VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the above findings, we *reject* Korea's claims that:

a. Japan improperly found government "entrustment or direction" of the Four Creditors to participate in the October 2001 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*;

b. Japan improperly found that the October 2001 restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

c. Japan improperly treated certain Hynix creditors as "interested parties", and improperly applied facts available and made adverse inferences, contrary to Articles 12.7 and 12.9 of the *SCM Agreement*;

d. Japan improperly found that the October 2001 and December 2002 restructurings constituted "direct transfer[s] of funds", contrary to Article 1.1(a)(1)(i) of the *SCM Agreement*;

e. Japan improperly determined that the October 2001 and December 2002 restructurings were specific, contrary to Article 2 of the *SCM Agreement*;

f. Japan improperly failed to determine whether or not a benefit continued to exist following changes in the ownership of Hynix as a result of the October 2001 and December 2002 restructurings; and

g. Japan's determination improperly failed to demonstrate that the subsidized imports were, through the effects of subsidies, causing injury, contrary to Article 15.5 of the *SCM Agreement*;

8.2 In light of the above findings, we *uphold* Korea's claims that:

a. Japan improperly found government "entrustment or direction" of the Four Creditors to participate in the December 2002 restructuring, contrary to Article 1.1(a)(1)(iv) of the *SCM Agreement*;

b. Japan improperly found that the December 2002 restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

c. Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 restructurings, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*;

d. Japan improperly used methods to calculate the amount of benefit to the recipient that were not provided for in its national legislation or implementing regulations, contrary to the *chapeau* of Article 14 of the *SCM Agreement*; and

e. Japan improperly levied countervailing duties in 2006 to offset some of the subsidies provided by the October 2001 restructuring, even though the JIA only found that some of those subsidies applied from 2001 through to 2005, contrary to Article 19.4 of the *SCM Agreement*;

8.3 In light of the above findings, we *decline to rule* separately on Korea's claims that:

a. Japan acted inconsistently with Articles 1 and 2 of the *SCM Agreement* by reversing the burden of proof and basing its findings of "financial contribution" and "benefit" on the absence of evidence;

b. Japan improperly imposed countervailing duties on the basis of a flawed analysis of benefit, contrary to Article 19.4 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*; and

c. Japan improperly imposed countervailing duties contrary to Article 32.1 of the *SCM Agreement*.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Japan has acted inconsistently with the provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to Korea under that Agreement.

8.5 Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> [i]t shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted)

8.6 We therefore recommend that the Dispute Settlement Body request Japan to bring its measure into conformity with its obligations under the *SCM Agreement*.[628]

8.7 Korea has asked the Panel to suggest that the countervailing duty measures imposed by Japan on imports of DRAMS from Korea be immediately rescinded, and that any countervailing duties collected by Japan on such imports be refunded forthwith. In this regard, we note that Article 19.1 goes on to provide that:

> [i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.8 We thus consider that Article 19.1 would allow us to make the suggestion requested by Korea. However, we have found various violations of Japan's obligations under the *SCM Agreement*, which may necessitate differing responses in order to bring the measure concerned into conformity

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[628] Korea initially submitted (at para. 48 of its Second Written Submission, and in response to Question 54 from the Panel) that, since the JIA did not use methods that are consistent with the first sentence of Article 14 to calculate the benefit to Hynix, the requirements of Article 1.1 were not met and no countervailing duties should have been imposed. Korea stated that the Panel should therefore recommend that Japan immediately rescind the countervailing duties it has imposed. At the Second Substantive Meeting, and in response to Question 119 from the Panel, Korea clarified that it was only asking the Panel to recommend that Japan bring its measures into conformity. Accordingly, there is no need for us to address Korea's initial request that we recommend that Japan immediately rescind the countervailing duties it has imposed.

with Japan's obligations under the *SCM Agreement*. In our view, the modalities of the implementation of our recommendation are, in the first place, for Japan to determine. We therefore decline to make the suggestion requested by Korea.