on this issue, SEC has been precluded from making its case before the final determination. The respondent notes that the CIT has held such lack of opportunity for comment to be fundamentally prejudicial to the affected party's due process rights (citing to Lois Jeans & Jacks v. United States, 566 F.Supp 1523 (CIT 1983)).

In any case, SEC claims that the petitioner's allegation is moot with regard to 1998 because the company received no countervailing benefits in that year, either from loans outstanding during the POI or from non-recurring subsidies allocable to the POI. SEC adds that a 1998 loan it received under the Fund for Promotion of Informatization was tied to non-subject merchandise. The Department confirmed this at verification, SEC notes, and, moreover, found no other relevant loans. The Department also found no non-recurring benefits allocable to the POI, either in the Preliminary Determination or at verification, including any benefits under the newly alleged permission to build in restricted areas. Therefore, SEC concludes, there is no basis for considering the issue (citing to Trinidad Wire Rod).

However, SEC continues, should the Department choose to proceed, SEC had eight significant won-denominated long-term bond issues in 1998 that should serve as dispositive evidence of its creditworthiness in that year. The Department confirmed at verification that the vast majority of these bonds were underwritten by private companies not under the direction or control of the GOK. SEC adds that the KDB underwrote only a small portion for the same fee rates as the other subscribers. The Department also verified that none of SEC's bond issues were backed by government guarantees. Disputing the relevance of S&P's and Moody's ratings to the company's won-denominated bonds, SEC claims that the ROK's two independent credit rating agencies gave SEC's 1998 debt (including the bond issues) a rating of AA-.

In this regard, SEC notes that the Department has rejected the petitioner's allegation regarding government control of the ROK bond market. The Department examined the issue in Plate in Coils, for example, and found that the GOK no longer controlled the bond market. Having rejected the petitioner's allegation regarding control of the bond market, SEC claims that the Department should also reject the petitioner's allegation that SEC was uncreditworthy in 1999 because the petitioner has not identified any 1999 subsidies for which an uncreditworthy benchmark would be relevant. Additionally, SEC notes that its 1998 profits were triple those of 1997, and that it reduced its debt ratio from 295.64 percent in 1997 to 198.08 percent in 1998. The respondent points out that financial analysts who issued positive projections for the

company for 1999 forward were proven right, which undercuts the probative value of any negative projections as indications of SEC's creditworthiness for these years. Finally, SEC argues that nothing in the creditworthiness allegation would change the current minimal subsidy rate found in the preliminary determination because the Department has already verified all of the company's relevant debt in the POI.

*Petitioner's Argument:* The petitioner rebuts SEC's contention that the allegation was brought untimely, noting that the Department formally initiated and collected data during verification. Thus, according to the petitioner, the Department provided notice, opportunity for comment, and fair opportunity to develop the record on the issue.

Moreover, the petitioner adds, even if the respondent had a valid argument, SEC waived it away by not raising the issue in its initial response to the allegation.

The petitioner urges the Department to investigate the respondent's creditworthiness in both 1998 and 1999; SEC had bond issues from both years outstanding during the POI which should be countervailed because the GOK controlled bond market.

The petitioner contends that, in both years, SEC received no comparable commercial loans and issued only speculative bonds which, under the Department's regulations, are not comparable for the purposes of a creditworthiness analysis. SEC's debt in 1998, according to the petitioner, was rated as speculative by S&P (BB-, B+, and on credit watch with negative implications) and Moody's (Ba1, which is deemed to have "speculative elements"), and rated below investment grade beginning in April of that year by Japan Rating & Investment Information. The petitioner questions the reliability of the ROK rating agencies who, the petitioner claims, have higher historical default rates for A- and BBB-rated firms than for BB-rated firms. Additionally, the petitioner notes, the ROK agencies rated as investment grade SEC's dollar-denominated debt which, by contrast, S&P and Moody's rated as speculative. In any case, the petitioner argues that SEC's attempt to place ROK credit rating information on the record, as an attachment to its case brief, was untimely and should be disregarded.

The petitioner claims that SEC's current ratio in 1998 was below the 2.0 benchmark for a normal company and was below 1.0 in 1999, while the quick ratios were below the 1.48 industry average in both years. The petitioner contends that, if not for the manipulation of its financial statement, SEC's debt to equity ratio would have been at 2.85 in both years. The company's fixed assets to net worth ratios were above 2.0 in 1998 and above 1.0 in 1999, which indicate heavy reliance on debt, while its times interest earned ratios were significantly below 2.0 in both years, which is low for the capital-intensive semiconductor industry. These financial ratios, according to the petitioner, are poor relative to industry peers worldwide.

In terms of the company's cash flow from operations ratios, the petitioner claims that these were well below 1.0, and dropped as low as 0.16, between 1994 and 1999. With inconsistent cash flow, the petitioner alleges, SEC concealed significant off-the-book contingent liabilities to affiliates, and steadily reduced its capital expenditures. These financial troubles were noted by various analysts at Clarion, Credit Suisse First Boston, Merrill Lynch and Morgan Stanley. The petitioner questions the relevance of analyst reports cited by SEC since the Department, according to the petitioner, does not consider equity infusions to be indicative of a firm's credit worthiness.

*Department's Position:* As discussed above in Comment 4, we are not reinvestigating whether the bond market in the ROK was controlled during the AUL period of this case. Thus, we are not investigating whether the bonds issued by SEC provided a countervailable subsidy. Moreover, SEC did not receive any loans in these years that are being countervailed, or any non-recurring benefits that would be allocated to the POI. Therefore, as we do not need to make a creditworthiness finding for SEC in 1998 or 1999, we have not addressed the petitioner's arguments on this issue.

***Comment 21: Facts Available for SEC's Unreported Short- and Long-Term Financing***

*Petitioner's Argument:* The petitioner argues that the Department should apply "facts available" and countervail SEC's overdraft facilities and bonds. The petitioner claims that, despite repeated requests to SEC to report all credit obligations outstanding during the POI, SEC's reporting of its overdraft facilities and bonds was deficient. According to the petitioner, short-term credit arrangements such as overdraft facilities are "credit obligations" within the meaning of the loan information requested by the Department. However, the petitioner notes, SEC provided overdraft facilities balances only for three specific dates, which is not an appropriate measure of overdraft activity according to the petitioner.

Regarding SEC's bonds, the petitioner alleges that SEC failed to identify the purchasers of the bonds and failed to identify the underwriters until verification. The petitioner argues that SEC only revealed underwriting information to the Department after the petitioner discovered that the bond offerings were completely or partially underwritten by the KDB.

As argued above in Comment 4, the petitioner contends that the GOK directed credit to SEC through the bond market during the POI. Moreover, the petitioner claims that the record shows that the KDB, a government entity, underwrote several of SEC's bond issues. Therefore, the petitioner contends, the Department should apply facts available and find that all of SEC's bonds outstanding during the POI were underwritten by or issued with the support of the GOK, and that the bonds constitute countervailable financial contributions.



*SEC's Argument:* SEC counters that it did report its overdraft arrangements in its March 28, 2003 loan chart. SEC also notes that these arrangements were identified in its financial statements, which it submitted to the Department. Therefore, SEC urges the Department to dismiss the petitioner's claims about the overdraft facilities.

With regard to its bond issuances, SEC claims that the Department did not accept the petitioner's allegation that the GOK directed credit to SEC through the bond market. Moreover, SEC maintains that it complied with the Department's request to report its bonds in its February 25, 2003 submission. In that same submission, SEC indicated that the bonds were issued to the general public. SEC contends that it did not violate a reporting obligation because the Department never asked SEC to disclose the identity of

the bond underwriters. Therefore, SEC argues that the Department should also dismiss the petitioner's claims about SEC's failure to report bond information.

*Department's Position:* We disagree with the petitioner that SEC's alleged reporting failures should lead the Department to countervail SEC's overdraft facilities and its bonds. Regarding the overdraft facilities, because the Department has found that the GOK did not direct ROK banks to make loans to SEC during the POI, there is no basis for finding a countervailable subsidy.

Regarding SEC's bonds, the Department did not investigate and has made no finding that the GOK directed credit to SEC through the ROK bond market during the POI, as explained in response to Comment 4. Nor is there any basis in the record to find that KDB's underwriting activities provided a countervailable subsidy to SEC. Therefore, we find no countervailable benefit to SEC through its overdraft and bond financing.

#### ***Comment 22: Treatment of Certain SEC Interest Payments***

*Petitioner's Argument:* The petitioner urges the Department to disregard certain interest payments made by SEC on loans outstanding during the POI. (The circumstances of these interest payments are proprietary.)

*SEC's Argument:* SEC argues that the Department's regulations dictate that, in analyzing long-term loans, the Department will compare the difference between the interest payments on the countervailable loan and the interest payments the firm would have made on the benchmark loan. Thus, according to SEC, the petitioner's arguments must be dismissed.

*Department's Position:* We agree with SEC. Pursuant to 19 CFR 351.505(a), we measure loan benefits by calculating the difference in interest payments actually made by the respondent during the POI with those that would have been made under the benchmark. Thus, we are

continuing to calculate SEC's loan benefits as we did in the Preliminary Determination.

***Comment 23: SEC Sales***

*SEC's Argument:* According to SEC, the SEC Verification Report correctly noted that SEC's reported sales include processing fees from the company's affiliate in Austin, Texas. SEC claims that including these fees in its sales denominator accords with the Department practice of using total sales, unless the subsidy is specifically tied to a smaller subset of sales. Therefore, the reported sales figures for SEC require no adjustment for the final determination.

*Petitioner's Argument:* The petitioner submitted no comment regarding this issue.

*Department's Position:* We agree with SEC. As stated in the GIA, 58 FR at 37238, we have determined that the value of services sold should be included in a company's total sales when the subsidy for which we are measuring the benefit is not tied to the production of merchandise. In this case, the countervailable subsidies to SEC (directed credit) are not tied to the production of merchandise. Therefore, we have continued to include the processing fees in SEC's total sales.

***Comment 24: ESF Program***

*Petitioner's Argument:* The petitioner argues that the Department verified that applications for ESF financing are filed jointly by the ESCO and its customer. The petitioner notes that the GOK administering agency, KEMCO, reviews both the applicant and the ESCO in deciding whether to approve an application. Furthermore, the petitioner contends that the ESCO's receipt of loans under the ESF program is directly tied to a particular project for a particular applicant.

According to the petitioner, this constitutes a financial contribution within the meaning of section 771(5B)(iii) of the Act because the GOK "makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution." Additionally, the petitioner notes that the Department has previously countervailed ESF financing in Sheet and Strip. Finally, the petitioner contends that the GOK did not identify any distinction between the structure of the funding directed to Hynix and SEC in the present proceeding.

*Hynix' Arguments:* Hynix argues that the ESCOs did not serve as a funding mechanism to provide a financial contribution to Hynix since any contribution made by an ESCO is not normally vested in the government and the practice involved differs in substance from practices normally followed by governments pursuant to section 771(5)(B)(iii) of the Act. Specifically,

Hynix argues that the GOK is not a provider of energy reduction services and equipment. In fact, according to Hynix, the ESCO practice so differs from what a government practice might normally be as to be completely incomparable.

Hynix maintains that, unlike SEC, Hynix contracted with an ESCO, and the ESCO was the applicant under the ESF program. While Hynix concedes that the commercial bank providing the ESF funds reviews the creditworthiness of both the ESCO and the contracting party (in this case, Hynix), Hynix argues that this is different than stating that Hynix was the applicant. According to Hynix, it is important to note that the ESCO, not Hynix, received ESF funds. Hynix maintains that the relationship between it and the ESCO is contractual in nature, and that the agreement covers the amount of investment, maintenance, and other fees. Hynix further notes that it does not record its obligation to

the ESCO as a loan, but as an expense account with payment recorded as an account payable.

*Department's Position:* As explained above in the discussion relating to the ESF Program included in the "Analysis of Comments" section, we have determined that any benefits provided under the ESF program are not specific within the meaning of section 771(5A) of the Act and, therefore, are not countervailable. Consequently, we do not need to address the issues raised in this comment.

***Comment 25: De Facto Specificity of Certain Tax Programs Under TERCL and/or RSTA***

*Petitioner's Argument:* According to the petitioner, evidence collected at verification indicates that SEC was the beneficiary of a disproportionate share of tax benefits under RSTA Articles 10, 12, 24, and 26. As such, the petitioner argues, these tax laws are de facto specific to SEC and/or the semiconductor industry in general. In support of its position, the petitioner points to the variance between SEC's contribution to GDP and its share of tax credit benefits.

The petitioner further asserts that its opportunity to conduct a comprehensive analysis of these programs was obstructed by the GOK. According to the petitioner, in the absence of a finding of specificity, it would be appropriate to apply a facts available analysis in light of the GOK's failure to provide information requested by the Department concerning the beneficiaries of the tax laws.

*Respondents' Arguments:* In response to the petitioner's allegations concerning RSTA Articles 10, 12, 24, and 26, as a threshold matter, SEC argues that the Department did not investigate Article 12 and, therefore, it may not be considered. Regarding the remaining articles, the petitioner has never disputed that each of the remaining tax credits is de jure generally available, according to SEC. Moreover, SEC argues that the Department has

implicitly determined that the tax relief provided by these articles is de facto generally available. According to SEC, these programs (or nearly identical programs) provided varying levels of financial contributions based on different criteria, and the Department has previously found a benefit only to the extent that the specific contribution level exceeded the non-specific level. Because the Department only countervailed the differential, SEC argues that the Department has implicitly found the remainder to be de facto generally available.

Furthermore, SEC contends that, when a subsidy program has been previously investigated and found non-specific, a petitioner must demonstrate that the program has changed or that the situation of the industry differs from those previously investigated, which the petitioner has not done in this case. Moreover, SEC claims, because the

petitioner did not allege de facto specificity, and nothing in the initial questionnaire responses indicated specificity, the Department did not investigate de facto specificity.

In any case, SEC contends that the petitioner's claim of disproportionate use of these tax benefits is incorrect. First, SEC maintains that its percentage of the total tax credits that the GOK granted is irrelevant. In support of its argument that disparity does not equate to disproportion, SEC cites Bethlehem Steel Corp. v. United States, 140 F.Supp.2d 1354 (CIT 2001), amended at 155 F. Supp. 2d 707 (CIT 2001). SEC takes the position that it is one of the ROK's largest companies and, therefore, it could be expected to receive one of the largest amounts of benefit from tax credit programs. This, according to SEC, does not amount to specificity. SEC claims that its position is further supported by the CAFC's decision in AK Steel and in the Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey, 67 FR 55815 (August 30, 2002).

Second, SEC argues that it is inappropriate to examine a one and a half-year "snapshot" of tax credits attributable to programs which have been in effect for many years because of distortions related to investment cycles and tax credit carry-overs. As such, SEC contends, the Department would need to examine appropriate information for each year the programs were in effect. Third, SEC contends that the petitioner's reliance on SEC's contribution to GDP as an appropriate benchmark is flawed. SEC maintains that Certain Steel, cited by the petitioner in support of its GDP argument, is limited to the unusual facts of that case. Fourth, SEC notes that the starting point of the Department's analysis should be an examination of the number of program users. According to SEC, these tax credits are available to every company in the ROK with only limited exceptions under RSTA Article 26. Finally, SEC argues that it has cooperated fully with the Department's requests for information and, therefore, an adverse facts available finding is not warranted.

The GOK argues that the petitioner has failed to demonstrate that RSTA Articles 10, 12, 24, and 26 are de facto specific. As an initial matter, the GOK argues that it did not have sufficient

time to respond to these allegations. Additionally, the GOK maintains that the Department must reject the Article 12 subsidy allegation because the petitioner did not submit this allegation within the time specified by 19 CFR 351.301(d)(4)(i)(A). The GOK also argues that the mere allegation of disparity is insufficient to establish a dominant or disproportionate use of the tax credits. According to the GOK, the petitioner's arguments fail to take into account distortions caused by investment cycles and tax credit carry-forwards. Lastly, the GOK denies that it obstructed the Department's requests for information, and it argues, therefore, that a facts available analysis is not warranted.

*Department's Position:* In our initiation of this proceeding, we included RSTA Articles 10, 24, and 26 as programs we intended to investigate. For each of these articles, the petitioner alleged that the tax benefits were specific because they were contingent upon use of domestic over imported inputs. Based upon our review of the questionnaire responses, we preliminarily found no evidence of specificity for RSTA Articles 10 and 24. For RSTA Article 26, we preliminarily concluded that benefits were contingent upon use of domestic inputs and found a countervailable subsidy. At verification, however, we confirmed that SEC's RSTA Article 26 tax credits were related to investments made after the GOK eliminated the different tax treatment for investment in domestic versus imported facilities. Accordingly, we have determined that RSTA Article 26 tax credits claimed by SEC on returns filed during the POI are not specific as import substitution subsidies.

Clearly, the Department's attention was focused on whether receipt of the tax benefits was contingent upon use of domestic inputs. Moreover, RSTA Article 12 was not among the programs we included in our initiation.

The petitioner first submitted allegations concerning the de facto specificity of RSTA Articles 10, 12, 24, and 26 after the Department completed verification. In support of its arguments, the petitioner relied upon an October 2002 Report on Reduction and Exemption that was compiled by MOFE and submitted to the ROK National Assembly. This document, which was first reviewed by the Department at verification, contains overviews of the various types of ROK tax incentives, actual 2001 and projected 2002 tax levels, methods of administration, and future plans relative to fiscal concerns. The Department examined this document at verification as part of its overview of the ROK tax system, and noted, e.g., that the report showed no evidence of export-related tax incentives. As the petitioner has now pointed out, the report also contains information measuring the total utilization of the RSTA tax programs for 2001, with projections for 2002.

To fashion its allegation of de facto specificity, the petitioner compares the amount of the tax credit claimed by SEC under a particular article in tax year 2001 to the total utilization amount for tax year 2001. Where SEC did not use a particular credit in tax year 2001, but did in 2000, the petitioner assumes that the total utilization in 2000 is the same as 2001. Thus, for

two of the Articles, SEC's tax credits are contemporaneous with the total amount utilized, and for two, they are not.

We do not agree with the petitioner that this limited amount of information permits the Department to find de facto specificity for these tax provisions. At best, the petitioner has provided a one-year snapshot of these programs, and one year's data does not allow the Department to account for normal distortions such as investment cycles and carry-forwards. In fact, the petitioner's allegation shows the deficiencies of relying on a single year. For two of the articles in question, SEC utilized the credits in 2000, but it did not use them in 2001. Thus, with more data, we would expect to see varying levels of use year-by-year and company-by-company.

SEC has noted that certain of these tax provisions date back to 1982. While we would not require data going back that far to determine whether these programs were de facto specific, the Department normally looks at several years data for its specificity analyses. In our standard questionnaire, we ask for usage data for the year of the alleged subsidy and for the three preceding years. Amongst other uses for this data, it would permit us to do the type disproportionality analysis alleged by the petitioner, which requires multiple years and/or other comparison data in order to provide meaningful data and comparisons for analysis.

Furthermore, we are satisfied that the respondents supplied the information requested by the Department regarding these tax programs in a complete and timely manner during the course of this investigation. The Department's questionnaires contained a thorough and comprehensive array of questions addressing the GOK tax programs under investigation. We sought information concerning eligibility criteria, the number of applicants, number of participants, and regional usage. We did not, however, request information concerning the collective amount claimed by participants for any given tax year or tax program. Furthermore, throughout these proceedings, the GOK maintained that it did not compile information regarding industry or regional use. We found nothing at verification to contradict those assertions. The Report on Reduction and Exemption, examined at verification, does not provide any breakdown on the use of incentives on an industry or company-specific basis. (See GOK Verification Report Exhibits 2-9). Moreover, the respondents did not supply information on RSTA Article 12, but we did not request any; this tax program was not a subject of this investigation. Accordingly, we have no basis for applying a facts available determination.

***Comment 26: RSTA Article 26 and Import Substitution***

*SEC's Argument:* SEC argues that RSTA Article 26 did not constitute an import substitution subsidy and, therefore, that SEC's tax credits under this provision should not be countervailed. Specifically, SEC notes that no difference existed during the POI between tax credit allowances

for investments in foreign-made versus domestically-made facilities, machinery, or equipment.

SEC further notes that the Department's preliminary determinations concerning RSTA Articles 9, 10, 24, 25, and TERCL Articles 16 and 17, were verified and should be affirmed. Specifically, with regard to RSTA Article 9, SEC states that the Department verified that SEC did not establish a countervailable reserve. SEC also asserts that the Department verified that RSTA Article 10 is not specific because eligibility is extended to almost all domestic businesses. Additionally, SEC notes that the Department verified that SEC's RSTA Article 24 and 25 tax credits were tied to investments made after April 10, 1998, and therefore these credits are not countervailable. Finally, SEC notes that the Department verified that SEC did not use TERCL Article 16 and 17 reserves during the POI.

Finally, SEC states that while the Department correctly determined that RSTA Article 18 (Tax Exemption for Technicians) and FIPA Article 9 (Tax Reductions or Exemption on Foreign Investments) were not used by SEC, the Department should classify these programs as "not countervailable" rather than "not used" in order to avoid confusion in any future proceeding.

*Petitioner's Argument:* All comments raised by the petitioner on RSTA/TERCL tax issues are included above in Comment 25.

*Department's Position:* We agree with SEC that the Department has verified that RSTA Article 26 does not favor use of domestic over imported inputs and, therefore, is not an import substitution subsidy. Similarly, the Department verified the claimed non-use by SEC of certain reserves, the timing of certain credits and the broad availability of RSTA Article 10.

We have not made a finding of non-countervailability regarding RSTA Article 18 and FIPA Article 9. Because these programs were not used, there is no need to reach a decision on this countervailability in this proceeding.

#### **Comment 27: 21<sup>st</sup> Century Frontier R&D Program**

*Petitioner's Argument:* The petitioner argues that the 21<sup>st</sup> Century Initiative provided countervailable benefits to SEC and Hynix. In its April 14 submission, the petitioner provided a June 2001 MOCIE report, which indicated that Samsung Advanced Institute of Technology ("SAIT"), SEC's R&D arm, had received GOK funds for R&D activities in the area of nano-technology commercialization. According to the petitioner, funding for nano-technology research is a key aspect of the 21<sup>st</sup> Century Initiative. Also according to the petitioner, R&D activities in nano-technology are vital to the future DRAMS and semiconductor industries, and the Department has found in past antidumping cases that research in one technology area benefits research in other areas, *i.e.*, that there is cross fertilization.

In addition to the funds provided directly to the companies under the 21<sup>st</sup> Century Initiative, the petitioner contends that Hynix and SEC benefitted from government funding provided under the Initiative for Seoul National University and several government research institutes (“GRIs”). The petitioner argues that, if not for the 21<sup>st</sup> Century program, the respondents would have to undertake the R&D projects on their own in order to remain competitive in the industry. Thus, the GOK is providing a service to the semiconductor industry and substantial benefits, even if, as the respondents have claimed, product commercialization is unlikely for several more years.

The petitioner argues that the Department should countervail all benefits provided under the 21<sup>st</sup> Century Initiative, using facts available. First, despite the Department’s request that SEC report assistance received under the 21<sup>st</sup> Century Initiative, the company did not do so. Second, regarding funding to Seoul National University and the GRI’s, the GOK responded that it was checking into whether these institutes had any responsive information, but the GOK provided no further information. Based on information it submitted, the petitioner claims that the GRIs are government authorities within the meaning of section 771(5)(B) of the Act.

Moreover, according to the petitioner, information on the record indicates that the 21<sup>st</sup> Century Initiative provides R&D funding for a limited number of industries, identified in the Department’s verification report as “certain key industries, including the semiconductor industry.” Hence, the petitioner claims, the program is specific. Further, in light of the GOK’s, Hynix’ and SEC’s failure to cooperate, the Department should, as facts available, compute the benefit to the semiconductor industry using the total expenditures under the 21<sup>st</sup> Century Initiative during the POI, USD 510 million.

*Respondents’ Arguments:* The GOK disputes the petitioner’s argument that the 21<sup>st</sup> Century program provides countervailable benefits to Hynix and SEC. According to the GOK, the evidence relied upon by the petitioner indicates merely that SEC was a participant in the “tera nano-technology project,” one of 19 projects conducted under the 21<sup>st</sup> Century Initiative. The GOK claims that the purpose of the 21<sup>st</sup> Century Initiative was to develop basic science and technology, and that the projects generally have a ten-year time horizon. Consequently, any commercial application would not occur, if at all, for ten years, in the GOK’s view. Finally, there is no indication in the verification report that the tera nano-technology projects have anything to do with DRAMS.

SEC also disputes the petitioner’s claims. With respect to benefits SEC allegedly received via Seoul National University and the GRIs, the Department met with representatives of these organizations during verification and confirmed that none of them provided R&D assistance related to memory products to SEC. SEC contends that the fact that the GOK sponsors or conducts research is insufficient to constitute a countervailable subsidy. Rather, according to SEC, for a subsidy to exist the GOK must receive less than adequate remuneration for some good or service it provided to SEC.



Beyond this, SEC points out that the tera nano-technology development project was merely one of 19 projects established under the Initiative. The petitioner has not, in SEC's view, shown that R&D assistance for nano-technology is industry specific. Instead, SEC claims, the potential applications of this technology are vast, including wristwatch-size supercomputers and robots that can perform surgery inside the body. Moreover, according to SEC, its involvement through SAIT in the nano-technology project had nothing to do with the development of new DRAMS technologies.

Like the GOK, SEC claims that the 21<sup>st</sup> Century Initiative was concerned with basic research and that any technology that was developed could not be used for commercial purposes for 10 years or more. In support of this position, SEC points to evidence submitted by the petitioner which states that a commercial product relying on nano-technology will take years, even decades, before reaching the shelf.

For all of these reasons, SEC takes issue with the petitioner's suggestion that the Department countervail the entire amount of expenditures under the 21<sup>st</sup> Century Initiative as a subsidy to the semiconductor industry. Moreover, SEC points to the Department's verification report which states, "our examination of the company's R&D project report and company accounts did not provide any evidence that the company's {DRAMS} operations were benefitting from government R&D assistance {except under the HAN program}."

*Department's Position:* As discussed above in the "Analysis of Programs" section, we have determined that the appropriate level of analysis for G-7/HAN and 21<sup>st</sup> Century "programs" is at the "project area" level. Both G-7/HAN and the 21<sup>st</sup> Century Initiative serve as umbrellas for different project areas. There are 18 project areas in the case of G-7/HAN and 19 in the case of the 21<sup>st</sup> Century Initiative. The different project areas can be overseen by different ministries and will have project-specific regulations (in addition to common management regulations).

The project area singled out by the petitioner under the 21<sup>st</sup> Century Initiative is "tera-level nano- devices development." As noted above, the petitioner claims that nano-technology is important to the future of the DRAMS industry. At the same time, the respondents have claimed that nano-technology research will affect numerous industries.

Based on our analysis of the evidence and argumentation on the record, it appears that SEC, through SAIT, did receive direct assistance under the 21<sup>st</sup> Century Initiative's nano-technology project. The petitioner's submission of April 14 (at Exhibit 159) indicates that SAIT was covered in MOST's support plan regarding nano-technology for three different areas of research. Although the Department's verification report makes no mention of these loans, SEC appears to concede in its rebuttal brief that it did receive such assistance ("Concerning funds

provided to SAIT under the 21<sup>st</sup> Century Frontier program, {the petitioner} relies on a MOCIE report identifying various nano-technology research projects, including projects in which SAIT has received funding.”). (See SEC Rebuttal Brief at 26.)

In light of this, we are troubled that SEC elected not to report its participation in the nano-technology project despite the fact that the Department listed the 21<sup>st</sup> Century Initiative in our questionnaire and asked SEC to respond to our questions for all R&D grants and loans received through various GRIs and directly from the government. Although SEC claims belatedly that SAIT’s research activities were unrelated to semiconductors, the Department was not able to examine this claim because the information was not provided.

Nevertheless, even if we were to assume that the research undertaken by SAIT was related to all of SEC’s production and the funds reported in the petitioner’s April 14 submission were outright grants instead of loans, any benefit to SEC from this assistance would be so small that there would be no impact on the overall subsidy rate, regardless of a determination of countervailability. Thus, consistent with our practice, we do not consider it necessary to determine whether benefits conferred to SAIT are countervailable.

The petitioner’s second argument regarding the 21<sup>st</sup> Century Initiative is that, but for the GOK’s funding of nano-technology research by the Seoul National University and the GRIs, this research would have to be undertaken by SEC and Hynix. Thus, in the petitioner’s view, the GOK is providing a service at no cost (*i.e.*, for less than adequate remuneration) to the ROK semiconductor industry. While we agree with the petitioner that R&D is important in the semiconductor industry, we do not find evidence that the particular nano-technology research being undertaken by Seoul National University and the GRIs would have been undertaken by SEC and or Hynix. Nor do we find evidence that a good or service has been provided by the these institutions. Therefore, we find no financial contribution by virtue of the GOK’s funding of Seoul National University or the GRIs under the 21<sup>st</sup> Century Initiative.

***Comment 28: Other R&D Programs***

*Petitioner’s Argument:* The petitioner alleges that the Department discovered unreported R&D loans to Hynix and SEC at verification. Certain of the loans to Hynix covered projects dealing with embedded memory, excimer laser technology, and copper materials. The petitioner claims that the Department further found that excimer lasers are used in the semiconductor lithography process, and that the equipment developed in this process will be used solely in the production of semiconductors. Another of the supported technologies seeks to improve the integration of memory and system chips for integrated circuits, according to the Department’s verification report. Additional loans discovered at SEC’s verification, the nature of which are proprietary, are also indisputably related to semiconductors.

The petitioner contends that SEC's failure to report these loans (as well as the 21<sup>st</sup> Century Initiative assistance) evidences a lack of candor in SEC's questionnaire responses, and that the loans should be countervailed.

*SEC's Argument:* SEC contends that the Department verified that SEC had reported all government-provided R&D loans for memory products. SEC also claims that the Department confirmed that the additional loans "discovered" at verification did not relate to memory production.

*Department's Position:* As part of its verification of R&D loans received by SEC under the G-7/HAN Program, the Department reviewed other loans classified in the same account to ensure that all G-7/HAN loans had been reported. In making this check, the Department found loans provided under another government-funded R&D program. SEC officials explained that this project had no application to memory products, and we did not gather further information. (See SEC Verification Report at page 9.)

Regarding the other loans to SEC identified by the petitioner, we are satisfied that our verification of SEC's accounts relating to the G-7/HAN Program and government-funded R&D was complete. Therefore, we have no basis to conclude that these loans were outstanding during the POI.

As with SEC, in verifying Hynix' R&D loans, the Department questioned other loans recorded in the same account. For certain projects, we established that the loans were not related to DRAMS production or research based on our discussions at verification. (See Hynix Verification Report at page 37-38.) For other loans, we were not able to establish whether they benefitted subject merchandise, or whether they were R&D loans or payments to Hynix for services rendered. Moreover, because this government-funded R&D program was not among the programs included in our initiation or questionnaire, we do not have information about the program that would allow us to make a finding that it is countervailable.

Therefore, if this proceeding results in a CVD order, we will investigate this program further to determine whether any funding received by Hynix confers a countervailable benefit.

***Comment 29: Export Insurance Program***

*Respondents' Argument:* SEC states that the Department should affirm its preliminary finding that SEC did not receive countervailable benefits related to export insurance. Specifically, SEC notes that the Department verified that SEC did not make any claims or receive any pay-outs related to DRAMS during the POI. Both the GOK and Hynix concur with this argument.

*Petitioner's Argument:* The petitioner did not submit argument concerning the Export Insurance Program.

*Department's Position:* We agree with the respondents. At verification, we found no evidence indicating that either SEC or Hynix received pay-outs for losses related to DRAMS transactions. Accordingly, we continue to find that this program did not confer a countervailable benefit on SEC or Hynix.

### ***Comment 30: Electricity Discounts Under the RLA Program***

*Respondents' Arguments:* SEC argues that the Department erred in preliminarily determining that the RLA program is specific. At verification, the Department saw that the discounts are distributed to a significant number of customers in a range of industries, according to SEC. Moreover, SEC maintains, the government provision of a good or service is countervailable only where the good or service is provided for less than adequate remuneration in accordance with section 771(5)(E)(iv) of the Act. According to SEC, there is no evidence in the record that KEPCO has provided electricity for less than adequate remuneration, and none of the Department's prior findings on this program included an analysis of adequate remuneration.

The GOK argues that the Department's verification revealed that the RLA discounts are distributed to a significant number of customers in a range of industries, contrary to the Department's Preliminary Determination.

*Petitioner's Argument:* The petitioner argues that the RLA program is specific under the Department's traditional analysis. According to the petitioner, the RLA program is de facto specific due to the limited number of participants, as verified by the Department. Moreover, the petitioner maintains that the fact that a limited number of customers were able to purchase electricity for less than the standard rate is by itself sufficient evidence that the electricity was provided for less than adequate remuneration.

*Department's Position:* We disagree with the respondents' assertion that the RLA program is not de facto specific. Nothing submitted during the course of this investigation or examined at verification counters our previous findings that the RLA program was used by a limited number of participants.

As noted by SEC, in Thai Hot-Rolled Steel and Trinidad Wire Rod, we examined the financial contribution aspect of this type of program as being the provision of a good by a government agency as set forth in section 771(5)(D)(iii) of the Act. Nevertheless, SEC raised its argument concerning our financial contribution methodology for the first time after verification. Accordingly, the Department did not verify information of the type or scope that was subject to

consideration in the Thai Hot-Rolled Steel or Trinidad Wire Rod cases. Furthermore, SEC's submissions in the instant proceeding do not provide an adequate basis upon which a determination under section 771(5)(E)(iv) can be reached. In any event, as noted in the Analysis of Programs section above, any benefit to the subject merchandise resulting from the RLA program would be so small that there would be no impact on the overall subsidy rate, regardless of a determination of countervailability. Thus, consistent with our past practice, we do not consider it necessary to determine whether benefits conferred thereunder to the subject merchandise are countervailable.

***Comment 31: Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates, and on Domestic Sales of Finished Products Manufactured from Imported Raw Materials***

*Respondents' Arguments:* The respondents claim that, per ROK customs law and as verified by the Department, no import duties are levied on materials used for DRAMS production in bonded factories. Since all of the respondents' DRAMS production are in bonded factories, the companies paid no import duties and received no import drawbacks for wastage or loss rate on inputs for DRAMS production for export, or for non-physically incorporated inputs. The Department also confirmed that respondents paid no import duties on inputs used in the small percentage of DRAMS sold in the ROK domestic market, because the import duty rate is calculated as a percentage of the import duty payable on the finished product, *i.e.*, DRAMS, for which no import duties are levied. Consequently, the respondents received no benefits under this program.

*Petitioner's Argument:* The petitioner submitted no comment regarding this program.

*Department's Position:* Based on the record evidence, including information gathered at verification, we agree with the respondents, and find that no countervailable benefits were conferred under this program to SEC or Hynix during the POI.

***Comment 32: Import Duty Reduction for Cutting Edge Products***

*Petitioner's Arguments:* The petitioner argues that the program is *de jure* specific, since it is limited to specific types of equipment in seven high-tech industries, and also *de facto* specific to the semiconductor industry as the epitome of "high-tech" industries promoted by the GOK. Although responses and verification information indicated that the Korean Customs Service had company-specific data, the petitioner notes that the GOK provided only a list of participating companies without the reduction amounts and had failed earlier to provide data on an industry and region basis. Therefore, the petitioner contends, the Department should apply facts available and find that the program is *de facto* specific to the semiconductor industry. In rebutting the respondents' arguments on specificity, the petitioner claims that the respondents

cannot rely on CTL Plate, where the Department found a program was not specific, because it was available to all manufacturing and mining industries.

The petitioner notes that, in the Preliminary Determination, the Department applied the 0.5 percent allocation test and, based on the results, expensed the benefits in the pre-POI years. The petitioner claims, however, that the regulations allow the Department to disregard the test or to aggregate all programs on a company-specific basis if the test has a significant impact on the results of the investigation, *i.e.*, where the test makes a difference in whether the rate reaches above *de minimis*. Because the program was temporary and ended before the POI, the petitioner points out, the benefits will not be countervailed, unless the Department allocates them to the POI regardless of the 0.5 percent test. With regard to SEC, the petitioner urges the Department not to offset the benefit with the “negative tax benefit” claimed by SEC, because 19 CFR 351.503(e) stipulates that the Department will not consider the tax consequences of the benefit. Finally, the petitioner points out that SEC’s benefits should be calculated based on SEC’s semiconductor sales, because SEC reported that the duty reductions were applied to semiconductor equipment; Hynix’ benefits should be calculated based on Hynix’ DRAMS sales, because Hynix reported that its reductions were applied to equipment for its DRAMS operations.

*Respondents’ Arguments:* The respondents’ urge the Department to reverse its preliminary finding that the duty reduction program was *de jure* specific. Citing to CTL Plate, the respondents note that, in the past, the Department has rejected the argument that a program restricted to certain industries must necessarily be deemed specific. The enforcement decree, they point out, identified seven broad-based industrial groups, each group comprising multiple individual industries (*e.g.*, the precision electronics group comprised eleven different industries, of which semiconductors was only one). Altogether, the decree identified 65 separate industries, encompassing hundreds of individual companies. The respondents argue that this is similar to the situation in Thai Hot-Rolled Steel, where the Department found a program available to eight broad industry categories to be not countervailable, because the categories comprised a wide range of industries encompassing 351 separate firms. The Department also made a similar finding in the Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62128 (October 3, 2002) with regard to a program covering five types of projects available to a wide variety of industries. As to the petitioner’s claim of *de facto* specificity, the respondents note that the Department confirmed at verification that the District Customs Office kept relevant data only on a per-company, not per-industry or per-region, basis. Thus, contrary to the petitioner’s claims, the GOK did not withhold relevant information.

Rebutting the petitioner’s argument against applying the 0.5 percent test, the respondents claim that even if the Department allocated the reductions to the POI, the benefit would remain

negligible. They argue that the Department has departed from practice only in very limited situations that are not applicable to the present proceeding, i.e., where the test might create inconsistencies with the benefit calculation in prior determinations (citing, e.g., to Industrial Phosphoric Acid From Israel: Preliminary Results of Countervailing Duty Administrative Review, 66 FR 45965 (August 31, 2001); Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 5991 (February 8, 2002); Certain Pasta From Italy: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 65 FR 48479 (August 8, 2000); Final Affirmative Countervailing Duty Determination: Pure Magnesium From Israel, 66 FR 49351 (September 27, 2001) (“Magnesium from Israel”); and Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From India, 64 FR 73131 (December 29, 1999) (“CTL Plate from India”). In Magnesium from Israel, the respondents note that the Department did not do the test for lack of sales data, while in CTL Plate from India, the Department applied the test twice, based on when the benefits were realized, allocating the benefits in one year and expensing them in another. The petitioner, they contend, misrepresents the Department’s intent when claiming that the regulations allow an exception if the test has a significant impact on the results of the investigation. The relevant section of the Preamble shows that applying the test on a company-wide basis was a suggested idea that the Department rejected for the administrative burden it would impose. With regard to the petitioner’s claim that allocating the benefits would likely bring the ad valorem rate above de minimis, respondents note that in a very similar case, the Department confirmed the policy of applying the test for non-recurring benefits, regardless of its impact on the margin (citing to Cut-to-Length Carbon Steel Plate From Belgium: Amended Final Results of Countervailing Duty Administrative Review, 64 FR 18001 (April 13, 1999)). In any case, they note that SEC had no other non-recurring benefits from the pre-POI periods that might potentially require allocating on a cumulated company basis. Thus, even if the Department did take this approach, it would have no impact on the results.

Additionally, SEC argues that in calculating any benefit, which consisted solely of a reduction in the cost of acquiring equipment, it must be offset by the “negative tax benefit,” i.e., the additional tax SEC paid due to the increase in its taxable income in subsequent fiscal years attributable to the reduced cost of the equipment. Finally, since the Department found the program conferred no benefits in the POI, the respondents claim that the petitioner’s argument to adjust the sales denominator is moot.

*Department’s Position:* We disagree with the respondents on the issue of specificity. In CTL Plate the Department did, as the respondents noted, find one program to be not (de facto) specific, absent additional evidence or information from the petitioner in that proceeding to suggest that a program provided to all manufacturing and mining industries is specific under CVD law. First, that was clearly not a categorical finding that manufacturing and mining industries cannot ever constitute a specific set of recipients of subsidies within the meaning of

the Act. Second, the seven high-technology industry sectors present here clearly constitute a more limited subset of the economy than “all manufacturing and mining industries.”

We also disagree with the petitioner’s suggestion that the Department should apply a facts available finding against the respondents for failing to provide relevant data. This subsidy allegation was filed on February 20, 2003, approximately three months after this investigation was initiated, and the Department was unable to address it in the Preliminary Determination, although it was addressed in the Supplemental Preliminary Determination Memo approximately three weeks after verification. Given the compressed amount of time available for submitting responsive information, and considering that the respondents did not have the data in the format requested, we find that recourse to facts available is not warranted.

Additionally, we are not persuaded by the petitioner’s suggestion either to disregard the 0.5 percent test or to apply it on a cumulated company basis. As noted by the respondents, the Department has made exceptions or alterations to its practice in this regard only in very narrowly defined circumstances which do not obtain in this case. Moreover, as the respondents noted, the amount of benefits conferred under this program are so minuscule that allocating them has no effect, and in the case of SEC, has no effect even on a cumulated company basis. Consequently, we continue to find that the benefits received by SEC or Hynix under this program are expensed in the years of receipt and, therefore, that no countervailable benefits were received by either respondent during the POI.

***Comment 33: Permission for Hynix and SEC to Build in Restricted Area***

*Petitioner’s Argument:* The petitioner contends that, in 1996, SEC faced a general prohibition on new construction or expansion of factories in the Seoul metropolitan region, under various provisions of the SMARPA and the Industrial Placement and Factory Construction Act (“IPFCA”), and their respective enforcement decrees and ordinances. Specifically, in the growth management zone, where SEC’s DRAMS facility was located (in Giheung, Gyeonggi Province), the GOK prohibited construction or expansion of factories and other “population-concentrating facilities.” The petitioner claims that there was an exception to this prohibition for big companies in seven high technology industries only, including the semiconductor industry, pursuant to Article 27.1 of the IPFCA enforcement decree. For these companies, expansion was allowed up to 25 percent of existing facilities. In late 1996, the ROK press reported that this 25 percent cap was hindering SEC’s plans to expand its Giheung facility. According to the petitioner, the company joined other leaders from the electronics and semiconductor industries in asking the GOK, specifically MOCIE and MOCT, to raise the expansion limit in order to increase exports. The petitioner claims that, in October 1996, the cap was raised to 50 percent.

As part of SEC’s expansion, the petitioner contends that the company acquired about fifty lots



directly from the government. SEC had to acquire the rest from private landowners, but was having difficulty obtaining land by 1997. Consequently, according to the petitioner, SEC sought and obtained from the governor of the province an “industrial park” designation for its planned expansion, which provided the company with authority to confiscate land by eminent domain, pursuant to Article 22 of the Industrial Placement and Development Act (“IPDA”). After completing the necessary land acquisitions in 1999, SEC built a new factory two kilometers from its Giheung facility, in the district of Hwaseong, which doubled the land area for its DRAMS production and expanded its production facilities by 50 percent (in keeping with the new expansion cap).

The petitioner argues that the power granted to SEC to confiscate land constituted a financial contribution to SEC in the form of a provision of land for less than adequate remuneration. The petitioner disagrees with the Department’s preliminary conclusion that the value of any development rights was reflected in the purchase price, since the right to develop was granted exclusively to SEC and was available only to the seven industrial sectors designated under the IPFCA. According to the petitioner, under Articles 67(2) and 70(2) of the Land Acquisition Act, SEC was obligated to pay only the “assessed value” for the land it confiscated. The petitioner claims that SEC received a benefit in the amount of the difference between the “assessed value” and the “expected selling price” representing the market value inclusive of the development rights conveyed with the property. The petitioner contends that, because of this price difference, SEC was able, through GOK action, to obtain the land for less than adequate remuneration, which is considered under the Department’s regulations to be a subsidy.

The petitioner suggests that a financial contribution may also have been provided in the form of the GOK’s control of access to property development, which may be considered similar to government control of access to loans, which the Department has countervailed in the past (citing to CTL Plate and Certain Steel). The Department has also found that the right to locate in an industrial park is countervailable if the government limits which industries can locate in the park (citing to the Final Negative Countervailing Duty Determination: Carbon Steel Wire Rod From Singapore, 51 FR 3357 (January 27, 1986) (“Singapore Wire Rod”). Finally, the petitioner suggests that a financial contribution may exist under section 771(5)(B)(iii) of the Act because SEC was entrusted or directed to develop and confiscate land for its own benefit, a role usually granted to the regional government.

The petitioner argues that the grant of development rights provided to SEC was de jure and de facto specific: the permission to build was expressly limited to seven product categories, including semiconductors, and at verification the Department found that only a small number of applications were approved for industrial use from 1997 to 2002. The petitioner dismisses as irrelevant the respondents’ claim that 86 of 92 applications were approved during the same period, because those numbers included non-industrial use applicants. Additionally, the petitioner claims that the right to develop was also an export subsidy because permission was

sought, justified and granted on the basis of increased exports. SMARPA Administrative Rules, Section 10(1), according to the petitioner, mandated the SMARPA Committee to review a project's contribution to national economic development, such as increasing exports, and both SEC and the governor of Gyeonggi indicated in SEC's application that the new factory would enhance exports. Moreover, the petitioner claims that the GOK expressly told the public that it had approved SEC's new Hwaseong factory in order to increase exports. Thus, the petitioner argues that, consistent with section 771(5A)(B) of the Act, the Department has found export subsidies to exist where applicants filed for assistance on the grounds that they were exporters (citing to the Final Affirmative Countervailing Duty Determination: Steel Wire Rope from India, 56 FR 46292 (September 11, 1991) and South Africa Plate In Coils).

The petitioner argues that SEC benefitted from the government-owned land that it directly acquired and from the authority to confiscate private lands, and suggests that the benefit is measurable as the difference in the "assessed value" and the "expected selling price." The amount allocable to the POI should be divided by SEC's total semiconductor sales, or total semiconductor export sales, if found to be an export subsidy. However, the petitioner contends that this method understates the total benefit to SEC, which should include the benefit from the right to develop, measurable, the petitioner suggests, in terms of higher capital productivity in the Seoul metropolitan area relative to outlying areas. Citing a 1998 report from the Federation of Korean Industries, the petitioner claims that the capital productivity ratio in Gyeonggi Province at the time was 108.84, which was 70 percent higher than the 63.83 in other areas. According to the petitioner, this meant SEC would need to invest an additional 70 percent if it located outside the Seoul metropolitan area. The petitioner suggests that this productivity advantage can also be measured in terms of SEC's revenue stream, calculable as the difference in the expected rates of ordinary profit in the metropolitan region versus outlying areas.

The petitioner argues that the Department should draw an adverse inference against the respondents with regard to subsidy, benefit, and specificity for failing to cooperate and provide relevant information in their responses to the Department's requests, consistent with past practice (citing to Certain In-shell Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty Administrative Review, 68 FR 16473 (April 4, 2003) and the Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy, 67 FR 3163 (January 23, 2002)). For example, the petitioner claims that SEC failed to mention in its initial questionnaire response that SMARPA was just one of several laws relevant to the permission to build issue. The company also evaded requests for locational studies; hid the fact that the new facility was located in a different town across a highway; denied that an application form existed; and failed to answer the Department's questionnaire addressing the provision of goods and services. Similarly, the petitioner alleges that the GOK failed to provide a list, by industry and region, of the companies granted permission to build; failed to provide a copy of the IPFCA; misled the Department at verification that construction applications were reviewed on a first come, first served basis; and told the Department's verifiers that the central

government was not involved in SEC's land purchases, when the government granted the company the power of confiscation under Article 22 of the IPDA. The petitioner rejects the respondents' claim that the subsidy allegation was limited to the approval for a new industrial area, arguing that the restrictions on factory placement and construction were central elements of the allegation and the Department's inquiry. The petitioner also notes that, contrary to the respondents' assertions, factories are included in the term "population-concentrating facilities" under SMARPA Article 2.3. Finally, the petitioner rebuts the respondents'

objections to the findings of petitioner's expert, claiming that substantial evidence supports the analysis.

*Respondents' Arguments:* According to the respondents, and as the Department confirmed at verification, SEC's old wafer fabrication facility in Giheung and its new Hwaseong facility are adjacent to each other, not two kilometers apart, as the petitioner has claimed. In the process of developing its new Hwaseong facility in 1999, SEC first had to obtain approval to establish a new industrial area under the SMARPA. SEC contends that the SMARPA approval must be distinguished from approvals for new factory construction under the IPFCA and for establishing a new industrial site under the IPDA. The petitioner, according to the respondents, has intentionally failed to make these distinctions and caused confusion in the record. There is no dispute, according to the respondents, that this new facility is in the growth management zone, where, the respondents claim, SMARPA Article 8 authorizes the designations of new "industrial areas." In order to obtain this designation, the respondents explain, SEC first had to obtain the approval of the SMARPA Committee. To this end, SEC submitted its application in November 1998 to the Gyeonggi Province government, which reviewed it for compliance with environmental, traffic and other laws. The province then submitted the application, with its recommendation, to the SMARPA Committee which, in turn, reviewed it for various types of impact before notifying local authorities of the approval, which came in April 1999. The respondents point out that verification information shows the GOK never indicated that they provided any form of assistance to SEC in connection with the approval of the industrial area or the land acquisitions by SEC.

After the SMARPA Committee's approval, the respondents continue, SEC proceeded to acquire land, and obtained approval for factory construction from the Hwaseong district government in July 1999, pursuant to Article 8 of the Construction Act and IPFCA Article 19. The respondents explain that such approvals were routinely required for factory construction, as well as for other stages of the development, e.g., preparations of the site (grading, drainage, etc.) and the buildings (foundation, plumbing, etc.). Construction of the new facility proceeded in July 1999 through the year 2000, with commercial production commencing in June 2000.

The respondents protest the petitioner's allegations that they have failed to cooperate or provide information relevant to the investigation. They note that the petitioner's initial

allegations and the Department's initiation memorandum addressed potential benefits only with regard to SMARPA, not any other law, and that respondents fully responded within this scope to the Department's requests for information. The respondents explain that SEC did not produce a copy of its SMARPA application because the Department had not requested it specifically. However, they provided translated copies of SMARPA and the related enforcement decree, and thus disclosed the application process and the fact that SEC obtained permission for development. They also note that SEC produced the relevant application form at verification, which was the first time the Department actually requested it. Moreover, the respondents contend that the petitioner knew from the start that SEC was required to file an application under SMARPA, and the documents on which the petitioner relies are public records, so it could have studied all the relevant laws before asking the Department to initiate an investigation. The respondents reject the petitioner's allegation that SEC refused to produce studies that it could not locate, noting that the law does not obligate a respondent to produce records that do not exist or no longer exist. In any case, SEC did produce three year's worth of its Board of Directors minutes, which are among the most sensitive strategic documents in its possession, and which the Department found to have no relevance to the alleged subsidies. The allegations about the GOK's responsiveness is also unmerited, say the respondents. The GOK did provide relevant breakdowns of the applications filed and approvals granted from 1997 through 2002; it correctly characterized SMARPA as allowing transfers out of the other zones into the growth management zone; and it correctly stated that it was not involved in any of the land purchases for the Hwaseong site. Accordingly, the respondents argue that applying adverse inferences is not warranted in this proceeding, as the petitioner has alleged.

The respondents argue that the petitioner improperly widened the scope of the investigation with new and untimely allegations. They claim that, in various comments submitted up through verification, the petitioner departed from its original subsidy allegation regarding the permission to develop to encompass any type of permission regarding factory placement, construction, etc. The respondents claim that the petitioner switched theories from the SMARPA to the IPFCA, which they regard as an impermissible expansion into an entirely different law. The respondents note that, notwithstanding SEC's strong objection to this expansion, and although the Department limited its verification outline to SMARPA (and thus implicitly rejected the petitioner's efforts), they nevertheless provided full opportunity at verification for the Department to gather relevant information. The respondents further contend that the petitioner untimely introduced yet another law, the IPDA, which they consider to be an improper allegation of an entirely different subsidy program. Nevertheless, the respondents point out that SEC produced IPDA Article 22, as well as the Land Acquisition Act, which defines land expropriation and price assessment procedures. The respondents note that, although the original investigation never covered these laws, they provided the Department the opportunity at verification to address laws governing factory construction, including review of land records, and that the Department found nothing relevant to any benefits conferred, including payments for land at less than fair value.

The respondents strongly disagree with the Department's preliminary finding that "special circumstances" warranted acceptance of public information filed after verification. They note that the Department may decline a new allegation when the regulatory deadline has passed or when the Department has insufficient time to investigate (citing to Bethlehem Steel Corp. v. United States, 162 F.Supp.2d 639, 642-43 (CIT 2001)). Since the petitioner never showed that the IPFCA was "adopted in connection with the implementation of the SMARPA," the Department's claim that the IPFCA was responsive to the questionnaires is misplaced. The respondents further contend that the confusion of the IPFCA with the IPDA, which are two separate Acts, is due to the petitioner's late injection of the IPDA into the investigation. The respondents claim that the Department also shifted the focus regarding benefit, *i.e.*, that SEC acquired land at less than fair market value, even though the Department's verification outline did not include questions pertinent to this point. The respondents contend that, since the start of the investigation, the petitioner had focused on general infrastructure benefits, specifically those articulated in its expert's report. Since the petitioner's land confiscation allegation was untimely, the verification addressed the issue only in a cursory manner—for example, the Department did not examine the price of land. The respondents deny that they can be faulted for failing to respond to an allegation raised by the petitioner two weeks after verification. Therefore, they argue that it would be unfair and prejudicial for the Department to rule adversely on this issue.

The respondents reject the petitioner's allegation that the permission to build was *de jure* specific because many types of uses besides "industrial areas" may be approved by the SMARPA Committee as "large-scale development" projects (*e.g.*, housing sites, tourist resorts, etc., of over 300,000 square meters in area) under SMARPA Articles 2 and 19, and Article 4 of the enforcement decree. The respondents dispute the petitioner's allegation that the IPFCA allowed factory expansions only to seven high-tech industries. They claim that under IPFCA Article 27, and Table 2 of the enforcement decree, 15 additional use categories were permitted, including expansions of existing factories of large corporations of all types. The respondents also reject the petitioner's allegation that the permission to build was *de facto* specific, pointing out that 86 out of 92 applications, or nearly 95 percent, were approved during the AUL period, as the Department found at verification. The limited number of applicants in 1998, they say, was nothing more than a reflection of the economic crisis, together with the fact (also found at verification) that demand for industrial sites over 300,000 square meters was not very high. In any case, the respondents note that all applications filed in 1998 were approved. Furthermore, the respondents claim that, contrary to the petitioner's allegation that the IPFCA prohibited factory construction, the GOK explained at verification that nationwide construction limits were set yearly for new factory construction of all kinds, not just large factories or factories in newly designated industrial areas. The respondents claim that record evidence, including verification information, does not show that SEC received benefits under the IPFCA, and that the petitioner has failed to show that the IPFCA, or its enforcement decree, or some other evidence indicates the contrary.

The respondents contend that it was not until verification began at SEC that the petitioner first alleged export contingency, with no explanation how this provided a benefit. The respondents rebut this allegation, saying that neither the approval notice nor the SMARPA Committee's Administrative Rules cite exports as the basis for approval. The latter mentions the project's extent of contribution to national economic development, but not to increased exports, which was something that the petitioner asserted parenthetically. Finally, the respondents claim that the ROK press article on which the petitioner relies for its export subsidy allegation does not pertain to the new Hwaseong facility at all, but to some other facility.

The respondents point out that, under 19 CFR 351.511(d), the regulations expressly consider general infrastructure to be not countervailable, as opposed to specific infrastructure, which the Preamble defines as a facility built inside an industrial park, e.g., a road; or a facility used exclusively by one industry or group of industries, e.g., a port (citing to the Preamble, 63 FR at 65378). The record, including verification information, and the petitioner's expert report contain no evidence that specific infrastructure was provided. The advantages cited in the expert report, e.g., access to a trained workforce, highways, electricity and water, etc., are all general infrastructure within the meaning of the regulations. Additionally, the respondents claim, the petitioner's expert never claimed that SEC paid discounted rates for these advantages or that the GOK constructed specific facilities for SEC's new facility.

The respondents also claim that the petitioner erroneously equates "property development rights" with "goods and services" despite the lack of evidence that anyone other than SEC paid to develop the property. The respondents also rebut the petitioner's reliance on Certain Steel, saying that this decision (specifically in regard to "preferential access") actually supports SEC's position: a countervailable benefit exists only if SEC received a benefit unavailable to others in the growth management zone. However, as the respondents have argued, all locational benefits were widely available general infrastructure, which is specifically excluded from the "goods and services" provision invoked by the petitioner.

The respondents contest the petitioner's evidence for the higher productivity of capital in the Seoul metropolitan area versus outlying regions. They point out that the study does not appear to be official (although it cites the National Statistical Office as a source), consists of the opinion from the author or the Federation of Korean Industries, and lacks a description of the methodology used. Moreover, SEC checked with the National Statistical Office and found no such data. For these reasons, the respondents argue that the study is legally impermissible as a basis for measuring any alleged benefit from the SMARPA approval; even if the calculations were reliable, the alleged advantages were clearly attributable to general infrastructure. The respondents contend that the petitioner has not shown that SEC obtained these alleged advantages for less than adequate remuneration. The respondents further contend that any benefits must be offset by the higher land, labor, utility and other costs of locating in the

metropolitan area.

The respondents strongly object to the land confiscation allegation brought by the petitioner, who never raised the issue in its original allegation or identified the relevant statute. Confiscation procedures are not set forth under SMARPA, the only law addressed in the Department's initiation; rather, confiscation authority is exercised for public works purposes under the Land Acquisition Act, which is applicable through yet another law, the IPDA. Thus, the respondents claim that the power to confiscate land derived from an entirely different legal source than any law the petitioner identified as providing benefit to SEC. The respondents argue that the Department must first conclude that SEC exercised or threatened to exercise the authority to confiscate land before the Department can consider this latest new subsidy allegation. They note that SEC had no opportunity to demonstrate that it did not do so, since the petitioner did not raise the issue until its case brief, and the petitioner's resubmitted May 12, 2003 submission was the earliest the respondents could find any reference to the issue, including the alleged acquisition of government-owned lots. The respondents argue that no record evidence supports an inference that SEC exercised confiscation authority. The GOK verification report does not address it, they note, and SEC officials denied press reports that the local government exercised it.

The respondents point to a distinction in the Land Acquisition Act between acquisition of land through consultation with landowners under Chapter III and through expropriation under Chapter IV. The respondents claim that the petitioner has not shown that SEC actually expropriated land; SEC acquired land for the Hwaseong facility through the consultation procedure, by which it reached agreement with landowners on the price of the land through "good faith negotiations" under Article 16 and entered into sales contracts under Article 17. The respondents note that SEC never had an opportunity to show this, since the purchase of land was never part of the investigation. Their objections notwithstanding, respondents provide an explanation of the expropriation procedures, asserting that these are relevant to evaluating the credibility of the petitioner's allegation.

According to the respondents, the process has four separate stages under Chapter IV: consultation, adjudication, appeal of adjudication, and administrative litigation, which are designed to provide due process and fair treatment, and allow full opportunity for the landowner to obtain a fair price. Various provisions for calculating the land price under Chapter VI afford further protections to the landowner. For example, the respondents claim, the developer must obtain at least two independent appraisals, with the landowner having the right to designate another, and the price must be based on the most current publicly announced prices. Thus, according to the respondents, the Land Acquisition Act provides ample protections to the landowner both in terms of the acquisition procedures and the determination of the land price. Thus, even assuming that SEC used the threat of expropriation, the petitioner has not shown how that could adversely affect the landowner, given the protections provided

under the law. In any case, the respondents argue that there is no evidence that SEC ever did so, or that the landowners sold out cheaply under an expropriation threat. Therefore, the respondents contend, the Department should reject the petitioner's allegations regarding the true value of the land and the lower price that SEC supposedly paid.

With regard to any alleged benefits deriving from the land acquisitions, the respondents assail the petitioner's allegation that SEC obtained about fifty government-owned lots. They point out that the public notice on which the petitioner relies includes a statement indicating that Gyeonggi Province did not provide any "major facility" to SEC. They also note that the "list of lands" in the notice comprises only 52 separate entries totaling 51,211 square meters, far less than the total land SEC acquired for development, and that only five of the 52 lots were listed as government-owned. Finally, they remark that the notice does not indicate the price paid or to be paid by SEC, nor that the price was less than fair, and provides no indication that the government gave land to, or expropriated land on behalf of, SEC. The respondents dispute the petitioner's reliance on the land's supposed "assessed value" and "expected selling price," noting that the website document on which the petitioner relies is undated and does not explain the meaning of those terms. Assessed value, according to the respondents, is normally associated with taxation, not expropriation, and the expected selling price could well be the price that the landowners expected from SEC, not, as the petitioner insists, the post-acquisition land value. The respondents reject the petitioner's reading of this information, contending that SEC would not have an expected selling price for land that it was acquiring for its own use.

*Department's Position:* The petitioner filed its allegation that SEC and Hynix were permitted to build in a restricted area on February 20, 2003, approximately three months after this investigation was initiated. The Department accepted the allegation and sent questionnaires to the parties seeking information about their construction activity in zones where activity was restricted by SMARPA (also referred to as the "Capital Area Streamlining and Planning Law"). Because of the timing of the allegation, the Department was not able to address it in the Preliminary Determination.

At our verification in April, we examined the SMARPA review and approval process. Also in April, the petitioner began placing supplemental materials on the record regarding, inter alia, permission for semiconductor producers to build in restricted areas. In a May 12, 2003, submission which was rejected by the Department and subsequently refiled on May 22, 2003, the petitioner claimed that laws other than SMARPA permitted specific industries to expand their facilities in the Seoul area. We accepted this filing, although it was made after the deadline for filing new factual information, because it appeared to include information pertaining to



information gathered at verification.<sup>29</sup> We also allowed the respondents to make a supplemental factual filing. In a May 16, 2003 filing, the petitioner introduced an additional dimension to the subsidy allegation by claiming that SEC had used obtained the land for its expansion through an ROK confiscation procedure similar to eminent domain.

As this chronology evidences, the initial subsidy allegation was made late in the proceeding, significant new factual information was received very late, and the nature of the subsidy allegation shifted after verification. In these circumstances, it would normally be the Department's practice to rely on 19 CFR 351.311(c) and defer consideration of this potential subsidy to a subsequent administrative review. However, because of the low subsidy rates found for SEC for the other programs being investigated, it was not clear that SEC would be included in any CVD order that might be issued. Therefore, the Department proceeded and issued a preliminary analysis of this alleged subsidy (as well as two others), on May 28, 2003, approximately two and a half weeks before the deadline for our final determination. See Supplemental Preliminary Determination Memo.

In our preliminary analysis, we addressed the petitioner's two-fold allegation that the GOK's bestowal of development rights provided a subsidy to SEC and that the GOK may have provided land for the expansion both directly and by granting confiscation authority to SEC. Regarding the former, we preliminarily found that the alleged development rights given to SEC were best analyzed as a GOK provision of a good (land). We determined that when the GOK decided in 1997 to allow expansion of certain factories in growth management areas, the landowners in those areas stood to benefit because their land became more valuable as companies like SEC sought to expand.

The petitioner argues that the confiscation authority allegedly granted to SEC meant that SEC only needed to pay the assessed value of the land it needed to expand. This ensures, in the petitioner's view, that any windfall that might have gone to owners of property adjacent to SEC through the restoration of development rights would have gone to SEC instead. This increased value, in the petitioner's view, is reflected in the difference between the assessed value (reflecting what SEC paid for the land) and the "expected selling price" (the value of the land once it was in SEC's hands).

We have not adopted this position for our final determination because it relies on the assumptions that 1) SEC used its authority to confiscate land; 2) SEC actually paid the assessed value; and 3) the "estimated selling price" reflects the value that should have been paid

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<sup>29</sup>We also note that the petitioner's filing was of publicly available information, which could have been submitted earlier and in particular before verification.

to the owners of the adjacent land. There is insufficient evidence on the record to support any of these assumptions. SEC has claimed that it used the consultation procedures of the Land Acquisition Act, rather than the expropriation procedures. Due to the lateness of the parties' submissions after verification, we have not been able to investigate this claim. (The Land Acquisition Act was only placed in the record on May 27, 2003.) Regarding the assessed value, we did not ask SEC how much it paid for the land and, therefore, do not know what it paid or even what "assessed value" means.<sup>30</sup> Finally, we do not know what the "estimated selling price" is and why such information would be posted on a local government website. Therefore, we have determined that the information on the record does not provide a sufficient basis to conclude that SEC received a countervailable benefit by virtue of permission from the government to expand its Giheung facility.

The petitioner has argued that the bestowal of property development rights can be likened to granting access to foreign currency loans, a practice which the Department has countervailed in prior ROK steel cases. We disagree that the two situations are analogous. In the steel cases, the value of receiving the foreign loans clearly accrued to the steel companies. In this case, as discussed above, the value of the restored development rights enhanced the value of the land to the landowners. The petitioner has also pointed to Singapore Wire Rod to argue that the Department has found that the right to locate in an industrial park can confer a subsidy if the government limits the firms that can locate in the industrial park. However, a review of that case shows that the alleged subsidy was not the ability of companies to locate in the industrial estate, per se. Instead, the petitioner alleged that certain benefits, such as low taxes and reduced rental rates, were available to companies that located in the industrial estates. The Department found that those benefits did not exist, in addition to finding that access to the industrial estates was not limited.

Additionally, the petitioner argues that the financial contribution in this case may take the form of the GOK entrusting or directing SEC confiscate and develop land for its own benefit, a role usually granted to regional governments. Under section 771(5)(B), a subsidy can arise where, inter alia, a government entrusts or directs a private entity to make a financial contribution to a person. This provision addresses situations where a government directs a non-government (private) entity to provide a financial contribution to the producer under investigation (the person). Therefore, we do not agree that the GOK can direct or entrust SEC to provide a subsidy to itself.

Finally, the petitioner contends that the Department should draw an adverse inference and find a countervailable subsidy due to the parties' failure to provide complete and accurate responses

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<sup>30</sup>Given that the issues were raised so late, there was not sufficient time to issue supplemental questionnaire.

to the Department's requests for information. As discussed above, this investigation has been made difficult by the enormity (and complexity) of the factual information that came onto the record very late in the proceeding. While the Department placed some of the responsibility for that on the respondents in our preliminary analysis, it was not the respondents' fault exclusively and we cannot say that the respondents have not acted to the best of their ability to respond to the Department's requests for information. The initial focus of the investigation into this allegation was SMARPA. By the end of the case, the focus had shifted entirely to laws such as the Land Acquisition Act, the IPDA, and the IPFCA. Since their possible relevance became known only in the last weeks of our investigation, we never requested information specifically on these laws, or the amount of land purchased by SEC for its expansion, or whether SEC used (or even had) confiscation authority.

The petitioner points to certain specific instances where, in the petitioner's view, SEC and the GOK should have been more responsive to the Department's questionnaire. Clearly, we would have preferred to have as much information as early as possible. However, we do not agree that the respondents failed in these instances. With respect to the Department's request that the respondents provide a copy of the SMARPA law "as well as any other statute, code or regulation, adopted in connection with the implementation of the 1994 Seoul Metropolitan Area Readjustment Planning Act," the Department would not normally require all laws and decrees that might be cross-referenced in a particular law. In any case, we did not request the laws that were cross-referenced in SMARPA in any of our supplemental requests for information.

Regarding SEC's application for approval under SMARPA, we believe that SEC should have read the question as requiring submission of that document. However, as SEC has explained, it was asked the standardized question asking for applications for benefits, and it did not believe it had applied for benefits. While, based on the facts known at the time, no follow-up questions were sent in the supplemental questionnaire, the Department examined the application thoroughly at verification and SEC did not hide its application at verification. Finally, as part of initial questionnaire regarding SMARPA, we asked SEC to respond to our standard questionnaire appendix regarding the provision of goods and services, if applicable. Given that the questions pertained to SMARPA, we are hard pressed to say that SEC was remiss in not providing the values of land which the petitioner (much) later alleged were confiscated.

In summary, with the benefit of hindsight, we believe that the GOK's and SEC's responses could have been better. However, given the focus of the investigation on SMARPA, both from the respondents' and the Department's point of view, we do not agree that an adverse inference is warranted.

***Comment 34: Exemption of Value-Added Tax on Imports Used for Bonded Factories under Construction***

*Petitioner's Arguments:* The petitioner argues that the program is limited to certain items and is, therefore, specific within the meaning of section 771(5A)(D)(I) of the Act. It is also an export subsidy, the petitioner claims, since the exemption was limited to bonded factories, which exist specifically to facilitate exports. Citing to Cold-Rolled Steel, the petitioner notes that the Department recently found certain VAT exemptions on imports to be countervailable. The petitioner also points out that the VAT exemption was applied to capital equipment, not raw inputs, and a benefit exists where an exemption on indirect taxes extends to inputs not consumed in production (citing to 19 CFR 351.518(a)). Since both SEC and Hynix reported that exemptions under the program were related to memory equipment, the petitioner contends that the Department should base the ad valorem calculation on the companies' memory-related sales.

*Respondents' Arguments:* The respondents claim that the program is not specific, since the exemption applied to all goods imported for bonded factory construction, without restriction to particular companies or industries, location, export performance, or use of domestic over imported goods. They rebut petitioner's contention that factories are bonded solely for the purpose of facilitating export production as a gross overstatement, for which the petitioner has not cited any prior case for support.

According to the respondents, the VAT is an indirect tax within the meaning of 19 CFR 351.102(b), and an exemption to it is countervailable only under limited circumstances. Thus, the Department correctly found in the preliminary analysis that no benefit exists under this program, based on several prior decisions on similar programs. The respondents rebut the petitioner's reliance on Cold-Rolled Steel, noting that none of the parties in that case addressed or explained the VAT, which led to the erroneous finding that exemption for the VAT benefitted the producer. The respondents also rebut the petitioner's claim that the exemption is countervailable since it applies to capital inputs not consumed in production. With regard to VAT exemptions, they note, the Department has made no distinction between physically incorporated raw materials and capital equipment incorporated in the form of allocable depreciation expense (citing to, *inter alia*, Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Countervailing Duty Administrative Review, 65 FR 13368 (March 13, 2000)). Finally, the respondents note that, since the Department found no benefits under the program in the POI, the petitioner's argument to adjust the sales denominator is moot.

*Department's Position:* As we found in the preliminary analysis, the VAT is a consumption tax which the company merely conveys to the government, ultimately paying nothing, because it is the final consumer who actually shoulders the tax burden. Specifically, consistent with the Department's findings in Thai Hot-Rolled Steel and other prior decisions as cited to in the preliminary analysis, we found that the company does not benefit from the VAT exemption, and that any time-value-of-money benefit deriving from the time difference between tax incidence at importation and tax recovery at reconciliation was insignificant. The petitioner has not

presented new evidence or information to indicate that the ROK VAT exemption program did not operate in the same manner as those previously determined not to confer a benefit, i.e., as in Thai Hot-Rolled Steel and the other proceedings cited to in the preliminary analysis. Given the mechanics of how the VAT operated, i.e., that the tax burden is with the consumer, not the producer, we find that the requirements of 19 CFR 351.518(a) regarding indirect taxes on inputs not consumed in production, as cited to by the petitioner, are inapplicable. We also note both the petitioner's reliance on Cold-Rolled Steel and the respondents' observation that the Department lacked adequate information on the VAT program in that case. We agree with the respondents on this point and find that the decisions in Thai Hot-Rolled Steel and the other proceedings cited to in the preliminary analysis provide the proper precedents in this case. Therefore, we continue to find that neither SEC nor Hynix received a countervailable benefit under this program during the POI.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE        \_\_\_\_\_        DISAGREE        \_\_\_\_\_

\_\_\_\_\_  
Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)