

ANNEX C

REBUTTAL SUBMISSIONS OF PARTIES

Contents		Page
Annex C-1	Executive Summary of Korea's Rebuttal Submission	C-2
Annex C-2	Executive Summary of the European Communities' Rebuttal Submission	C-12

ANNEX C-1

EXECUTIVE SUMMARY OF KOREA'S REBUTTAL SUBMISSION

(4 December 2004)

INTRODUCTION

1. Although this case involves a complex and extensive factual record, at its core this case is about assessing the WTO consistency of the actions by the EC authorities. Korea believes that the EC has imposed a punitive countervailing duty that does not comply with EC obligations under the *SCM Agreement*.

I. INJURY ISSUES

A. THE EC MISINTERPRETS ARTICLES 15.1 AND 15.2 OF THE *SCM AGREEMENT* AND THE STANDARD OF REVIEW

2. The EC argues that the *only* obligation set forth under Articles 15.1 and 15.2 is that the national authority "examine" and "consider" the evidence. To the contrary, to satisfy the obligations of Article 15.1 and 15.2, the investigating authority must demonstrate that its determination is, in fact, based on *positive evidence* and reflects *objective examination*. Moreover, the Panel must be allowed to examine whether the evidence on which a determination is based is credible. Verifiable facts are not necessarily positive evidence of injury, and an examination of incomplete or inadequate facts does not make an examination objective.

B. THE EC'S FINDINGS ARE INADEQUATE UNDER BOTH ARTICLES 15.1 AND 15.2

1. **The EC's finding of a significant increase in imports is not supported by positive evidence or objective examination**

3. The EC argues that because the EC did not make a specific finding that LGS received subsidies, it could not take into account LGS' EC shipments during 1998 and 1999. The EC's proposed justification makes absolutely no sense. The issue is whether the volume of subsidized imports increased over time. The proper way to analyze the volume of subsidized imports from Hynix over a time period that pre-dates the merger of Hyundai Electronics and LGS and the existence of Hynix is to combine the imports of Hyundai Electronics and LGS in the time period before Hynix. Otherwise, there can be no proper "apples-to-apples" comparison. The EC had LGS data, it just declined to undertake an objective analysis.

4. The EC also provides no rationale why a finding of an *absolute* increase in imports would constitute positive evidence of a "significant increase" within the meaning of Article 15.2 when even the EC understood that a key characteristic of the DRAM is that the number of bits supplied by all producers dramatically increases every year. What is important when analyzing the volume of DRAMs shipments is to examine the increased shipments *relative* to consumption and relative to other suppliers. An absolute increase, by itself, says very little.

5. The evidence before the EC demonstrates unequivocally that, when analyzed properly, Hynix' market share *did not increase at all*, but rather decreased over the period examined. Moreover, based on an objective examination, the increase of value and units was also not significant even if the merger effects with LGS were not properly considered. Finally, even if the EC's analysis of the volume of subsidized imports somehow complied with Article 15.2, the lack of positive evidence and objective examination means that the EC has still violated Article 15.1.

2. The EC's finding of significant price undercutting is not supported by positive evidence or objective examination

6. The EC found competition in the DRAM market takes place largely on price. Yet, the evidence showed that Hynix steadily lost market share in the EC market from 1999 through 2001, the years prior to and including the year in which Hynix allegedly benefited from subsidies. This steady loss of market share cannot be reconciled with the EC's own observations regarding price undercutting. Although the EC claims that "it is quite *possible* for a company to be price undercutting, but losing market share for other reasons," it never provides any examples of such "other reasons". More importantly, the EC does not point to any record evidence that such "other reasons" were, in fact, behind Hynix' decreased market share. Such speculation does not satisfy the obligations of Article 15.1 and Article 15.2.

7. The EC defends its flawed price comparison methodology – comparing Hynix' monthly average prices with individual daily prices for Community producers – with a truism that Article 15.2 does not specify any particular methodology to be used to analyze underselling and price effects. But the EC must demonstrate why its approach is correct, and the Panel must determine whether the EC's conclusion of significant price undercutting is based on positive evidence.

8. Finally, even if the Panel believes that the EC somehow complied with Article 15.2 in its pricing analysis, it must still assess whether the EC pricing analysis in this case meets the independent obligation under Article 15.1. For the reasons stated above, Korea submits that the EC did not meet that obligation.

C. THE EC DID NOT ADEQUATELY CONSIDER THE CONDITION OF THE DOMESTIC INDUSTRY

9. Article 15.4 of the *SCM Agreement* establishes that the national authority must examine all of the enumerated injury factors. But the EC did not address wages, a specific factor under Article 15.4, and it did not make sufficient data available to be able to analyze what a proper analysis of "wages" would have produced. The EC also effectively states it does not have to consider statements of its own domestic industry that have a direct bearing on the Article 15.4 factors. Korea finds this position problematic, as it provides for no accountability.

10. Contrary to EC claims that the "economic downturn" in the DRAM market is "a question of causation rather than assessing the condition of the domestic industry," the DRAM business cycle is an overarching consideration that should inform an objective assessment of more discrete economic factors. Yet, nowhere does the EC actually address this cycle alone, or as context in understanding other economic factors.

11. Finally, Korea reiterates that the EC has not explained adequately why just three of 13 enumerated factors should compel its conclusion that the domestic industry was suffering material injury. While an objective examination of the facts and a reasoned explanation of the analysis would include such consideration, we find nothing in the EC's determination to this end. It is inadequate under Article 15.4.

D. THE EC FAILS TO EXPLAIN HOW ITS DETERMINATION SATISFIES THE LEGAL REQUIREMENT TO ESTABLISH A CAUSAL RELATIONSHIP AND TO SEPARATE AND DISTINGUISH OTHER FACTORS

1. **The EC has failed to show a causal relationship**

12. The EC injury analysis is premised in large part on an erroneous and inappropriate finding of an absolute increase in subject imports, with or without including LGS. Even if this approach complies with Article 15.2, this approach does not comply with Article 15.5 read in light of Article 15.1. And even if Article 15.5 were read so narrowly as to permit a finding of causal relationship in this situation, the analysis is still not objective, and would at the very least represent another aspect of the EC determination's that is inconsistent with Article 15.1.

13. The evidence before the EC demonstrated that there was no correlation between the trends in Hynix's market share and either the domestic industry's market share or the domestic industry's financial performance. The EC has therefore not demonstrated the requisite causal relationship required by Article 15.5.

2. **The EC did not properly separate and distinguish causes**

14. The EC's *Definitive Regulation* was inconsistent with the requirements of Article 15.5 because the EC did not separate and distinguish the injurious effects of other factors. The EC erroneously dismissed the role of the drop in demand for 2001, ignoring compelling evidence by every industry observer that the drop in demand, along with the accompanying "inventory burn," were critical factors for understanding the domestic worldwide drop in prices in 2001. The EC ignored evidence on changes in relative capacity that confirmed the dominant role of other suppliers who increased their capacity much more than Hynix. Although the EC tried to address the role of unsubsidized imports, it either ignored or distorted the key evidence.

15. The standard imposed by Article 15.5 does not allow the EC simply to assert its conclusions. The EC was required to explain how it ensured that the injurious effects of the dramatically slowing of demand were not included in the assessment of the injury ascribed to subsidized imports. Because the EC's determination does not do this, the determination is inconsistent with Article 15.5 of the *SCM Agreement*.

II. **SUBSIDY ISSUES**

A. THE EC'S INTERPRETATION AND APPLICATION OF "FACTS AVAILABLE" IS INCONSISTENT WITH ARTICLE 12.7

1. **A responding party does not bear the burden and potential consequences of an investigating member's ambiguity**

16. The EC believes facts available are warranted in situations where a responding Member failed to anticipate what the investigating Member considered to be "necessary information". This approach is untenable. The investigating Member must define the "necessary information" and adequately communicate its expectations to the responding Member. To find otherwise would force a responding Member to bear the burden and potential consequences of an investigating Member's ambiguity or failure to request what it considers to be "necessary information".

2. Article 12.7 is a gap filler, not a punitive measure, nor a substitute for the facts on the record

17. The EC provides no textual basis for concluding that the purpose of Article 12.7 can only be for the purpose of drawing adverse inferences. Indeed, the Agreement text supports just the opposite conclusion. In this regard, Annex V of the *SCM Agreement* provides important context for the interpretation of Article 12.7, consistent with Article 3.2 of the DSU. Specifically, paragraph 7 of Annex V explicitly contemplates the use of adverse inferences, but Article 12.7 is silent. Moreover, paragraph 6 of Annex V distinguishes "evidence available" to a Member from the application of adverse inferences, which remains the purview of the panel. It would follow, therefore, that "facts available" is also distinct from adverse inferences, since Article 12 of the *SCM Agreement* does not otherwise provide for the application of adverse inferences.

3. The EC does not justify either the application or extent of application of "facts available"

18. The EC wrongly applied facts available in a number of instances. With respect to the Economic Ministers' documents, the EC's presumption that the documents prove entrustment or direction colours its perspective with respect to whether the Government of Korea ("GOK") withheld these documents. But a decision to apply facts available should not be driven by the EC's self-serving interpretation of "entrusts or directs". The EC must consider whether the request for information could be interpreted differently. Even assuming the EC was entitled to apply facts available and adverse inferences, the documents should not become an excuse to impugn all financing to Hynix. Yet that is precisely what happened in this case.

19. Similarly, with respect to the 10 March attendance of an FSS official at a Hynix creditor council meeting, the EC chose to penalize the GOK based on its own self-interested view of the weight to be accorded that attendance in terms of entrustment or direction, rather than looking objectively at the circumstances of its request for information and/or balancing the interests of Korea. It should not be the basis for the EC's application of facts available, particularly in a punitive manner. Here again, the EC authorities drew overbroad inferences, using the attendance as an excuse to attack financing completely unrelated to the meeting.

20. The EC also distorts the facts surrounding the Arthur Andersen report. The EC never indicated that Hynix was not cooperating with respect to the report, never asked for a more extensive excerpt from the report, and never sought to avail itself of the opportunity to review the contents of the report while at verification. Only in the Final Disclosure Document did the EC raise the issue. The EC's actions were unreasonable, punitive, and inconsistent with its obligation under Article 12.7 to rely on "facts," not arbitrary adverse inferences.

21. Finally, the EC misstates the facts with respect to Citibank. It was the EC, not Citibank or Hynix, that failed to act in good faith. Given all the efforts by Citibank to provide requested information while remaining in compliance with its own internal regulations, Citibank cannot reasonably be held as non-cooperative. Again, the only rationale the EC offers for applying facts available in this instance is that Citibank's assertions could not be verified. This self-serving description of the facts does not begin to detail what really happened. The EC's conduct was neither objective nor reasonable.

B. ARTICLE 1.1(A)(1)(IV) IMPOSES AFFIRMATIVE LIMITS ON THE SCOPE OF "ENTRUSTS OR DIRECTS"

1. The meaning of "entrusts or directs" imposes legal limits

22. The Agreement text is the foundation of every Member's obligations; it is not to be given effect only when it suits a Member's purpose. Yet, the EC chooses to ignore the core meaning of "entrusts" and "directs" as provided in Article 1.1(a)(1)(iv). The core meaning of "entrusts" requires that there be something to be entrusted. When a bank makes a loan or forgives a debt that is not pursuant to some government programme, there is nothing to be entrusted. Similarly, the core meaning of "directs" is the concept of requiring something, or giving an order. Any doubts the EC attempts to raise through alternative English definitions of these terms, can be resolved by referring to the French and Spanish texts of the same provision, both of which use a word that translates into English as "order".

23. The EC tries to downplay the relevance of *US-Export Restraints*, which provided a careful analysis of the "entrusts or directs" standard, by arguing that the panel in that case considered a different factual context. But this effort to distinguish *Export Restraints* fails on two levels. First, the panel in that case was clearly offering its own reading of the specific text at issue here. The factual context may have been different, and so the application of the standard to those facts may differ. But the panel first developed its textual interpretation of the meaning of "entrusts or directs". Second, that panel also wisely explained the problems with an overbroad reading of "entrusts or directs". The panel noted that "governments intervene in markets in various ways," and distinguished carefully between such interventions and actions that by their nature rise to the level of "entrusts or directs".

2. December 2000 Syndicated Loan

24. The EC claims that the GOK ordered KEB, KFB and KDB to participate in the December 2000 Syndicated Loan. At the same time, the EC brushes aside the fact that a number of other private bodies were also involved that did not require any lending limit waivers. Their participation reflects a choice to lend money to Hynix. Choice is effectively the antithesis of entrustment or direction. Moreover, nothing in the EC record reflects a government command or even a suggestion that KEB, KDB and KFB *lend* money to Hynix. Rather, the means were provided, as contemplated under Korean law, for those banks *to lend* to Hynix.

25. The EC seeks to remedy its argument with the notion that the FSC conferred a valuable right on KEB and KFB through the waivers it granted, not unlike the stumpage rights considered by the Appellate Body in *US – Softwood Lumber*. But the facts are very different. The Appellate Body in that case found that by granting a right to harvest standing timber (which the government owns), a government provided that standing timber to timber harvesters. However, it is simply not the same to state that by removing a lending restriction on a bank, a government provides a loan. The government does not provide the loan. Indeed, it never even owned the funds that comprise the loan. The bank provides the loan. The loan would only be a financial contribution if the government issued a command to the bank to provide the loan.

3. KEIC insurance

26. If the EC intends to treat the KEIC insurance as a grant in the total value of the D/A credit line, as opposed to the methodology prescribed in Annex I(j) of the *SCM Agreement*, the EC must demonstrate that Hynix' creditors were entrusted or directed to provide the D/A financing. But the EC merely states that the banks provided the financing because of the KEIC insurance. The existence of the KEIC insurance does not amount to entrustment or direction of the banks. Nor does it matter whether KEIC is a public body. KEIC provided insurance, not D/A financing. The banks provided D/A financing. At most, the EC has identified some effect, not any evidence of entrustment or

direction. The panel in *US-Export Restraints* rejected an "effects test" for entrustment or direction, and so should this Panel.

4. KDB programme

27. The EC takes the position that it may countervail the entire amount of bonds refinanced under the KDB as a grant provided by a public body. This position is illogical in light of the nature of the programme, including the burden sharing explicitly contemplated by the programme. The mechanics of the programme required KDB to be the initial underwriter of the refinanced bonds, but many other creditors were immediately involved through their own financial commitments and it was understood that they would be immediately involved, along with other investors in the CBO/CLO programme. Thus, whatever the EC's position with respect to KDB, given the facts of the programme the EC was required to show that these other creditors and investors were entrusted or directed by the GOK. The EC did not meet its evidentiary burden. For these reasons, the EC determination with respect to the KDB programme was inconsistent with its obligations under Article 1.1(a)(1)(iv).

5. The May 2001 restructuring package

28. The EC's findings with respect to the May restructuring are premised largely on the alleged non-cooperation of the GOK, Hynix and Hynix's creditors. It brushes aside fairly decisive evidence of Hynix' creditors making rational decisions and protecting their decisions through the financing they formulated. In particular, nowhere does the EC mention the GDR when it addresses financial contribution and the May 2001 restructuring package. Instead, the EC argues the absence of financing, when the GDR provided such financing.

29. The EC's only real "evidence" of entrustment or direction is little more than the fact that an FSS official's attendance at a March 2001 meeting of creditors and the fact that the GOK holds ownership in some of the banks involved. But, Korea does not consider the fact that an FSS official attended a meeting of creditors at their request to witness prior commitments made by the creditors to be evidence of entrustment or direction. Likewise, government ownership is not a substitute for entrustment or direction. The mere fact that the GOK may own some or all of a particular bank does not, itself, demonstrate that the bank was entrusted or directed by the GOK to provide financing to Hynix. For these reasons, the EC has failed to show entrustment or direction of the May restructuring package, inconsistent with its obligations under Article 1.1(a)(1)(iv).

6. The October 2001 restructuring package

30. With respect to the October 2001 restructuring, the EC stresses the degree of government ownership of the banks. Again, such evidence simply cannot establish entrustment or direction. The EC also turns to other insufficient evidence to establish entrustment or direction. First, it cites to banks taking into account public policy considerations. This approach reflects a flawed understanding of the legal standard. There is nothing unusual about banks taking into account a wide range of factors when making a loan. Second, the EC also alleges a "pattern of continuous involvement," but in doing so misstates the facts. Since entrustment or direction requires some affirmative government action, the analysis must focus on specific transactions, not some generalized "involvement". Third, the EC makes much of the statement by the Korean Deputy Prime Minister, but again misinterprets the evidence. At most, this statement represents an effort to influence, and does not provide evidence of entrustment or direction. Finally, the EC then turns to an analysis of evidence for several specific banks. This discussion of "evidence," however, never provides any credible basis to find entrustment or direction. For these reasons, the EC's findings with respect to the October 2001 restructuring are inconsistent with Article 1.1(a)(1)(iv).

C. THE EC'S BENEFIT DETERMINATION IS INCONSISTENT WITH ARTICLE 1.1 AND ARTICLE 14

1. The EC's benefit analysis must fail where it has not shown financial contribution

31. As a legal matter, if the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then the EC findings on benefit must also fail. A countervailable subsidy requires a financial contribution, a benefit conferred, and a benefit that is specific. Although it may be possible to identify a financial contribution in the absence of benefit or specificity, where a financial contribution is not found, it is not possible under the construction of the Agreement to find either benefit or specificity.

2. The EC advances an incorrect interpretation of the relationship between Articles 1.1 and 14

32. Korea has properly challenged both the finding and measurement of benefit under Articles 1.1(b) and 14 of the *SCM Agreement*. The EC claims that no definition of "benefit" exists within the *SCM Agreement*, and that Article 14 is limited to the calculation of the amount of a subsidy. The EC overlooks the fact that "benefit" is itself a definitional term under Article 1.1 and an essential part of finding a subsidy. Thus, read in light of Article 1.1, Article 14 provides very clear guidance on what a subsidy is not. Under Article 1.1, no subsidy exists if a benefit is not conferred. Paragraphs (a)-(d) of Article 14 each describe specific instances where particular conduct "shall not be considered as conferring a benefit". In other words, Article 14 is not just about calculating the amount of benefit, but serves an important role in defining whether a subsidy even exists, consistent with the requirement provided under Article 1.1.

3. A member's methodology for calculating benefit must be consistent with the principles set forth in Article 14

33. Article 14 applies very concrete terms focused on the "usual" or "prevailing" conduct in the market under investigation, or "comparable" conduct. With respect to the amount of benefit, Article 14(b) and (c), in particular, state that the amount of benefit conferred "shall be the difference" in the costs of the instruments compared. With respect to the provision of goods, Article 14(d) requires a comparison of the goods or services provided versus the adequate remuneration for such goods or services, which "shall be determined in relation to prevailing market conditions".

34. In *US – Softwood Lumber*, the Appellate Body found that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*". An authority may do so only when "it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods". Moreover, having established the issue of market distortion, an authority must still validate an alternative benchmark.

35. The EC claims that the Appellate Body's holding in *US – Softwood Lumber* is distinguished by the fact that it only dealt with the language of Article 14(d), and must be restricted to Article 14(d) on that basis. But such a reading completely ignores the clear preference for primary benchmarks (i.e., those present in the market under investigation) found in the other paragraphs of Article 14. The EC cannot read out of the Agreement text words like "comparable" and "usual investment practice of private investors in the territory".

4. The EC did not and has not justified its benefit findings with respect to the individual transactions at issue in this dispute

(a) Syndicated loan

36. With respect to the Syndicated Loan, the EC failed to benchmark the KFB, KEB and KDB loans against the loans of the other seven banks involved. Moreover, it is clear in comparing the EC's provisional and definitive regulation that the EC simply confused the distinction between financial contribution and benefit. When a provisional assessment provides an analysis of benefit that demonstrates no benefit, and the authority changes that determination solely on the basis of allegations related to entrustment or direction, there is an obvious problem. Even if KEB, KDB, and KFB were actually ordered to participate in the Syndicated Loan, that fact does not answer the question of whether the participation of seven other banks can serve as a benchmark. Thus, the EC failed to measure what was received by Hynix and what was available to Hynix on the market, inconsistent with its obligations under Articles 1.1(b) and 14(b).

(b) KEIC insurance

37. The EC found that KEIC insurance was an export subsidy. As an export subsidy, that insurance would be governed by Annex I of the *SCM Agreement*, and namely paragraph (j). The measure of benefit as prescribed by paragraph (j) is the difference between the premium paid and the premium required to cover the long-term operating costs and losses of the programme. The EC did not measure benefit on that basis. The EC has also not responded to a more fundamental calculation issue that relates to the nature of D/A financing. In short, it is a credit facility allowing for short-term financing (typically 90 days) for export transactions. It never constituted a loan for USD600 million, which was the credit ceiling of the facility. In any case, the EC has not appropriately measured what was received with what was available on the market.

(c) KDB programme

38. The EC goes to great lengths to discredit potential benchmarks for and other evidence suggesting the commercial basis of participation in the KDB programme by Hynix creditors and investors. But the EC does not even attempt to take on the June 2001 USD 1.25 billion GDR and the reality that international investors were willing to commit significant capital to Hynix, not unlike the commitment made by Hynix creditors and investors through the KDB programme and related CBO/CLO programme. Ultimately, the EC should not have found that the KDB programme constituted a grant in the amount of the bonds refinanced under the programme. Capital was available to Hynix such that benchmarks could have been utilized, consistent with the obligation to measure what was received against what was available on the market under Articles 1.1(b) and 14.

(d) May 2001 restructuring

39. The EC's treatment of the May 2001 restructuring suffers from the same fatal flaw as its treatment of the syndicated loan, and namely the use of evidence concerning financial contribution as a substitute for benefit. In a proper analysis, The EC should have compared the convertible bond interest rates with applicable market interest rates, consistent with Articles 1.1(b) and 14 of the *SCM Agreement* and *Canada – Aircraft*. By treating the alleged convertible bond purchase benefit as a grant and thus failing to conduct the appropriate comparison of what was received versus what was available on the market, the EC failed to meet its obligations under the Agreement.

(e) October 2001 restructuring

40. The EC's benefit analysis of the October restructuring applies rigid profit maximization assumptions without any objective consideration of the underlying facts. It considered Hynix'

financial condition in a vacuum without considering the DRAM market in which Hynix operated or the circumstances surrounding its existing investors. In sum, the EC did not develop any appropriate benchmark for the October restructuring, and instead improperly assumed a grant. It justified neither action, inconsistent with its obligations under Articles 1.1(b) and 14 to measure what was received with what was available on the market, as further elaborated by the Appellate Body in *US – Softwood Lumber*.

D. THE EC HAS NOT JUSTIFIED MAINTAINING ITS CALCULATION ERRORS

41. The EC does not justify its calculation errors. With respect to the KDB programme, the EC argues that Hynix never raised the fact that the EC was effectively double counting benefit from the KDB Programme bonds by not deducting those bonds swapped for convertible bonds as part of the May 2001 restructuring. This is incorrect. The record plainly shows that Hynix specifically warned the EC about this error in its 30 June 2003 comments on the EC's Final Disclosure. The EC's failure to correct the error plainly identified by Hynix is inconsistent with Articles 1.1(b) and 14.

42. Another fundamental error in the EC's approach to the KDB programme was its treatment of interest-bearing instruments as grants. The EC now places all the burden on Korea, arguing that Hynix never claimed that interest should be deducted from the KDB debenture calculation. But Hynix's argument was that the grant methodology should have never been applied in the first place. The EC should have at least considered the matter and deducted the interest paid.

43. The EC also refuses to acknowledge the problems inherent in its grant methodology when it comes to the October 2002 restructuring programme, determining that loans, with interest terms and interest paid, are grants. Because the EC never took the interest payments into account, it did not accurately establish the alleged benefit to Hynix, inconsistent with Articles 1.1(b) and 14 of the *SCM Agreement*.

44. The EC's position on its use of an erroneous value with respect to the amount of debt rolled over as part of the October 2001 restructuring is perhaps its most indefensible argument. Hynix alerted the EC to the error in the total amount being used. The EC's only apparent defence is that Hynix should not have been surprised because it responded to Hynix' comments and informed Hynix what value was being used. That statement is not a defence to the error.

E. THE EC SPECIFICITY ARGUMENTS ARE INADEQUATE

45. As a legal matter, to the extent that the EC's findings on financial contribution are found inconsistent with the *SCM Agreement*, then its findings on specificity must also fail. Even if financial contribution is presumed, its specificity findings are inconsistent with Articles 1.2 and 2.

46. With respect to the KDB Programme, the EC suggests that it considered all the factors outlined in Article 2, but this is not obvious in the lone paragraph cited from its *Provisional Regulation*. For these reasons Korea, reiterates its claim that the EC acted inconsistently with its obligations under Article 1.2 and 2 in finding the KDB Programme specific.

47. The EC's arguments in support of its specificity findings with respect to the May and October restructuring packages are so narrow as to render the specificity requirement virtually meaningless. Many companies had debt restructured under the same "work-out" framework used by Hynix and its creditors. The EC ignores these facts. Its findings with respect to the transactions involved in the May and October restructuring packages are therefore inconsistent with Articles 1.2 and 2 of the *SCM Agreement*.

F. THE EC'S DETERMINATION IS INCONSISTENT WITH ARTICLES 19.4, 10 AND 32.1 OF THE *SCM AGREEMENT* AND ARTICLE VI:3 OF GATT 1994

48. In choosing to use Hynix' unconsolidated sales, the EC confuses the scope of the investigation (DRAMs) with the question of which product and entity benefited from the alleged subsidies. It is not because the EC investigated the DRAMs market that subsidies granted to Hynix can automatically be viewed as benefiting only Hynix as a parent entity and only with regard to DRAMs. By taking this approach, the CVD duties imposed by the EC exceed the limits imposed by Article 19.4 of the *SCM Agreement* and Article VI:3 of GATT 1994.

49. Moreover, every violation of the specific provisions of the *SCM Agreement* identified above triggers a parallel violation of Articles 10 and 32.1 once the decision to impose duties was made.

III. CONCLUSION

50. For all of these reasons, we respectfully request the Panel to make the findings set forth in paragraph 676 of Korea's First Submission.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN COMMUNITIES' REBUTTAL SUBMISSION

I. FACTS, EVIDENCE, BURDEN OF PROOF

1. The EC would like to re-iterate the following points.
2. The burden of proof in these Panel proceedings is on Korea.
3. The investigating authority relied on the totality of the facts and evidence available.
4. The facts are as set out in the regulations, which have been summarised by the EC in its pleadings.
5. Hardly any of the facts are contested by Korea. There is no basis for this Panel to make any findings in relation to uncontested facts. There is no basis for this Panel to enquire into the evidence on which the investigating authority relied in order to substantiate uncontested facts.
6. Where Korea does contest facts, it generally does so on the basis of bare assertions. It does not adduce any evidence to support its assertions. In this scenario, Korea's assertions must be rejected; there is no basis for this Panel to make any findings in relation to such facts; and there is no basis for this Panel to enquire into the evidence on which the investigating authority relied when establishing such facts.
7. In short, the starting place for this Panel's considerations is not the evidence relied on by the investigating authority, it is the evidence relied on by Korea in these proceedings, if any. Absent any such evidence, Korea has failed to make out any case at all, and that is an end of the matter.
8. If Korea does adduce evidence merely equivalent to the evidence on which the investigating authority relied, this Panel must still find in favour of the EC. To succeed, Korea must adduce evidence that establishes a *prima facie* case, that is not rebutted by the record evidence relied on by the EC investigating authority.

II. THE WHOLE IS MORE THAN THE SUM OF THE PARTS

9. The views that Korea continues to peddle reflect basic and alarming egregious legal errors. The moment has probably come to take a step back from the thicket of facts, to reflect on, and to get straight, a couple of basic matters.
10. Articles 1 and 14 of the *SCM Agreement* refer to a subsidy, a financial contribution, a benefit. All in the singular.
11. The *SCM Agreement* contains no express rule about the investigation period, and the choice of the year 2001 in this case, selected because it coincides with the most recent financial year in Korea prior to initiation, is not seriously contested by Korea.

12. Having decided what the investigation period will be, an investigating authority goes about gathering the evidence and facts on the basis of which it will make its determination. Typically, as in the present case, the investigating authority will gather hundreds or even thousands of facts.

13. Having gathered the facts, an investigating authority will decide how to structure and characterise them. Nothing in the *SCM Agreement* would prevent an investigating authority from considering, in the same investigation, more than one subsidy, more than one financial contribution, more than one benefit. And the investigating authority can, if it wishes, *analyse the facts* in this *compartmentalised* way. But nothing in the *SCM Agreement* obliges an investigating authority to proceed in that way. Articles 1 and 14 are drafted in the singular. If an investigating authority proceeds on the basis that there is one subsidy, one financial contribution and one benefit, *even if broken down into different elements*, neither a complainant nor a Panel can simply assume that, in doing so, the investigating authority acts inconsistently with Articles 1 and 14 of the *SCM Agreement*. There is simply no basis for such an assumption, and to assert that there is a breach of the *SCM Agreement* solely on that basis would certainly be legally erroneous.

14. In the context of the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), the Appellate Body has made it clear, in the *EC-Bed Linen* case and other cases, that an investigating authority makes a (singular) finding of dumping in relation to a (singular) product concerning a (singular) domestic industry.

15. What did the investigating authority do in this case? Evidently, it broke down the hundreds of facts it had gathered during the investigation into a number of elements, in order to facilitate its task. In doing this, it examined, on their merits, the facts relating to individual programmes and banks. However, at the same time, the investigating authority repeatedly stated that it based its determination on the *totality of the evidence and facts available*. The investigating authority made this statement with such frequency that it simply cannot be ignored by this Panel. What does it mean?

16. It means that, in effect, the investigating authority *also considered the whole picture*. One big picture. In the singular. That also explains why the EC eventually imposed one countervailing duty – not five. This is why the investigating authority considered that all the facts and evidence that go, for example, to the question of financial contribution were equally or almost equally relevant in relation to all the elements of the subsidy - from the Syndicated Loan through to the October 2001 Rescue Package. This Panel must not allow itself to be misled by Korea's attempts, based on certain aspects of the mere form of the measure at issue, to deconstruct the investigating authority's determination into something it is not (several legally *compartmentalised* determinations). This Panel must look beyond the form of the measure at issue, and judge what the investigating authority actually did – i.e. in addition to an examination of the facts relating to individual programmes and banks *also* an examination and reliance on the totality of the facts and evidence available.

17. Thus, there is a major legal problem when Korea invites this Panel to make its findings by considering, for example, whether a certain limited category of facts and evidence – limited by Korea – supports the investigating authority's determination, *vis a vis* one element of the subsidy. **That simply does not take into account everything that the investigating authority did.** This Panel must consider what the investigating authority actually did.

18. To put the matter another way. Korea would have this Panel, without any consideration of the relevant legal issues, impose on the facts gathered by the investigating authority a sort of compartmentalised template; to view them from a perspective different from that used by the investigating authority; to apply a methodology different from that applied by the investigating authority. In short, Korea invites this Panel to re-do the assessment, based on Korea's own methods and approaches, different from those used by the EC, without any further explanation. This Panel is not empowered to do that, and it would constitute a grave legal error.

19. A threshold legal question before this Panel is therefore this : was the investigating authority entitled to rely on the totality of the facts and evidence available? If the answer to this question is yes (and the EC is certain that the answer is yes), then all or almost all of Korea's claims and arguments may be dismissed forthwith, because they simply relate to something quite different from what the investigating authority actually did.

20. The first and most obvious point is : why not? What provision of the *SCM Agreement* obliges an investigating authority to proceed otherwise? Korea cites none because there is none. In many respects, that observation is sufficient to dispose of the case.

21. If, contrary to what an investigating authority actually did, a complainant in DSU proceedings or for that matter a Panel begins to deconstruct and atomise the totality of the facts and evidence available to the investigating authority, where does this process stop? Especially in a case such as the present one, which involves such extraordinary factual detail and complexity.

A. DOWN TO THE LAST WON

22. Let us first consider the problem in documentary or material or substantive terms. Take, for example, something like the KEIC Guarantee. The investigating authority viewed this as one element of the subsidy to Hynix. Korea essentially invites this Panel to assess it as if it were in a separate and isolated legal compartment from the other elements of the subsidy. Korea even goes further, and tries to get the Panel to assess it in relation to each bank (although this reflects a basic misunderstanding of the analysis conducted by the investigating authority). But why stop there? Why not deconstruct the facts even further and look at every single transaction that benefited from the KEIC Guarantee in a legally isolated compartment? Then presumably Korea would argue that the investigating authority was obliged to show GOK direction in relation to each specific export transaction (no doubt there are hundreds or even thousands of them). Why not down to each last won? Indeed, to follow Korea's logic would be to raise the evidential threshold so high as to render circumvention of the *SCM Agreement* a simple matter. There is simply no basis in the *SCM Agreement* for Korea, or for that matter this Panel, to impose its view about what single approach must, in all cases, be the correct one.

B. THE TIME IS NOW

23. One may also consider the matter from a temporal perspective. Korea assumes that a fact more generally associated with an earlier part of the investigation must be considered irrelevant to a later part of the investigation. Why? What provision of the *SCM Agreement* does Korea refer to? It is perfectly possible, for example, that a subsidy is granted at the beginning of the investigation period, whilst material injury only emerges towards the end of the investigation period. Nothing in the *SCM Agreement* prevents an investigating authority from relating these facts to each other – or indeed from finding a *causal link* between them. Why should the situation be any different for other facts, such as those relating to financial contribution?

24. Under the *Anti-Dumping Agreement* (which Korea has agreed may be relevant context), all other things being equal, domestic transactions, on the basis of which normal value is established, might be situated towards the beginning of an investigation period, and export transactions towards the end – there is no problem. Article 2.4 of the *Anti-Dumping Agreement* requires an investigating authority to make the comparison “at as nearly as possible the same time” – and the same time for these purposes, absent problems such as a high inflationary environment or exchange rate issues, may well be the whole year of the investigation period, which for this purpose may be treated as a *time singularity*. The *SCM Agreement* contains no equivalent provision because there is no such comparison under the *SCM Agreement* – but the basic point remains the same : having selected its investigation period (which is not seriously contested by Korea in this case), nothing in the *SCM Agreement* obliges an investigating authority to make the kind of temporal sub-divisions that Korea advocates in this case.

25. In this case there were numerous respects in which the various elements of the subsidy overlapped with each other, as outlined in some detail in the regulations and the EC's first written submission, and as otherwise appears from the record.

C. HERDING

26. Similar comments may be made regarding Korea's attempts to persuade this Panel to consider the situation of each bank in an isolated and compartmentalised way. That is not what the investigating authority did, and nothing in the *SCM Agreement* obliges it to proceed in that way.

27. Does a shepherd and his dog direct a herd of sheep? Yes. Does a shepherd entrust his dog with the herding of his sheep? Yes. In this case, the totality of the facts and evidence shows that the GOK did everything it could, through legislation and through its behaviour, to keep the banks together, as one unit, for as long as possible. That no doubt explains the kind of threats issued to banks like KFB and Koram who had the temerity to attempt to step out of line, particular in the early stages. It also no doubt explains why the CFICs were structured in such a way as to keep all the banks in the fold, for as long as possible. In these circumstances, an investigating authority is perfectly entitled to base itself on facts and evidence about entrustment or direction of the herd as a whole. Nothing in the *SCM Agreement* obliges an investigating authority to consider the situation in relation to each animal in the herd in an artificially isolated and compartmentalised way.

28. Indeed, in this respect, the situation is highly reminiscent of the classic cartel situation, in which, for example, it is discovered that the sales directors of a dozen competitors met clandestinely in a hotel. They all protest innocence, but written evidence is found that indicates that more than half of them were engaged in price fixing. There is also a wealth of incriminating evidence suggesting the same was more than likely the case with respect to the others. It is perfectly reasonable that, on the basis of the totality of the facts and evidence available, the remaining companies may also be considered to have participated.

D. AND THE GOVERNMENT SAID ROLL-OVER

29. As the EC has repeatedly explained, in this case the money flowing into Hynix was essentially being continuously rolled over from one element of the subsidy to another, rather like some vast game of pachinko, as summarised in Exhibit EC-38. In this respect, the investigating authority essentially considered that when Hynix's liabilities from earlier on in the investigation period, which were in fact never serviced, were rolled-over into liabilities towards the end of the investigation period, that also constituted good reason to view the whole picture, and make its determination on the basis of the totality of the facts and evidence available. That was an entirely reasonable manner in which to proceed, and there is no basis for any finding that in conducting its analysis in this way the investigating authority failed to comply with any obligation contained in the *SCM Agreement*.

E. THIS PANEL HAS NO BASIS TO CONCLUDE THAT THE INVESTIGATING AUTHORITY DID NOT ACT OBJECTIVELY

30. In the light of these observations, and in the light of the totality of the facts and evidence available, also as determined by the lawful operation of Article 12.7 of the *SCM Agreement*, and the resulting inferences, the EC strongly believes that the investigating authority was fully justified in proceeding as it did. Nothing in Korea's submission is capable of supporting the conclusion that, in acting as it did, in relation to this threshold issue, the EC did not act objectively, or acted inconsistently with any provision of the *SCM Agreement*.

III. THE LG SEMICON MERGER

31. Article 15.2 of the *SCM Agreement* refers to a “significant increase in subsidised imports” (either in absolute terms or relative to production or consumption in the importing Member). To determine whether or not there is an “increase”, it is necessary to make a comparison – that is, to make at least two measurements, one before and one after, and to compare them.

32. Evidently, the basic idea behind Article 15.2 of the *SCM Agreement* is to consider whether or not there is any evidence that the subsidy has had an impact on the flow of imports from a particular source. That means that an investigating authority will basically aim to catch a period before the period in which the subsidy occurred, and compare it with the period during which there was subsidisation. In this way it will be able to consider whether or not there is an increase in exports/imports coincident with the subsidy.

33. The *SCM Agreement* contains no rule about the overall time frame to be used by an investigating authority when considering this matter. In this case the investigating authority used the 4 years 1.1.1998 to 31.12.2001, which was perfectly lawful, and which is not seriously contested by Korea.

34. The *SCM Agreement* also contains no rule about how to divide the time frame up for comparison purposes. In this case the investigating authority essentially used annual periods, which was perfectly lawful, and which is not seriously contested by Korea.

35. Similarly, there is no rule in the *SCM Agreement* about the investigation period in respect of subsidy. The investigating authority chose 2001, which was reasonable and perfectly lawful, and which is not seriously contested by Korea.

36. Having established this framework, the investigating authority in this case started by considering the volume of exports/imports from the subsidised company, Hynix, during 2001, the period during which it was determined that there was a subsidy. It then looked back at imports during the preceding 3 years from the same source.

37. At this point, one may say, for the sake of the discussion, that the investigating authority was, at least in theory, faced with a choice about what it would consider “the same source” to be. One option was to look at all the imports during the earlier three year period that came from the firm Hynix (and this is what the investigating authority in fact did). A second option was, according to Korea, to look at all the imports from the *production facilities* that were under Hynix’s control in 2001, even if they were not under Hynix’s control in the earlier years. This choice is, in fact, fairly typical of the kinds of choices that investigating authorities have to make in economic law investigations.

38. Korea complains that, because the investigating authority chose the first option, it acted inconsistently with Article 15.2 of the *SCM Agreement*. Why? What provision of the *SCM Agreement* imposes any obligation on an investigating authority in this respect? There is simply no such obligation in Article 15.2 of the *SCM Agreement*. All that provision requires is that an investigating authority consider whether or not there has been an increase. If the drafters had wished to impose a particular method, they could easily have done so – but they chose not to. Korea might, in this particular case, assert that, stepping into the shoes of the investigating authority, it would have preferred one method rather than another – and the Panel might or might not agree – but that is entirely beside the point. This Panel cannot re-do the investigation. It cannot add to or diminish the rights and obligations of the Members as provided for in the *SCM Agreement*.

39. The EC takes the view, in this specific context, that great care should be exercised in “piercing the corporate veil” – an enterprise notoriously fraught with difficulty and the potential for

introducing subjectivity. In this context the EC preferred the objective test of looking at the firm Hynix and tracing its behaviour back in time. Article 15.1 of the *SCM Agreement* requires an objective examination, and the approach chosen by the investigating authority was well suited – indeed best suited – to achieving that objective.

40. The very nature of a subsidy is that, in general terms, it is typically given to a firm (such as Hynix), not to a production facility. A subsidy typically passes from the control of government to the control of the firm (in this case, Hynix), and that is the critical moment (change in control over the resource) that really matters. There is often a legal act (decision or grant or contract) between the government and the firm. In case of disagreement with the government any litigation would involve the firm (Hynix), not the production facility. This is so even if the production facility has since been sold on. Furthermore, the ultimate fate of the money depends on the decisions made by the persons then controlling the money, that is, the persons controlling the firm, not the production facility. Often subsidy is a *quid pro quo* – the money is only paid over in return for certain action by the recipient – that is, the firm, not the production facility. Often subsidies are paid to government controlled entities – precisely because in that way governments typically feel more comfortable about their chances of controlling the eventual use of the subsidy, through control of the management mechanisms of the firm.

41. There is nothing artificial or legalistic in focussing on the firm in this sense. Incorporation with limited liability is not just a formal legal concept. Limited liability is a corner stone of the development of modern business. The limited liability company is a centre of imputability in legal terms, but also in economic, accounting, business and other ways (political, financial markets). There is a raft of legislation that has been built up around this concept and it cannot be casually dismissed as “formalistic”.

42. A further critical point to take into consideration is that, in relation to the 3 earlier years, we simply do not know whether or not *any* imports were subsidised. There is no finding of subsidy. But also there is no finding of no-subsidy. Actually, if there were subsidies throughout the earlier period, that might mean that no increase in export/import volumes would be found (volume might just have been high and steady throughout the period). The injury investigation period would not have been stretched back far enough. This is a real risk in Members where there is good reason to believe that subsidy is endemic. Especially in the case of national champions that the Member has publicly indicated will not be allowed to go bust, even if they periodically hit bad times.

43. To try to avoid or reduce this risk, the injury investigation period in this case was stretched back to cover 4 years. This reflects normal EC practice. Since, at least according to Korea, companies such as Hynix are generally not subsidised on a continuous basis but only periodically, one can be reasonably sure if one goes back far enough to reach a stage in the company’s subsidy cycle when it was not being subsidised. That way, you get a fair trend analysis. Presumably Korea would not contest this. Presumably Korea would not argue that in fact Hynix was subsidised during this entire injury investigation period. The investigating authority can never be certain that it has attained its objective, but it was a reasonable assumption in this case.

44. It is this kind of uncertainty with which an investigating authority is faced when it has to decide whether to follow the firm, or the production facilities back in time. One problem if the investigating authority follows the production facilities is that this increases the uncertainty – it causes the forensic trail of investigation to bifurcate and encompass, at a given moment in time, two entirely different and separate and independent centres of imputability – totally unrelated to each other. This does not help the analysis. There is no guarantee that the other entity would not itself have been in receipt of subsidies – something that might seriously distort the trend analysis. It might well have been at a different stage in its subsidy cycle. In fact, if recently purchased, there is every chance it was in difficulty and thus in receipt of subsidies.

45. Things could get even more needlessly complicated if the tree bifurcates more than once – the investigating authority could find itself looking at several different production facilities all under different and changing control during the relevant period. Since it is simply impossible to be certain about all the circumstances, it is better to stick with the objective approach of following the firm (Hynix).

46. Furthermore, on the basis of Korea's approach, if, going back in time, one would have to follow the "production facilities", that would mean that the investigating authority would have to take account not only of those purchased, but also those disposed of or closed. For example, if Hynix had owned a very large production facility in 1999, with lots of imports to the EC, but sold or closed it in 2000, on Korea's logic, that production facility would have to be taken out of the earlier years of the calculation. We don't hear Korea arguing for that. In addition, the practical problems of getting information from companies that no longer exist and production facilities that have been sold or closed should not be underestimated. The EC finds Korea's approach over-complicated, impractical and unnecessary and rejects it – as it is entitled to do – nothing in the *SCM Agreement* obliges it to do otherwise.

IV. INSIDER OUTSIDER

47. The EC has two comments about insider investor theory.

48. The first comment is that, as outlined in the EC's first written submission, in the context of WTO law, the EC's position is that insider investor theory is wrong, and in any event nothing in the *SCM Agreement* imposed any obligation on the EC investigating authority to apply such a theory in this case. In any event, the point is largely academic, because however one views the actions of the banks, they could not in any circumstances be considered commercial.

49. The second comment is that, by repeatedly asserting that the banks acted on the basis of insider investor thinking in this particular case, Korea actually scores a spectacular own goal. Why? Because what the Korean respondents are saying is that they and Hynix were in a hole, and that all they ever did was what was commercially rational to try and get out of that hole. Leaving aside the fact that there was in reality no way back for the banks (huge losses had to be written off, as was always entirely predictable), this argument immediately begs the follow-up question : how did you get in that hole? One does not, of course, have to look very far to answer that : because of the GOK. In 1999 the GOK forced Hynix to merge with the highly indebted LG Semicon. And the banks' exposure to Hynix in mid-2001 was entirely a function of the GOK financial contributions and entrustment and direction *via* the Syndicated Loan, the KEIC Guarantee and the KDB Debenture Programme. What Korea's argument therefore demonstrates is that there are profound economic links between all the different elements of the subsidy assessed by the investigating authority with respect to 2001. In making this argument Korea is therefore effectively pleading for exactly what the EC has said all along : the need to consider the totality of facts and evidence – which is exactly what the investigating authority did in this case.

V. THE PROVISIONAL REGULATION

A. THE PROVISIONAL REGULATION NO LONGER EXISTS

50. The measure at issue is the Definitive Regulation. The Panel need only refer to the Provisional Regulation insofar as it contains statements of fact, law or analysis that are incorporated by reference, specific or general, express or implied, in the measure at issue, which is the Definitive Regulation.

51. The Provisional Regulation no longer exists. It is no longer in force or effect. It has expired – or been revoked. And there is no prospect of its re-introduction or renewal. It has not existed since

11 August 2003, when the Definitive Regulation was adopted. It did not therefore exist on 23 January 2004, the date on which this Panel was established. This Panel cannot therefore make any findings or recommendations in relation to the Provisional Regulation. Thus, all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed. At the very least, this Panel need not, and should not, make any recommendations in relation to the Provisional Regulation.

52. This view is confirmed by Article 3.3 DSU which states that the basic aim of the dispute settlement system is "the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being* impaired by measures taken by another Member." (emphasis added). Any recommendations or rulings by the DSB shall therefore "be aimed at achieving a satisfactory settlement of the matter" (Article 3.4 of the DSU) - which cannot be the case if there is no matter to settle (i.e. if the measure does not exist and is not being applied). In the same vein, Article 3.7 of the DSU provides that "before bringing a case a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

B. KOREA HAS MADE NO CLAIM PURSUANT TO ARTICLE 17 OF THE SCM AGREEMENT

53. In any event Korea has made no claim pursuant to Article 17 of the *SCM Agreement*. Absent any such claim, the Provisional Regulation must be considered consistent with Article 17 of the *SCM Agreement*, and there is therefore no basis for this Panel to find that the Provisional Regulation is inconsistent with the *SCM Agreement*. This view is confirmed by Article 17.4 of the *Anti-Dumping Agreement* (which Korea has admitted may be relevant context), according to which provisional measures may only be subject to dispute settlement if they are inconsistent with Article 7.1 of the *Anti-Dumping Agreement* (which concerns provisional measures). For this reason also all Korea's claims and arguments in respect of the Provisional Regulation must be dismissed.