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1st Administrative Review

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MEMORANDUM

DATE: March 14, 2006

TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results in the First
Administrative Review of the Countervailing Duty Order on Dynamic Random
Access Memory Semiconductors from the Republic of Korea

Background

On September 15, 2005, the Department of Commerce (“the Department”) published the preliminary results of this administrative review. See Preliminary Results of Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 70 FR 54523 (“Preliminary Results”). 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 administrative review for which we received comments and rebuttal comments from parties:

Comment 1: Entrustment or Direction of the December 2002 Restructuring

- A. Government of Korea Policy Towards Hynix
- B. Government of Korea Influence of Creditors
- C. Government of Korea’s Influence over the Creditors’ Council
- D. The Deutsche Bank Report

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| Comment 2: | Whether the December 2002 Restructuring Was Commercial |
| Comment 3: | Entrustment or Direction of the October 2001 Restructuring |
| Comment 4: | Private and Foreign Banks as Benchmarks |
| Comment 5: | Hynix's Equityworthiness |
| Comment 6: | Hynix's Creditworthiness |
| Comment 7: | Ministerial Error Regarding Financing from Foreign Banks |
| Comment 8: | Ministerial Error Regarding KDB Fast Track Bonds |
| Comment 9: | Adjustment of Benefit to Account for Sale of Hynix's Subsidiaries |
| Comment 10: | Benefits Relating to Creditors Exercising Appraisal Rights |
| Comment 11: | Ministerial Errors Regarding Benchmarks |
| Comment 12: | Value of October 2001 and December 2002 Equity |
| Comment 13: | Timing of Benefits from the December 2002 Restructuring |
| Comment 14: | Benchmark for Creditworthy Companies / Discount Rate for Debt Forgiveness |
| Comment 15: | Ministerial Errors Regarding G7/Highly Advanced National Program |
| Comment 16: | Evasion of the Countervailing Duty Order |
| Comment 17: | Hynix and the Government of Korea's Cooperation and Disclosure of Information |

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 DRAMS, the IRS Tables prescribe an AUL of five years. During this review, none of the interested parties disputed this allocation period. Therefore, we continue to allocate non-recurring benefits over the five-year AUL.

Discount Rates and Benchmarks for Loans

Long-Term Rates

For loans originating prior to 2000 that were found countervailable in the investigation, which carried the original loan terms and continued to be outstanding during the period of review ("POR"), we used the same creditworthy benchmarks that we used in the investigation.

For outstanding long-term loans that originated after the period of investigation ("POI"), i.e., since June 30, 2002, we have used an uncreditworthy benchmark calculated in accordance with 19 CFR 351.505(a)(3)(iii). See "Creditworthiness" infra. For the commercial interest rate

charged to creditworthy borrowers required for the formula, we used the rate for AA- three-year won-denominated corporate bonds as reported by the Bank of Korea (“BOK”). For Hynix’s foreign currency-dominated loans, we used lending rates as reported by the International Monetary Fund’s (“IMF”) International Financial Statistics Yearbook. For the term of the debt, we used 5 years because all of the non-recurring subsidies examined were allocated over a 5-year period.

Short-Term Loans

For short-term loans, we utilized the money market rates reported in the IMF’s International Financial Statistics Yearbook. However, for countries (or currencies) for which a money market rate was not reported, we utilized the lending rate.

Equityworthiness

Section 771(5)(E)(i) of the Tariff Act of 1930 (“the Act”) and 19 CFR 351.507 state that, in the case of a government-provided equity infusion, a benefit is conferred if the 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 examining 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.

Where actual private investor prices are not available, 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: (A) objective analyses of the future financial prospects of the recipient firm, (B) current and past indicators of the firm’s financial health, (C) rates of return on equity in the three years prior to the government equity infusion, and (D) equity investment in the firm by private investors.

The Department’s regulations further stipulate 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.” See 19 CFR 351.507(a)(4)(ii). 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.

The Department examined the circumstances leading up to Hynix's December 2002 restructuring. This restructuring resulted in the refinancing of some debt and the conversion of other debt to equity. Shortly after Hynix's October 2001 restructuring package was adopted, Hynix's Creditors' Council, established under the Corporate Restructuring Promotion Act ("CRPA"), set up a Special Committee for Corporate Restructuring ("Restructuring Committee"). The purpose of the Restructuring Committee was to monitor Hynix's situation and to fashion recommendations for enhancing the Council members' recovery of their investment. The Restructuring Committee was a sub-group of Hynix's principal creditors and outside consultants.

The Restructuring Committee explored the possibility of either securing a strategic alliance with other manufacturers in the DRAMS industry or selling Hynix. See Hynix's December 17, 2004, Questionnaire Response ("Hynix QNR") at 12-18. On December 3, 2001, the Restructuring Committee initiated negotiations with Micron Technologies to sell Hynix's memory division and a stake in Hynix's non-memory operations. Although the Creditors' Council approved a Memorandum of Understanding ("MOU") between the two companies concerning the sale to Micron, Hynix's Board of Directors ultimately rejected the MOU, largely due to concerns over the fate of Hynix's non-memory division. See Hynix QNR at 14-15.

Following this decision by Hynix's Board, the Restructuring Committee continued its evaluation of Hynix's operations, financial situation, and the measures necessary to preserve the creditors' existing investment in the company and to position the company and/or its assets for future sale. Id. at 15. Pursuant to this endeavor, the Korea Exchange Bank ("KEB"), Hynix's lead bank, retained Deutsche Bank ("DB") and Morgan Stanley Dean Witter ("MSDW") in May 2002 on behalf of the Creditors' Council.

Additionally, Arthur D. Little ("ADL") was retained in May 2002 to assist DB in reviewing the outlook for the semiconductor market, Hynix's business portfolio, technical and marketing competitiveness, and Hynix's restructuring plan. Also, Deloitte and Touche ("DT") was brought in as an independent accountant to perform a new appraisal of Hynix's liquidation value. In addition, De Dios & Associates provided DB with semiconductor market and price projections, and benchmarking. The final product of DB's analysis was the November 2002 report and recommendations ("DB Report"). Id. at 15-16.

For the reasons discussed in the Preliminary Results and in Comments 2 and 5, below, we continue to find that Hynix was unequityworthy at the time of the initiation and implementation of the December 2002 restructuring process through 2003.

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.

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. See 19 CFR 351.505(a)(4)(ii). However, according to the Preamble to the Department's regulations, in situations 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 the basis of these considerations, which are discussed in the Preliminary Results and in Comment 6, below, we continue to find that Hynix was uncreditworthy in 2002 and 2003. Consequently, we have used an uncreditworthy benchmark rate in calculating the benefit from loans received during this time period, and we have used an uncreditworthy discount rate in calculating any non-recurring benefits received by Hynix that were allocable to the POR.

Analysis of Programs

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

I. Programs Determined to Confer Countervailable Subsidies During the POR

Entrustment or Direction and Other Financial Assistance

In the investigation, the Department determined that Hynix received financial contributions from Korean banks that had been entrusted or directed by the Government of Korea ("GOK"). We reached this determination on the basis of a two-part test: First, we determined that the GOK had in place a governmental policy to support Hynix's financial restructuring to prevent the company's failure. Second, we determined that the GOK acted upon that policy through a pattern of practices to entrust or direct Hynix's creditors to provide financial contributions to

Hynix. See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea, dated June 16, 2003, (“Investigation Decision Memorandum”) at 47-61. The Investigation Decision Memorandum is contained in Micron’s April 25, 2005 Factual Information Submission (“FIS”) at Volume 43, tab 97 (hereinafter, FIS 43-97, for example). We also determined that “this policy and pattern of practices continued throughout the entire restructuring process through its logical conclusion.” Id.

The petitioner has alleged that an additional financial restructuring in December 2002 reflects a continuation of the government’s policy to prevent Hynix’s failure and that the GOK again entrusted or directed Hynix’s creditors. For that restructuring, Hynix’s creditors converted 1,856,771 million won of outstanding debt into equity, extended the maturities on 3,293.2 billion won of debt, and converted interest due into new long-term loans. See Micron’s June 20, 2005 Rebuttal Factual Information (“RFIS”) Exhibit 13 at page 39-40.

As in the investigation, the question in this proceeding is whether the GOK entrusted or directed Hynix’s creditors to provide financial contributions to Hynix, within the meaning of section 771(5)(B)(iii) of the Act. In evaluating the petitioner’s allegation regarding the December 2002 restructuring, we continued to distinguish between those banks found to be “government authorities” within the meaning of section 771(5)(B) the Act, and banks found to be “entrusted or directed” by the GOK, within the meaning of section 771(5)(B)(iii) of the Act.

In order to assess whether an entity such as the Korea Development Bank (“KDB”) should be considered to be the government for purposes of countervailing duty (“CVD”) proceedings, 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 Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 64 FR 30636, 30642-30643.

According to the BOK in a February 2002 report on Korean financial institutions, most of the specialized banks are government-controlled banks. See FIS 12-15. 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.” FIS 12-9. All of KDB’s senior management and its auditor are appointed by the Republic of Korea (“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. Id.

The purpose of the Industrial Bank of Korea (“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 determined 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. See Investigation Decision Memorandum at 13-17.

No new evidence or changed circumstances exist that would lead us to revisit our prior determination that the KDB and other “specialized” banks are government authorities and that the financial contributions made by these entities fall within section 771(5)(B)(i) of the Act.¹ See the GOK’s June 1, 2005, supplemental questionnaire (“GOK SQNR”) at 25-26, and 33-36. See also GOK’s July 11, 2005, Questionnaire Response (“GOK July QNR”) at Exhibit 3.

For all other financial institutions, we continued to evaluate whether the financial contributions they made to Hynix as part of the December 2002 restructuring were entrusted or directed by the GOK in accordance with section 771(5)(B)(iii) of the Act.

Government entrustment or direction to provide a financial contribution constitutes a subsidy when providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. See section 771(5)(B)(iii) of the Act. In other words, the question is whether the private financial contribution would otherwise be a government subsidy function. This is because the “entrusts or directs” language is intended to capture situations in which the government acts through private entities. See Statement of Administrative Action, H.R. Rep. No. 103-826 at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4239. The contributions in this case are loans (in the form of previously existing loans that were restructured and the conversion of interest owed to new loans) and equity infusions (debt-to-equity conversion). We find that the provision of these contributions would be a government subsidy function if performed by the GOK.

Entrustment or direction occurs when a government gives responsibility to, commits the

¹The other specialized banks are the National Agricultural Cooperative Federation and the National Federation of Fisheries Cooperative.

execution of a task to, or exercises authority over, a private entity. Government actions which entail pressuring, handing over responsibility, exerting influence, guiding, ordering, regulating, or delegating vis-a-vis a private entity are indicative of entrustment or direction. Moreover, these actions need not be explicit. Rather, the government entrustment or direction can also be implicit or informal. Additionally, when a government executes its policy by operating through a private entity, or when a government causes a private entity to act consistent with that policy, there is entrustment or direction by the government. Evidence of entrustment or direction need not be explicit but, rather, entrustment or direction can be inferred from circumstantial evidence.

Moreover, the Statement of Administrative Action indicates that the “entrusts or directs” standard shall be interpreted “broadly.” Statement of Administrative Action, H.R. Rep. No. 103-826 at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4239. Thus, it is not necessary to establish that the government is able to control every action or choice of the entrusted or directed private entities. Requiring control or absolute governmental authority over the private entities would be an impossibly narrow standard to meet.

Finally, even if the entrusted or directed entities are acting in their own interest, in whole or in part, there can still be entrustment or direction. The Act does not require the Department to find that the private entities acted against their commercial or economic interests when providing the financial contributions. Further, the Preamble to the Department’s regulations provides:

Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government requiring an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party.

Preamble, at 65350. In the context of this case, even if Hynix’s creditors were acting in their own interests, there can still be entrustment or direction by the GOK, provided, of course, that there is substantial evidence indicating so.²

In examining the evidence on the record, we are mindful that we must evaluate carefully all possible explanations for the actions taken by Hynix’s creditors, and that our conclusions must be

²In this case, Hynix and the GOK have claimed that the actions taken by Hynix’s creditors were in their own interests. As we have noted, even if this were the case, it would not alter our finding, based on substantial record evidence, that the creditors’ actions were entrusted or directed by the GOK. Further, as noted elsewhere in this Decision Memorandum and in the Preliminary Results, we have found that Hynix was in dire financial straits at the time of the December 2002 restructuring, and that the company was unequityworthy and uncreditworthy at when the creditors converted debt into equity.

made on the basis of the totality of the record facts. As we have noted, above and in the Preliminary Results, it is appropriate in cases involving government entrustment or direction to reach conclusions based on inferences from circumstantial evidence. Indeed, as in the investigation, much of the information regarding the GOK's involvement in the December 2002 Hynix restructuring is circumstantial in nature. See Preliminary Results at 54533-54535.

Moreover, the probative value of such circumstantial evidence can be enhanced where the parties are found to be secretive or evasive with respect to information that is relevant and responsive to the investigating authority's analysis. This has been the case in this administrative review and is discussed further in Comment 19, below. Nonetheless, we find on the basis of substantial record evidence that the GOK entrusted or directed Hynix's creditors to provide financial contributions to Hynix. We also find that it is appropriate to treat the circumstantial evidence in support of this conclusion as highly probative in light of the GOK's inadequate responses and the secretiveness under which the GOK and Hynix's creditors were operating at the time of the restructuring.

Hynix and the GOK claim that Hynix's creditors acted independently of the government and on a commercial basis when they provided new financial contributions to Hynix in connection with the December 2002 restructuring. We disagree. As we explain in detail, below, record evidence demonstrates that the GOK's policy to prevent Hynix's failure continued after the POI and throughout the POR. Record evidence also shows incontrovertibly that at the time of the December 2002 restructuring, Hynix was once again in dire financial straits and that the company desperately needed new financial assistance from its creditors in order to avoid bankruptcy and remain a going concern. See Creditworthiness and Equityworthiness sections, above. Direct and indirect evidence on the record further demonstrates that the GOK entrusted or directed Hynix's creditors to provide that assistance.³

The evidence on the record demonstrates an unwavering GOK policy to support Hynix and prevent its collapse, which was motivated by GOK concerns about the effects that Hynix's failure would have on the Korean economy. As discussed in the Analysis of Comments section, below, record evidence also shows the high-level involvement of GOK officials in the various solutions to Hynix's financial woes, including the possible sale to Micron and, ultimately, the December 2002 financial restructuring. Thus, we find that the GOK's policy to save Hynix from bankruptcy continued throughout the POR. We also note that there is no evidence on the record that suggests the GOK's policies with respect to Hynix came to an abrupt end after the October 2001 restructuring. Rather, as we noted during the investigation, the government's goal was to ensure Hynix's viability as an ongoing concern. The October 2001 restructuring did not bring about this goal. Rather, as became apparent during 2002, especially after the merger negotiations with Micron ended, Hynix again found itself in dire need of additional financial assistance from

³This finding does not apply to Korean subsidiaries of foreign-owned banks, which held a small amount of Hynix's debt. For further discussion on the role of this bank in the restructuring. See the "Equityworthiness" and "Creditworthiness" sections of this notice, and Comment 7, below.

its creditors, without which the company would have failed.⁴

At the time of the December 2002 restructuring, GOK-owned or -controlled banks dominated the Creditors' Council, giving the GOK the means to effectuate its policy toward Hynix and allowing the GOK to set the terms of the restructuring. In addition, the evidence demonstrates that the GOK had the ability to influence individual creditor's lending decisions and used that ability to ensure that Hynix's creditors participated in the financial restructurings of Hynix. See Sections B and C of Comment 1, below, for a further discussion. Hynix's condition was so dire in 2002 that no commercially motivated actor would have invested in or made loans to Hynix at the time of the December 2002 restructuring. The absence of any commercial rationale to provide more financial assistance to Hynix is one of many pieces of evidence supporting our finding that the GOK played a critical role in bringing about the December 2002 bailout.

The Department also finds that the roles of Hynix's outside advisors, such as DB and DT, do not erase the GOK's actions to entrust or direct Hynix's financial restructurings. The GOK's role in Hynix's financial restructuring was that of an orchestrator, or analogous to the role of the chief executive of a company. In that capacity, the GOK formulated a policy and an overall objective, and took the necessary actions to ensure that its policy and objectives for Hynix (*i.e.*, the complete financial restructuring of Hynix to prevent its bankruptcy and collapse) were carried out by Hynix's creditors. As such, the GOK left it to the relevant specialists to flesh out the mechanics of that objective. In this case, the outside financial advisors and specialists were companies such as DB and DT. In addition, we find that DB was unable to operate entirely independent of the GOK.

Given the totality of the evidence discussed above, the Department finds that the GOK entrusted or directed ROK lenders to provide a financial contribution to Hynix. The record shows that many leading GOK officials made statements which reveal the GOK's policy goals. These statements were reported at length by independent media reports, as discussed below. In summary, given totality of the evidence discussed above, the Department finds that the GOK provided a financial contribution to Hynix through banks found to be "government authorities" within the meaning of section 771(5)(B)(i) of the Act and through its entrustment or direction of Hynix's creditors, within the meaning of section 771(5)(B)(iii) of the Act, with respect to the December 2002 restructuring.

Specificity

In the investigation, the Department determined that the GOK entrusted or directed credit to the semiconductor industry through 1998. See Investigation Decision Memorandum at 12-21. For the period 1999 through June 30, 2002, the Department determined that the subsidy was specific

⁴For further discussion of Hynix's financial condition during the period leading up to the December 2002 restructuring, see the "Equityworthiness" and "Creditworthiness" sections of this notice, above.

to Hynix under section 771(5A)(D)(iii) of the Act because the GOK's entrustment or direction to provide a financial contribution, and the benefits thereby conferred, involved current or former Hyundai Group companies, and Hynix in particular. Id. at 17-19.⁵

For this review, we determine that the December 2002 restructuring is *de facto* specific to Hynix within the meaning of section 771(5A)(D)(iii)(I) of the Act. This provision states that a subsidy is specific if "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number."

The subsidy in this review is the GOK's entrustment or direction of Hynix's creditors to provide a financial contribution, and the benefit thereby conferred, in the December 2002 restructuring. The GOK entrusted or directed banks to save Hynix. Indeed, as evidenced by many of the articles placed on the record of this segment of the proceeding, the vast majority of statements relating to governmental pressure on banks specifically identify Hynix. The GOK's actions towards the creditors were all intended to effectuate the goal of saving Hynix. See Comment 1. The evidence demonstrates that the financial contributions were given to Hynix and benefitted Hynix. Therefore, we find that the subsidy under review was limited to Hynix.

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

In the investigation, the Department determined that the GOK entrusted or directed creditor banks to participate in financial restructuring programs, and to provide credit and other funds to Hynix, in order to assist it through its financial difficulties. The financial assistance provided to Hynix by its creditors took various forms, including: loans, convertible bonds, extensions of maturities (which we treated as new loans), Documents Against Acceptance Line of Credit ("D/A") financing, usance financing, overdraft lines, debt forgiveness, and debt-for-equity swaps. The Department determined that these were financial contributions which conferred a countervailable subsidy during the POI.

In an administrative review, we do not revisit the validity of past findings unless new factual information or evidence of changed circumstances has been placed on the record of the proceeding that would cause us to deviate from past practice. See, e.g., Certain Pasta from Italy: Preliminary Results and Partial Rescission of Seventh Countervailing Duty Administrative Review, 69 FR 45676 (July 30, 2004), *affirmed in* Certain Pasta From Italy: Final Results of

⁵We note that, even when the four events examined during the investigation are analyzed separately, each was specific under section 771(5A)(D)(iii)(I) of the Act. The December 2000 syndicated loan was given solely to Hynix and was intended as a stop-gap measure to cover Hynix's immediate financial needs. See Investigation Decision Memorandum at 19. The KDB Fast Track Program had a limited number of participants. See Investigation Decision Memorandum at 23-24. The May 2001 and October 2001 restructurings were limited to Hynix – that is, the GOK entrusted or directed the creditors to bail out Hynix, and the financial contributions and benefits went to Hynix. See Investigation Decision Memorandum at 19-22.

Seventh Countervailing Duty Administrative Review, 68 FR 70657 (December 7, 2004). Hynix makes several claims regarding the Department's investigation findings with respect to the October 2001 restructuring, which are based on what Hynix claims to be new information. However, the Department finds that this information is not new information nor is it persuasive such that it would warrant a re-examination of the Department's findings in the investigation with respect to the October 2001 restructuring. For further discussion, see Comment 3, below. Therefore, we are including in our benefit calculation the financial contributions countervailed in the investigation: bonds, debt-to-equity swaps, debt forgiveness, interest-free debentures, overdraft financing, usance financing, and D/A financing.

In calculating the benefit conferred by these financial contributions, we have followed the same methodology used in the investigation. For the short-term debt instruments, we have used the benchmarks described above in the "Subsidies Valuation Information" section. In addition, as discussed above, the December 2002 restructuring involved a restructuring of Hynix's debt and a conversion of debt to equity. We find that these debt-equity swaps and loans confer a benefit to Hynix within the meaning of section 771(5)(E)(i) and (ii) of the Act, respectively. Because we find Hynix to be unequityworthy at the time of the debt-to-equity conversion, we have treated the full amount of debt swapped for equity as a grant and allocated the benefit over the five-year AUL. See 19 CFR 351.507(a)(6) and (c). We have used a discount rate that reflects our finding that Hynix was uncreditworthy at the time of the debt-to-equity conversions. For the loans, we have followed the methodology described at 19 CFR 351.505(c) using the benchmarks described in the "Subsidies Valuation Information" section of this notice.

We have divided benefits from the various financial contributions by calendar year 2003 or POR sales, as appropriate, to calculate a countervailable subsidy rate of 58.09 percent *ad valorem* for the POR.

II. *Programs Previously Found to Confer Subsidies*

We examined the following programs determined to confer subsidies in the investigation and we find that Hynix continued to receive benefits under these programs during the POR.

A. Operation G-7/HAN Program

Implemented under the Framework on Science and Technology Act, the Operation G-7/HAN program ("G-7/HAN program") began in 1992 and ended in 2001. Investigation Decision Memorandum at 25; the May 15, 2003, Government of Korea Verification Report ("GOK Verification Report") at 29 (FIS 41-59); and the May 15, 2003, Hynix Semiconductor, Inc. Verification Report ("Hynix Verification Report") at 35 (FIS 41-58). See also the GOK's December 17, 2004, Questionnaire Response ("GOK QNR") at 9. The purpose of this program was to raise the GOK'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 research and development (“R&D”) association. This association was renamed in 1998 as the Consortium of Semiconductor Advanced Research (“COSAR”), and it acted as the intermediary between 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.

Hynix notes that, although the G7/HAN program ended in 2001, the company had outstanding loans under this program during the POR. See Hynix QNR at 24, Exhibit 12.2; see also, Hynix’s June 1, 2005, Supplemental Questionnaire Response (“Hynix SQNR”) at Exhibit 33_2.

The G-7/Han Program was found to provide countervailable subsidies in the investigation. No new evidence has been provided that would lead us to reconsider our earlier finding.

To calculate the benefit of these loans during the POR, we compared the interest actually paid on the loans during the POR to what Hynix would have paid under the benchmark described in the “Subsidies Valuation Information” section of this notice. We then divided the total benefit by Hynix’s total sales in the POR to calculate the countervailable subsidy. On this basis, we find that countervailable benefits of 0.13 percent *ad valorem* existed for Hynix. In addition, as discussed in Comment 17, below, we corrected certain calculation errors that we made in the Preliminary Results.

The petitioner alleged that there is a link between the G-7/HAN program and the System IC 2010 Project (“System IC Project”). In response to our questions, the GOK and Hynix stated that there is no connection between the two programs. The System IC Project is discussed below.

B. 21st Century Frontier R&D Program

The 21st Century Frontier R&D program (“21st Century 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 Investigation Decision Memorandum at 26; GOK’s Verification Report at 30. Altogether, the program is composed of 19 project areas, each typically having a 10-year time horizon. The 21st Century program provides long-term interest-free loans in the form of matching funds. Repayment of program funds is made in the form of “technology usance fees” upon completion of the project, pursuant to a schedule established under a technology execution, or implementation contract.

Hynix stated that it had loans outstanding under this program during the POR. See Hynix QNR at 24.

In the investigation, we determined that this program conferred a countervailable benefit on Hynix. No new evidence has been provided that would lead us to reconsider our earlier finding.

To calculate the benefit of these loans during the POR, we compared the interest actually paid on the loans during the POR to what Hynix would have paid under the benchmark described in the “Subsidies Valuation Information” section of this notice. We then divided the total benefit by Hynix’s total sales in the POR to calculate the countervailable subsidy. On this basis, we find that POR countervailable benefits of 0.00 percent *ad valorem* exist for Hynix.

III. *Programs Previously Found to Not Have Been Used*

We find that the following programs were not used during the POR: See Hynix QNR at 25; GOK QNR at 11; Hynix SQNR at 56.

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

IV. *Program Found to Not Confer Countervailable Subsidies*

Based on the information provided in the responses, we find that the following program did not confer countervailable subsidies during the POR:

System IC 2010 Project

The System IC Project was established by the GOK’s MOST and the Ministry of Industry and Resources in 1998 as a joint R&D project. The goal of this project is to make Korea the third largest producer of semiconductors by 2012.

The project is structured in three stages to be implemented over the period 1998-2011. Phase One of the project targets development of core technology research. Phase Two concentrates on intellectual property integration, high-speed performance, and leading chipsets. Phase Three will develop new core technology.

The System IC Project is applicable only to semiconductor development. Participants must contribute 50 percent of the total budget, and matching funds are provided through COSAR. The amount contributed by COSAR is repaid by the applicant once the research is successfully completed. See GOK's June 8, 2005, Supplemental Response at 4-6, 8; see also Hynix SQNR at Exhibit 50.

Hynix submitted a research plan to COSAR in September 2003 regarding ferroelectric random access memory semiconductors ("FeRAMs"). This project is set to end in August 2007. Hynix has received funds under the System IC Project to support its research. These funds have not been repaid because Hynix's project is still ongoing. See Hynix SQNR at Exhibit 50.

Hynix states that FeRAMs are non-subject merchandise. Hynix explains, moreover, that FeRAMs are produced in its "System IC" segment, whereas DRAMS are produced in the company's "memory" segment. The former segment produces applied products that are unrelated to memory semiconductors such as DRAMS and SRAMS. According to the response, the production processes for the memory products and the applied (non-memory) products are completely different.

Hynix further argues that the nature and goals of the project, as evidenced by Hynix's research/business plan submitted to COSAR, are solely for the development of FeRAMs, *i.e.*, non-subject merchandise. See Hynix's July 11, 2005, Supplemental Questionnaire Response ("Hynix July SQNR") at Exhibit 16.1. In addition, the contract between Hynix and COSAR clearly limits governmental support to development of FeRAMs.

Based on the information provided, we find that any benefits provided to Hynix under the System IC 2010 Project are tied to non-subject merchandise. Therefore, in accordance with 19 CFR 351.525(b)(5), we find that Hynix did not receive any countervailable benefits under this program during the POR.

Analysis of Comments

Comment 1: Entrustment or Direction of the December 2002 Restructuring

A. Government of Korea Policy Towards Hynix

Hynix's Argument:

According to Hynix, the Court of International Trade ("CIT") ruled that "Commerce may

lawfully support a finding of entrustment or direction with direct and circumstantial evidence drawn from across the alleged program . . . so long as the cumulated evidence and the reasonable inferences drawn therefrom sufficiently connect all the implicated parties and transactions to the alleged program of government entrustment or direction.” See Hynix Semiconductor Inc. v. United States, Slip. Op. 05-106 (August 26, 2005) (“DRAMS Investigation Remand”) at 13-14. Hynix notes that, according to the CIT, when cumulating record evidence, “Commerce must consider counterevidence indicating that transactions making up that alleged program were formulated by an independent commercial actor (not a government) and motivated by commercial considerations.” See DRAMS Investigation Remand at 14. Hynix contends that the Department’s analysis of the record evidence fails to meet the standards established by the CIT.

In the Preliminary Results, the Department found that “the record demonstrates that the GOK continued to worry that Hynix’s collapse could have a damaging effect on the Korean economy” and “undiminished support by the GOK for Hynix, motivated by its concern about the effect that the company’s failure would have on the Korean economy. {Record evidence} also attest{s} to the high-level involvement of GOK officials in the process leading up to the December 2002 restructuring.” See Preliminary Results at 54529-54530. Hynix contends that the evidence relied upon by the Department to reach these conclusions instead shows GOK ambivalence towards Hynix’s financial troubles and, therefore, fails to show that the GOK had a continued policy to save Hynix or the ability to control Hynix’s creditors. In addition, Hynix argues that other record evidence supports an alternative theory that the GOK had an interest in seeing Hynix sold even at the expense of its ability to remain a going concern. Hynix contends that record evidence demonstrates that many changes occurred between the investigation period and this POR with respect to the GOK’s policies and actions regarding Hynix and, therefore, the Department’s findings of entrustment and direction are baseless.

Specifically, Hynix argues that the Department misconstrued the evidence upon which it relied to conclude that, in the wake of Hynix’s failed merger with Micron and the failure of the October 2001 restructuring, the GOK was still concerned with the possibility of Hynix’s failure and that the GOK established in early 2002 a plan on how to handle Hynix. Hynix contends that this evidence instead shows that the GOK left the fate of Hynix in the hands of its creditors and that the GOK was not involved in Hynix’s financial restructuring in 2002. For example, Hynix points to an article from the Korea Herald entitled “Creditors Won’t Offer New Loans to Hynix: Jeon” which the Department cited to support its finding that the GOK was taking steps to save Hynix. See Preliminary Results at 54529 and FIS 45-187. According to Hynix, a closer reading of this article reveals that the article is concerned with the financial status of Hynix’s creditors, not that of Hynix. In addition, Hynix contends that the article did not state or imply that the planned financial policy coordination meeting was to discuss the fate of Hynix, as the Department interpreted, but rather was to discuss the impact of the failed Hynix-Micron merger on the creditors.⁶

⁶Hynix contends that the Department similarly misconstrued FIS 45-189 and FIS 45-182.

Moreover, Hynix contends, record evidence, which the Department overlooked and did not cite in the Preliminary Results, supports Hynix's alternate position that the GOK left the fate of Hynix in the control of Hynix's creditors. To support this argument, Hynix cites remarks by the FSC Chairman, Keun-Young Lee, "the Creditors Group should resolve {Hynix} on its own." See FIS 46-224. Hynix also cites a statement made by the Vice Finance Minister, Yoon Jin-shik, who "reaffirmed the government would not intervene in tackling the Hynix problem, saying that creditors are totally responsible for dictating the future of the troubled firm." See FIS 45-134. Hynix contends that these articles are among numerous other articles on the record that show that the GOK was not involved in solving Hynix's financial problems in 2002.

In the Preliminary Results, the Department concluded that "the government's ability to control the fate of Hynix became apparent in the additional press reports from that time," which was shortly after the failure of the Hynix-Micron merger. See Preliminary Results at 54529. According to Hynix, such a conclusion is not supported by the evidence relied upon by the Department. Hynix contends that the articles cited by the Department actually demonstrate that the GOK viewed Hynix's creditors as having an exclusive role in determining Hynix's fate. For example, the Department stated, "in its July 25, 2002, report to the National Assembly, the Ministry of Finance and Economy stated that it would prepare a structural adjustment plan for Hynix around the end of July based on due diligence underway at the time." See FIS 44-B-9. However, according to Hynix, the translation incorrectly suggests that the MOFE was preparing a structural adjustment plan. Hynix argues that the correct translation should read: "It is expected...that the restructuring plan for Hynix will be presented by the end of July..." See Hynix's October 24, 2005, case brief ("Hynix Case Brief")⁷ at Exhibit 2. In addition, Hynix contends that the Department's reliance on the November 2002 Public Fund Mismanagement Report (FIS 54-100) as evidence of the GOK's continued policy to support Hynix is misplaced. Hynix contends that this report contains nothing more than political mudslinging and dubious accusations against the Kim Administration.

Hynix contends that the GOK did not have a policy to prevent Hynix's failure during the POI or during the POR. According to Hynix, the record evidence demonstrates that, if the GOK had a policy concerning Hynix during the POR, that policy was to pursue the sale of Hynix in the hope of extinguishing the uncertainties weighing on the Korean financial market as a result of Hynix's financial troubles. Hynix states that the GOK's apparent sentiment, as reflected in press articles on the record, was that Hynix must be sold, even if that led to a decline in demand for Korean DRAMS or the liquidation of Hynix. In support of its argument, Hynix cites several news articles and statements made by Minister Jeon Yun-churl, for example, who "strongly opposed the independent survival of Hynix." See FIS 45-135. Hynix contends that such possible outcomes of Hynix's sale would not have been acceptable to the GOK if it were indeed committed to a policy of saving Hynix because of its place in a strategic industry in Korea. Hynix also contends that the GOK's opposition to independent survival is supported by

⁷Hynix submitted a revised version of its case brief on December 12, 2005, which contained revisions to the bracketing of certain information.

numerous press articles on the record. See e.g., FIS 45-136, 45-137, and 45-138. Moreover, Hynix argues that a common theme in the record evidence is that the GOK did not want Hynix to receive additional support and that debt write-offs would be viewed as such. According to Hynix, this view is summed up in the following press report:

The recent intervention by the government seems to be a clear message to the negotiation team and the Creditors Group that although the government assigned the details to the negotiation team, the basic policy of the Hynix issue – the ultimate goal of “sale” – should not be affected by straying support for independent survival theory, etc. See FIS 45-205.

Hynix contends that there is no discernable policy or pattern of practices in the above-cited press articles or those cited by the Department in the Preliminary Results. Alternatively, Hynix contends, the circumstantial evidence on the record could support the finding of several different GOK “policies” towards Hynix, and that a policy to save Hynix is not among the more prevalent policies. This is particularly true, according to Hynix, when the record evidence contains direct denials from the GOK and Hynix regarding an alleged GOK motivation, willingness and ability to control Hynix’s fate.

GOK’s Argument

The GOK states that, as in the investigation, the Department essentially adopted information from Micron’s submissions, which included numerous press reports and articles from mostly unknown or dubious sources, to support the Department’s pre-determined conclusions regarding the December 2002 restructuring. Thus, the GOK claims, it was unable to confirm the veracity of, or refute, the information relied upon by the Department. The GOK reiterates that, to the extent that the reports are not consistent with the statements and answers of the GOK in its questionnaire responses, the GOK does not agree with the contents of these news reports and articles. The GOK also argues that the Department ignored other news articles and documents that contradicted the Department’s findings. As such, the GOK accuses the Department of “cherry-picking” and distorting the true picture of the events. The GOK also argues that the CIT found that the Department similarly ignored counter-evidence in the investigation. See DRAMS Investigation Remand at 31-36.

According to the GOK, the December 2002 restructuring was decided autonomously by the Creditors’ Council, no GOK approval was required for this decision, and the GOK did not participate directly or indirectly in any of the discussions related to the restructuring. The GOK contends that in the Preliminary Results the Department failed to provide evidence otherwise. The GOK asserts that the evidence of entrustment or direction relied upon by the Department in the Preliminary Results does not demonstrate GOK actions of entrustment or direction, but rather demonstrates that the GOK was concerned with and interested in the restructuring from the perspective of a regulatory body.

The GOK further argues that the Department should not have second-guessed Hynix’s creditors’

decision to participate in the December 2002 restructuring. In the GOK's view, the Department failed to provide reliable evidence that Hynix's creditors were not acting as reasonable commercial entities. Noting that Hynix hired DB, the GOK criticizes the Department for attaching more importance to financial reports compiled by outside analysts than to the DB Report.

Micron's Argument:

Micron contends that the Department properly found that the GOK entrusted or directed Hynix's creditors to participate in the December 2002 financial restructuring of Hynix. Micron further contends that the record evidence, in its totality, establishes that the GOK had a policy to save Hynix, a willingness to act to effectuate that policy through interfering in private lending decisions, and the means to bring about Hynix's financial restructuring through its control and influence over members of the Creditors' Council. According to Micron, the record also demonstrates that Hynix's creditors acknowledged that GOK coercion influenced lending decisions and that GOK officials publicly called on Hynix's creditors to save the company throughout 2002.

Micron urges to the Department to elaborate on its preliminary finding that the December 2002 financial restructuring of Hynix was part of a continuous "single program" that began in December 2000 with the objective of saving Hynix from financial ruin. See Preliminary Results at 54530 and the Investigation Decision Memorandum at 49, which is contained in FIS 43-97. As further evidence of the GOK's continued policy to save Hynix, Micron points to the continued exertion of control over Hynix's creditors that is discussed and documented in Micron's July 21, 2005, submission at 20-28 and 32-58. In addition, Micron points to GOK control over the Creditors' Council evidenced in Hynix QNR at Exhibit 19, and Hynix SQNR at Exhibit 36.

According to Micron, the Department marshalled numerous compelling facts, establishing that: (1) the GOK maintained a policy to support Hynix; (2) the GOK exercised control and influence over Hynix's creditors sufficient to implement that policy; and (3) no legitimate commercial basis existed that served to disprove the GOK's role, as discussed in Comment 2, below. In addition, Micron notes that in the DRAMS Investigation Remand, the CIT upheld the Department's single program approach to the Hynix restructuring and rejected the notion that the Department must isolate evidence of entrustment or direction on a transaction or creditor basis. See DRAMS Investigation Remand at 13, 29-30.

According to Micron, Hynix's argument that the Department misread several news articles on the record and erroneously concluded that the GOK maintained a policy to support Hynix is without merit. For example, Micron notes that the Deputy Prime Minister of Korea is quoted in the article contained in FIS 45-187 as saying, "creditor banks will not offer more financial assistance to Hynix since they believe the chipmaker cannot survive on its own." Micron also notes that the article demonstrates that the Deputy Prime Minister urged Hynix's creditors and the FSC to come up with a speedy resolution to Hynix's financial problems and that the GOK was planning a

Financial Policy Coordination Meeting to discuss Hynix's fate. See Preliminary Results at 54529. Micron argues that this statement and the rest of the article demonstrate that the GOK had intimate knowledge of Hynix's restructuring and strongly suggest that the GOK was in charge of saving Hynix. Micron further argues that Hynix's claim that the article is concerned with the financial status of Hynix's creditors, not that of Hynix, is without merit, particularly when the record contains additional evidence that corroborates the Department's understanding of the article. For example, FIS 45-134 concerns the same event and confirms that the Deputy Prime Minister urged creditors to swiftly decide Hynix's fate. Micron also notes that Hynix omitted key sentences preceding a quote Hynix relied upon to argue that the GOK was committed to letting Hynix's creditors formulate a solution. See Hynix Case Brief at 20-21, citing FIS 45-134. According to Micron, the full quote from FIS 45-134 indicates that the GOK was overseeing Hynix's bailout and directing banks to assist Hynix:

Vice Finance Minister Yoon Jin-shik yesterday called on creditor banks of the cash-strapped Hynix Semiconductor to swiftly decide on the fate of the world's third largest chipmaker. "Creditors will have to find a solution to Hynix as soon as possible to minimize any adverse impact (of the collapse of a proposed deal with Micron Technology) on the economy," he said. He made the remarks right after presiding over a financial policy coordination meeting, which was attended by vice chiefs of the Financial Supervisory Commission and the Bank of Korea.

Micron contends that, given the GOK's history of intervention in, and control of, lending decisions in Korea, Hynix's creditors would interpret statements from high-level GOK officials, such as the statement above, as the GOK's assertion of control or influence over Hynix's creditors. Micron points to FIS 22-C-2 and FIS 46-267 as evidence of the GOK's long history of interfering with and controlling Korean banks' lending decisions.

Micron contends that, contrary to Hynix's assertions, the GOK was willing and able to control Hynix's fate, and that the GOK had a policy in place to do so throughout 2002. In support of this argument, Micron notes that the Department relied on information contained in FIS 44-B-9 to similarly conclude that the GOK had a policy in place to save Hynix. According to Hynix, this information was incorrectly translated. Micron contends that Hynix's new translation constitutes uncorroborated new information. In addition, Micron notes that this article was translated by an independent professional and that the information contained therein is corroborated by another, undisputed part of the same article, which identifies Hynix's "structural adjustment" as one of the GOK's "main policy issues of the second half" of 2002. See FIS 44-B-9, Micron's November 7, 2005, Rebuttal Brief ("Micron Rebuttal Brief") at Exhibit 2. As additional evidence of the GOK's policy to save Hynix, Micron cites FIS 54-100, which contains the November 2002 Public Fund Mismanagement Report. In response to Hynix's argument that this report is unreliable because it was politically motivated and without analytical support, Micron contends that the report was the culmination of extensive investigation and based on information obtained directly from the GOK agencies overseeing Hynix's bailout, including MOFE and the FSC. See Micron Rebuttal Brief at Exhibit 2.

Micron further argues that the GOK was anything but ambivalent towards Hynix during 2002, as Hynix contends. According to Micron, GOK officials thought that the sale of Hynix to Micron was an advisable and necessary step in Hynix's restructuring because Hynix's financial condition continued to deteriorate. In addition, Micron argues that, even if a successful purchase by Micron led to changes in Hynix's corporate structure, the changes would not have been necessarily at odds with the GOK's longstanding policy to support Hynix and to intervene in the conduct of private businesses in Korea's so-called strategic industries. Such policies are evidenced by the GOK's forced merger of Hynix and LG Semicon in 1999, and the Samsung Prospectus to the SEC. See FIS 21-B-68 regarding the merger. See also FIS 46-267, which states, "the Government has in the past exerted, and continues to exert, substantial influence over many aspects of the private sector business community . . . In the past, the Government has informally both encouraged and restricted the declaration and payment of dividends, induced mergers to reduce . . . excess capacity. . ." Micron contends that the prevailing sentiment and consensus view of the GOK leading up to the December 2002 restructuring was to keep Hynix afloat, and that there was no break in the "single program" to save Hynix. As additional evidence of the GOK's continued policy to save Hynix, Micron cites FIS 22-C-20, FIS 45-155, and FIS 45-120.

The Department's Position:

As in the investigation, the question in this segment of the proceeding is whether the GOK entrusted or directed Hynix's creditors to provide a financial contribution to Hynix, within the meaning of section 771(5)(B)(iii) of the Act. See Investigation Decision Memorandum at 47-48. As discussed in the "Analysis of Programs" section, above, we continue to find, on the basis of substantial record evidence, that the GOK entrusted or directed Hynix's creditors to provide financial contributions to Hynix with respect to the December 2002 restructuring. The Department based this finding, in part, on record evidence of the GOK's continued policy to save Hynix from bankruptcy. This policy was rooted in the GOK's fear of the potential adverse effects Hynix's collapse could have on the Korean economy. See Preliminary Results at 54529 and Investigation Decision Memorandum at 47-61.

According to Hynix, the Department either misinterpreted record evidence upon which it relied or failed to properly weigh record evidence that supposedly contradicts these findings. For example, Hynix contends that the record demonstrates that the GOK adopted a *laissez faire* approach towards Hynix and its financial troubles, and that the GOK purposely left the task of finding a solution solely in the hands of Hynix's creditors.

In light of Hynix's argument that the Department misconstrued evidence on the record, such as FIS 45-187, we revisit the May 2002 newspaper article in greater detail. The relevant part of the article states:

Deputy Prime Minister and Minister of Finance and Economy Jeon Yunchurl said yesterday that... "{w}riting off Hynix's debt would also be considered as fresh financial assistance." Jeon's comment comes after Hynix's board of directors,

under pressure from Korean labor unions, vetoed a tentative \$4.3 billion deal Monday to sell its memory-chip business to Micron Technology Inc. of the United States. Jeon expressed regret that the Hynix board of directors rejected the draft memorandum of understanding (MOU) for the sale of Hynix to the U.S. chipmaker. “We feel regret and confusion,” he said, adding that Hynix’s creditors and the Financial Supervisory Commission (FSC) should come up with a speedy resolution to the breakdown of the Hynix-Micron deal to minimize any negative impact on the economy...Jeon also indicated that the government still wants to sell Hynix to Micron, saying, “We’ve spent four months in the Hynix-Micron negotiations because the sale to foreign firms is the best way.” “If Micron asks for renegotiation, we have no reason to reject it,” he added...Many analysts were concerned that the breakdown of the sales talks would hurt the credibility of Hynix’s creditor banks...The government will discuss the fallout from the ruptured Hynix sales talks at a Financial Policy Coordination Meeting to be attended by Vice Minister of Finance and Economy Yoon Jin-shik, Vice Chairman of the Financial Supervisory Commission Yoo Ji-chang and Deputy Gov. of Bank of Korea.

In the Preliminary Results, the Department relied on this article as evidence of the GOK’s continued policy to save Hynix. See Preliminary Results at 54529. The Department continues to find that the article demonstrates that the GOK was indeed concerned with Hynix’s financial situation, and that the GOK intended to devote high-level government resources (*i.e.*, the Vice Minister of Finance and Economy) to address the Hynix situation. In other words, this article is evidence of the GOK’s undiminished policy to save Hynix from bankruptcy. Moreover, this article demonstrates that the GOK was heavily involved with the Micron-Hynix sales negotiations, that the GOK was actively engaged in seeking a solution to Hynix’s problems, and that the GOK was not sitting on the sidelines waiting for Hynix’s creditors to come up with a solution, as Hynix suggests. This article is evidence that refutes Hynix’s claim that the GOK had washed its hands of the Hynix problem during the POR in favor of a *laissez faire* policy. When considered with other corroborating record evidence showing that the GOK was concerned with Hynix’s financial situation and that the GOK had a government policy to handle Hynix and prevent the company’s collapse, such as FIS 45-120 (November 2002), FIS 45-163 (June 2002), FIS 45-182 (May 2002), FIS 45-189 (May 2002), and FIS 44-B-9 (July 2002), Hynix’s argument is not convincing or supported by record evidence.

Hynix also attempts to discredit the Department’s reliance on FIS 45-182 and FIS 45-189 in finding that the GOK had a policy to save Hynix because the articles did not quote the Minister of MOFE or because the articles show GOK ambiguity rather than a concrete “Hynix” policy. As with FIS 45-187, a detailed analysis of both articles reveals the GOK’s concerns about Hynix and demonstrates that the GOK was highly involved in bringing about a solution to Hynix’s financial problems in 2002. According to these articles, the GOK’s involvement included encouraging Hynix’s creditors to “swiftly handle Hynix,” preparing “a counter plan followed by the failure of the sale of Hynix,” and the Minister of MOFE and the Chairman of the FSC discussing “how to handle Hynix.” See FIS 45-182 and FIS 45-189, respectively.

Hynix contends that the July 25, 2002, MOFE report to the Korean National Assembly's Finance Committee, "Current Economic Situation and Pending Issues," was not translated correctly. See FIS 44-B-9. First, we agree with Micron that Hynix's argument relies on factual information that was untimely filed and, therefore, does not warrant the Department's consideration. Nevertheless, we did consider Hynix's new translation of the bullet point concerning Hynix and we reevaluated the translation of the MOFE report submitted by Micron. Micron's translation consists of bullet points under the heading "Main Policy Issues of the Second Half," and under sub-headings "Promotion of Stable and Balanced Growth" and "Establishment of Market Economy System Through Structural Adjustment." Each bullet point summarizes a MOFE objective or goal, and begins with an active verb, such as "strengthening," "promoting," "preventing," or "completing." In Hynix's translation of the bullet point concerning Hynix, the MOFE report assumes a passive tone, and simply states that MOFE was expecting a restructuring plan for Hynix to be presented by the end of July. See Hynix Case Brief at Exhibit 2. In contrast, Micron's translation states, "For Hynix Semiconductor, prepare a structural adjustment plan around the end of July, based on the result of due diligence currently under progress." We find that Hynix's new translation is inconsistent with the rest of the MOFE report (as translated by Micron) because, according to Hynix's version of the bullet point concerning Hynix, it is the only one in the entire report that is written in a passive voice. Had Hynix timely submitted a new translation of the entire MOFE report that showed that the entire report was written in the passive voice, rather than an active voice, we may have reconsidered Micron's translation. However, given the inconsistency of Hynix's translation with the rest of the MOFE report, the record does not contain any additional information that would cause us to believe that Micron's translation of the MOFE report is inaccurate. Therefore, we find that the MOFE report contained in FIS 44-B-9 is another piece of evidence demonstrating that the GOK indeed had a concrete policy towards Hynix during 2002, and that policy was to ensure that Hynix did not fail.

Hynix offers FIS 45-134 and FIS 46-224 as evidence that the GOK was not involved in Hynix's December 2002 restructuring. Specifically, Hynix notes that FIS 45-134 (September 19, 2002) states that "Yoon Jin-shik reaffirmed the government would not intervene in tackling the Hynix problem, saying that creditors are totally responsible for dictating the future of the troubled company." However, the same article begins with, "Vice Finance Minister Yoon Jin-shik yesterday called on creditor banks of the cash-strapped Hynix Semiconductor to swiftly decide the fate of the world's third largest chipmaker. Creditors will have to find a solution to Hynix as soon as possible to minimize an adverse impact (of the collapse of a proposed [sic] deal with Mircon Technology) on the economy, he said." See FIS 45-134. Examined in isolation, this article provides contradictory evidence with respect to the question of whether the GOK had a policy to save Hynix or whether the GOK was involved in solving Hynix's financial problems. However, when examined in conjunction with the totality of record evidence, it further corroborates the Department's finding that the GOK maintained a policy, and was actively engaged in efforts, to save Hynix. This additional evidence, which Hynix does not cite, also corroborates the first part of the article, which demonstrates that the GOK's policy to save Hynix

was a motivating force behind Hynix's financial restructuring in 2002.⁸

Hynix notes that the Chairman of the FSC stated in September 2002 that Hynix's "creditors group should resolve it on its own...the decision should be left to the Creditors Group's discretion." See FIS 46-224. Again, this statement on its own may appear to indicate a desire by the GOK to have the creditors resolve Hynix's problems without GOK participation. However, not only does the record contain evidence that the GOK was highly involved in the negotiations for selling Hynix to Micron in early 2002, but the record also shows that one of MOFE's policy goals for the second half of 2002 was Hynix's "structural adjustment" (i.e., the company's financial restructuring and its survival as a going concern). See FIS 45-187 and FIS 44-B-9. In addition, after the December 2002 restructuring had been finalized, President Dae-Jung Kim and Deputy Prime Minister Yoon Cheol Jeon attended an economic ministers' meeting at the Blue House to set out "plans for the year 2003 economy." At this meeting, GOK officials stated that they would "try to conclude dealing with insolvent companies including Hanbo Steel and Hynix Semiconductor as soon as possible." See Micron's July 21, 2005, Submission of Rebuttal Factual Information ("Second RFIS"), Exhibit 31. Clearly, the GOK had concerns about Hynix's financial troubles throughout 2002, and, as a result, the GOK maintained its policy regarding Hynix even after the December 2002 restructuring, which was aimed at preventing Hynix's collapse. Moreover, as we have previously found, based on substantial record evidence, that Hynix's creditors were entrusted or directed by the GOK to participate in the December 2002 restructuring.

Throughout the investigation and in this administrative review, Hynix and the GOK have repeatedly argued that the GOK had nothing to do with Hynix's financial restructurings during the POI and the POR. However, record evidence suggests otherwise. For example, the Department asked the GOK the following question:

Please explain the GOK's relationship/interactions between the CRPA Creditors' Council, the Restructuring Committee, Hynix, and its financial advisors during the period January 1, 2000 through the end of the POR. Was the GOK involved in any way in the Creditors' Council, the Restructuring Committee, and the selection of the new financial advisors? Were the actions of the Creditors' Council, the Restructuring Committee, Hynix, and its financial advisors monitored or influenced in any way by any GOK agency or official during the period January 1, 2000 through the end of the POR?

In response, the GOK stated:

The GOK did not maintain any relationship with the CRPA Creditors' Council, the Restructuring Committee, Hynix or its financial advisors during the period

⁸Examples of such corroborating evidence are discussed in the immediately preceding paragraphs.

specified above other than ordinary contacts between the GOK and those entities as required under relevant Korean law, if there is any, for prudential regulation. Nor did the GOK have any influence or effect on the entities mentioned above with regard to Hynix restructurings. In the same context, the GOK was not involved in any manner with the selection of financial advisors for the Creditors' Council or Hynix.

Having said that, the Korean financial supervisory authorities sometimes monitor the restructuring process of the large conglomerates and companies, including Hynix, which may have a substantial impact, whether positive or negative, on the Korean financial market in general. It is incumbent for a financial supervisory authority to be fully apprised of the volatile situation in the financial market in order to adequately exercise its authority delegated from the statutes. This monitoring, however, is nothing but an *ex post facto* verification of facts, confirmation of market situation, and collection of statistical data, all of which constitute quite normal functions of financial supervisory institutions around the world. Without such monitoring of the financial market, the financial supervisory authority would be unable to carry out its function effectively.

The GOK emphasizes that this statute-mandated *ex post facto* monitoring does not and cannot affect the decision of individual creditor financial institutions or Creditors' Council.

GOK SQNR at 62. Yet the record contains evidence that contradicts the GOK's statements above and demonstrates that the GOK interacted with and influenced the Creditors' Council and Hynix's financial advisors with respect to Hynix's financial restructurings during the specified time period. See the Department's March 14, 2006, Business Proprietary Information Memorandum for Final Results ("BPI Memorandum") at Comment 1-A. See also Section B of Comment 1, below, which details the proactive efforts of the Financial Supervisory Service ("FSS") and FSC to ensure that Hynix's creditors participated in Hynix's financial restructurings.

We also note that, in November 2002, just before the December 2002 restructuring, the GOK was severely criticized by Korea's Grand National Party ("GNP"), which had completed a report in the National Assembly regarding the GOK's mismanagement of public funds in recent years. See FIS at 54-100. A section of this report, entitled "Why is the Dae-Jung Kim Administration so Preoccupied With the Bailout of Hyundai?," addressed the restructuring of Hynix, stating that the Dae-jung Kim Administration:

{F}orced financial institutions to extend 24.4 trillion {won} in loans to the Hyundai Group, and mobilized government-invested banks and other government-funded or invested institutions which are run with taxpayers' money, to extend 11.5 trillion won to the Hyundai Group. This resulted in the injection of the astronomical amount of 33.6 trillion won in total thus far, since the Hyundai Group's liquidity crisis in May 2000 (excluding the matching portion from the Korea Development Bank).

Id. at 100. This report further notes that, by saving the failing company, the GOK was “injecting money into bottomless pits” and should account for the total amount of public funds being provided to the Hyundai Group. Indeed, the GNP concluded that the government was wasting astronomical sums of money on failed companies, including Hynix, and that the Korean taxpayers had suffered the consequences. Id. at 104. In addition, we find that, even if Hynix’s claim that the GNP report reflects political mudslinging were true, it would not undermine the veracity of the facts upon which the report was based.

We, therefore, continue to find that the Department’s preliminary findings that the GOK maintained a policy to save Hynix from collapse throughout the POR is supported by substantial record evidence and that Hynix and the GOK’s claims regarding contrary record evidence do not detract from that finding. We note that the GOK’s policy to save Hynix from bankruptcy and keep Hynix as a going concern began in 2000 and continued throughout the POR. We also note that the CIT upheld the Department’s “single program” approach in the DRAMS Investigation Remand and rejected the notion that the Department must isolate evidence of entrustment or direction on an individual transaction or creditor basis, finding instead that the Department could rely on the totality of direct and circumstantial evidence on the record.

B. Government of Korea Influence of Creditors

Hynix’s Argument:

Hynix argues that the record evidence does not support the Department’s preliminary finding that the GOK was able to control Hynix’s creditors. In addition, Hynix contends that, in the Preliminary Results, the Department failed to consider record evidence that demonstrates the GOK’s inability to control Hynix’s creditors. Specifically, Hynix argues that the Department did not consider remarks from experts in the Korean financial sector, whom the Department interviewed during verification for the investigation, which demonstrate that there were limitations on the GOK’s ability to interfere in the Korean financial sector. For example, Hynix notes, Expert 1 stated that “bank managers are responsible for their decisions...they can no longer intervene or directly influence the banks.” See Private Financial Experts Verification Report at 3, provided in FIS 41-60 (hereinafter, “Financial Experts Report”). According to Hynix, evidence contained in the Financial Experts Report is more reliable than the secondary-source evidence, such as newspaper articles, that the Department cited in the Preliminary Results. See e.g., Preliminary Results at 54530, citing FIS 45-175 and 54-117. In addition, Hynix points to other experts, such as Expert 5, who stated, “the government does not have any real means to sanction banks for non-compliance,” and that “by going through restructuring, the banks came out better without having to write off all the loans at a loss.” See Financial Experts Report at 12-13. Hynix also relies on statements made by Expert 8 to support its argument that record evidence demonstrates that the GOK did not have the ability to control Hynix’s creditors. Specifically, Expert 8 stated that “commercial banks are much stronger and more independent from the government than in the past,” and that “while the government likely wanted the banks to support Hynix and may have tried to exert pressure...it was likely not a very significant factor.” See Financial Experts Report at 16.

Hynix contends that the GOK-owned or -controlled creditors did not dominate Hynix's Creditors' Council at the time it was considering DB's December 2002 restructuring plan because those creditors did not hold 75 percent of the Council votes. Hynix contends that the Department failed to explain how GOK-owned or -controlled banks controlled 75 percent of the Council votes and instead simply referred to Hynix SQNR at Exhibit S-38. Hynix argues that the GOK did not control the KEB and, therefore, it was impossible for the remaining banks that the Department labeled "GOK-owned or -controlled" to hold 75 percent of the Council's vote. See Hynix's Pre-Preliminary Determination Comments at 21-22 (August 2, 2005). To support its argument that the GOK did not control the KEB, Hynix notes that the KEB's largest shareholder was Commerzbank, a privately owned foreign bank and that the KEB's stated reasons for lending to Hynix were concerns about its own fortunes, and the health of the financial sector and Korean economy. Hynix further contends that the Department's finding that foreign banks, such as Citibank, were not entrusted or directed by the GOK is at odds with the Department's continued finding that the KEB, a predominately foreign-owned bank whose loan committee was chaired by a Commerzbank official, was controlled by the GOK. Moreover, Hynix contends, the KEB's careful review and critique of Hynix under various MOUs is hardly the conduct of a bank operating under the control of the GOK.

Hynix contends that the Department's reliance on Kookmin Bank's ("Kookmin") and Woori Bank's ("Woori") filings to the U.S. Securities and Exchange Commission ("SEC") fails to demonstrate that either bank was entrusted or directed to participate in Hynix's financial restructuring.⁹ First, Hynix notes that the author of Kookmin's prospectus, the law firm of Cleary Gottlieb, Steen & Hamilton ("Cleary Gottlieb") filed a letter with the Department stating that the prospectus was not intended to refer to Hynix's restructuring where the prospectus stated, "{t}he Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow." See FIS at 33-11 and FIS 42-81 at 34. According to Cleary Gottlieb and Hynix, this statement related generally to the 1998 Corporate Restructuring Act ("CRA") among 200 financial institutions and was not related to a particular borrower. Hynix notes that Woori's 20-F filing acknowledges GOK "guidelines requesting financial institutions to participate in remedial programs for troubled corporate borrowers." See Second RFIS, Exhibit 46 at 26-27. Similar to the Kookmin prospectus, Hynix argues that the Woori filing refers to the CRA as a whole and does not demonstrate GOK control of Hynix lending. In addition, Hynix contends that the statements in the September 2003 Woori filing were speculative and regarding future events, not events prior to September 2003. Lastly, Hynix contends that Woori's credit evaluation of the December 2002 restructuring undermines the probative value of its SEC filing, and demonstrates that Woori was motivated to participate by its own commercial interests and was not motivated by the GOK. See Hynix July SQNR at Exhibit

⁹As of December 2002, Woori Bank was a wholly owned subsidiary of Woori Financial Group. See GOK SQNR at 29. Woori Financial Group is registered with the SEC as "Woori Finance Holdings Co., Ltd." Woori Bank's financial disclosures are consolidated within the filing by Woori Finance Holdings Co., Ltd. Hereafter, the entities may be referred to collectively as "Woori."

Hynix argues that the GOK does not have control over Chohung Bank (“CHB”) simply because the GOK indirectly owns 80 percent of CHB through the Korea Deposit Insurance Corporation (“KDIC”). In addition, Hynix argues that CHB’s role as administrator of certain GOK loan programs does not demonstrate GOK control of CHB. Hynix also argues that the KDB was not the GOK’s agent or an example-setting creditor for Hynix’s other creditors, as the Department has found. To support its position, Hynix notes that the KDB’s participation in the December 2002 restructuring was dwarfed by foreign creditors’ participation and that the KDB “discouraged the notion of selling Hynix and, instead, recommended its further restructuring,” while, according to the press, the GOK was supporting the immediate sale of Hynix. See FIS at 45-131. In addition, Hynix notes that the KDB’s desire to restructure Hynix mirrored the recommendations of DB, Hynix’s outside financial expert. See FIS at 45-131. Hynix also argues that the KDB was not acting like an executor of the GOK’s alleged policy to save Hynix when the KDB forced the redemption of KRW 26.4 billion in bonds when Hynix was effectively cash-starved. See FIS 45-156. Hynix notes that the KDB originally sought to redeem KRW 82.4 billion but, because Hynix’s creditors were operating under the rules of the CRPA, the KDB had to consult with the other members of the Creditors’ Council. Hynix contends that such actions by the KDB demonstrate that the KDB was not an executor of GOK policy or will, and that the Department misinterpreted record evidence regarding the KDB’s behavior towards Hynix.

The GOK’s Argument:

The GOK disputes the Department’s characterization that the Kookmin and Woori disclosures constitute direct evidence of GOK interference in the lending decisions of Hynix’s creditors. The GOK asserts that these documents are not even indirect evidence because they do not specifically refer to Hynix’s restructuring or the GOK’s alleged policy toward Hynix. According to the GOK, these documents show that these two banks may have to take into account other non-commercial reasons as stipulated in those documents. They do not state that Kookmin or Woori were, are, or will be entrusted or directed by the GOK to participate in the Hynix December 2002 restructuring.

Micron’s Argument:

Micron contends that the record contains overwhelming evidence, including experts’ views on the Korean financial sector, that the GOK controlled and influenced Hynix’s creditors. Micron further contends that in the Investigation Final Determination, the Department considered all of the record evidence (which is also on the record of this review) cited by Hynix, including expert opinions described in the Financial Experts Report, and concluded that the evidence overall supported a finding of GOK entrustment or direction. Specifically, Micron argues the expert testimony described in the Financial Experts Report in its entirety overwhelms Hynix’s evidence of no entrustment or direction. For example, one expert stated that “the reforms removed much,” but not all, “of the government’s influence over the banks.” See Financial Experts Report, Meeting 2 at 5. Another expert’s view, as described by the Department, was that the GOK

regularly uses tactics to bring about creditor compliance, ranging from “moral suasion” and “implicit rhetoric” to “jawboning,” all of which “provides pressure on the banks because they know they will not receive favor if they refuse to follow the government’s position.” See Financial Experts Report, Meeting 3 at 8. Micron notes that the Department reported another expert’s view that “the government was aware of the 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.” See Financial Experts Report, Meeting 1 at 4.

Micron contends that Dr. Edward M. Graham, Senior Fellow at the Institute for International Economics, and an expert on the Korean economy, corroborated the Department’s finding that the GOK had the ability to control Korean banks. Micron notes that Dr. Graham’s report, “The Hynix Bailout Constitutes Classic Korean Government Intervention,” confirms that the GOK enhanced its control of the banking sector after the 1997-1998 economic crisis through massive capital infusions; that Korean banks lack autonomy from the GOK; and that the GOK uses various tactics to exert control over Korean banks, such as broadcasting its own policies and requesting cooperation. See FIS 51-F-4 at 16-20. Micron argues that these are but a mere sampling of the plethora of record evidence regarding the GOK’s control of Hynix’s creditors throughout 2002, and that this evidence far outweighs counter-evidence offered by Hynix on this matter. In addition, Micron argues that, given the Department’s extremely thorough and probing review of the evidence and circumstances surrounding the December 2002 restructuring, the GOK’s accusation that the Department cherry-picked evidence is baseless.

Micron argues that the KEB, Kookmin, Woori, CHB, and the KDB were indeed owned or controlled by the GOK during the POR, despite Hynix’s arguments otherwise. Micron contends that the KEB’s internal analysis for participating in Hynix’s May 2001 restructuring makes no mention of whether participating in the restructuring was a sound commercial endeavor. Instead, Micron argues that the KEB’s assessment focuses on the importance of Hynix to Korea’s economy and the potential ripple effect of a Hynix collapse, and mimics the GOK’s policy concerns at that time. See Hynix Verification Report at 15. Micron contends that this demonstrates that the GOK controlled the KEB’s lending decisions with respect to Hynix. Micron also contends that, as Hynix’s lead creditor on the Creditors’ Council throughout the investigation period and the POR, the KEB spoke for all of Hynix’s creditors. In addition, Micron argues that the record contains no evidence that Commerzbank’s position as the chair of the KEB’s loan committee had any bearing on the GOK’s ability to entrust or direct the KEB. Notwithstanding Commerzbank’s chairmanship, the KEB spoke for, and was controlled by, the GOK, according to Micron. To support its argument, Micron cites FIS 21-93 at 47, FIS 29-76 at 2, and FIS 51-F-4 at 33, in which the KEB is characterized as the GOK’s hand-picked lead bank for Hynix and as the *de facto* GOK agent charged with coordinating the actions of the Creditors’ Council. Micron also notes that the GOK was the KEB’s largest shareholder; that Commerzbank was not a controlling shareholder and nominated only two of the KEB’s nine non-standing directors; and that the GOK expressly instructed the KEB to assist in the bailout measures at its ministerial meetings, further proving that the KEB was the GOK’s operative. See FIS 21, FIS

25-L-4, FIS L25-L-3, and FIS 28-9.

Micron argues that Kookmin's and Woori Bank's filings with the SEC demonstrate that the GOK owned and/or controlled Kookmin and Woori and, thus, entrusted or directed them to participate in Hynix's restructuring. Micron contends that the Cleary Gottlieb letter regarding the Kookmin prospectus is not on the record of this review and, therefore, the Department should disregard Hynix's argument. However, Micron argues, if the Department were to consider this letter, it should note that the Kookmin prospectus listed the CRA as one of many potential examples of GOK direction. In support of this argument, Micron points to the April 23, 2003, letter from Edward Young to the Department (FIS 34-44 and Micron Rebuttal Brief at Appendix 5) in which the author contends that Hynix's argument and the Cleary Gottlieb letter misconstrue the plain language of the Kookmin prospectus. Moreover, Micron argues, the Kookmin prospectus specifically refers to GOK lending pressure that is directed at troubled corporate borrowers, and that Kookmin's 2001 annual report lists Hynix as its top such borrower. See FIS 28-63 at 58. In addition, Micron contends that Kookmin's September 2001 filing with the SEC demonstrates that the GOK directed Kookmin to lend to technology companies, which, Micron argues, obviously refers to Hynix. See FIS 44-A-20 at 24. Micron also contends that the GOK admitted to having a "dominant influence" over Kookmin in a 2004 submission to the World Trade Organization ("WTO"), and that the firing of the president of Kookmin was likely due to his opposition to the GOK-directed bailout of Hynix. See FIS 49-E-5 at 113-114, FIS 44-B-15 and FIS 54-111.

Micron contends that the Woori filing similarly demonstrates that the GOK controlled Woori's lending to "troubled corporate borrowers" and "technology companies." Micron notes that Hynix was Woori's largest borrower as of December 2002, that its loans to Hynix were classified as substandard or below, and that Hynix was Woori's only substandard exposure that was also a technology company. See Preliminary Results at 54531. Micron contends that Woori's SEC filing was intended to reflect the GOK's control of its lending to Hynix. In addition, Micron contends that Woori's internal credit analysis related to the December 2002 restructuring demonstrates that the GOK controlled Woori's lending decisions concerning Hynix.

Micron contends that the GOK is a majority and controlling owner of CHB because the GOK owns 80.5 percent of CHB through the KDIC, which is a GOK entity. In addition, Micron argues that CHB officials resigned as a result of a dispute with the GOK over the appointment of bank officers and that the CHB administers GOK policy loans. According to Micron, the Department noted these facts in finding that CHB was controlled by the GOK. See Preliminary Results at 54532, citing FIS 48-C-7. See also FIS 45-175. Lastly, Micron contends that a current KDIC official serves on CHB's board, and that the KDIC exercises its voting rights as a shareholder concerning the general management of CHB. See Micron Rebuttal Brief at Appendix 3. For these reasons, Micron contends that the Department correctly found CHB to be a GOK-owned or -controlled entity.

According to Micron, the Department's long-standing position has been that the KDB is a GOK

entity and implementer of GOK policy and, thus, the KDB is owned and controlled by the GOK. See Investigation Decision Memorandum at 7-8, 52-53, 57-58. According to Micron, the KDB's portion of the December 2002 equity conversion is not relevant to the KDB's ability to influence Hynix's creditors. Rather, the KDB's substantial voting rights on the Creditors' Council afforded the GOK the ability to control the creditors' actions with regard to the December 2002 restructuring. With respect to Hynix's argument that the KDB opposed the GOK's desire to sell Hynix, Micron contends that there is no record evidence that the GOK ever abandoned its objective of ensuring Hynix's survival or that the KDB strayed from this policy. Micron also argues that the KDB influenced DB's assessment of and restructuring plan for Hynix. See FIS 45-131. In addition, Micron contends that the KDB had significant clout over Hynix's creditors, given its voting shares on the Creditors' Council and its role as a GOK bank. See FIS 45-131, in which the KDB is described as having "a significant impact on the outcome of the Creditors Meeting scheduled around the middle of the month, where {future} direction of Hynix will be decided."

In response to Hynix's argument that the KDB forced redemption of KRW 26.4 billion in bonds when Hynix was effectively cash-starved, Micron claims that the KDB was never intended to carry any of the KRW 82.4 billion that were supposed to be transferred to the CBO/CLO bond program pursuant to the Fast Track bond program. See FIS 45-162. According to Micron, the KDB was unable to unload these undesirable, high-risk bonds, but could not hold on to them without violating the terms of the Fast Track program. Thus, the KDB had to redeem some, if not all, of the bonds, particularly given that the Fast Track program was under heavy attack from the Korean National Assembly for providing subsidies to Hynix and other Hyundai Group companies. See FIS 29-101. Micron claims that, despite the need to divest itself of all of these bonds, the KDB unilaterally extended the maturity for KRW 56 billion that it did not redeem. According to Micron, the KDB extended the maturity for these bonds simply to benefit Hynix, which certainly conformed to the GOK's policy to save Hynix.

The Department's Position:

Hynix's arguments suggest that GOK's actions to influence or control the lending decisions of Hynix's creditors could not have occurred during the POR because the GOK did not control creditors such as the KEB, Kookmin Bank or Woori Bank. We find this suggestion to be highly dubious and unsupported by record evidence. As discussed above, substantial record evidence evinces the GOK's undiminished concerns regarding the impact a Hynix collapse would have on the Korean economy, and the GOK's continued high level of involvement in seeking a solution to Hynix's financial troubles. Record evidence further demonstrates that the GOK had the means to carry out its policies regarding Hynix during the POR, through its direct control over government banks such as the KDB, and by entrusting or directing other banks. The GOK-entrusted or -directed financial restructurings of 2001 did not bring about their intended results in 2002 and their success seemed more out of reach by mid-2002. In fact, it is undisputed that by mid-2002, Hynix's bankruptcy loomed as large as it did in 2001 (*i.e.*, during the first quarter of 2003). As discussed in Section A of Comment 1, above, the GOK did not abandon its policy to

prevent Hynix from collapse during 2002.

First, we examine the arguments regarding the Financial Experts Report. Hynix and Micron rely on various quotes from the Financial Experts Report to support their arguments regarding the GOK's ability and actions taken to influence private creditors' lending decisions in the ROK. While some of the financial experts stated that the GOK was no longer able to influence Korean creditors, the same and other experts made statements that the GOK did not lose its ability to influence Korean creditors, particularly Hynix's creditors. For example, expert 1 stated, "before the crisis, the GOK used both direct and indirect means to influence the banks. Now, however, the situation is very different. For example, except for those banks in which the government has significant ownership, it no longer influences" them. See Financial Experts Report at 2. However, none of those changes amounted to a wholesale departure from the GOK's past practices of influencing public and private banks to provide financial support in accordance with GOK policies, particularly with respect to Hynix. The same expert, expert 1, also stated, "the government was aware of the workout process and could influence the government-owned banks and the Korea Development Bank...In the creditors' meetings, the other state-owned banks and the specialized banks persuaded other creditor banks to participate in the various restructuring decisions" regarding Hynix. See Financial Experts Report at 4. Although the financial experts' views and statements are mixed with respect to the GOK's ability to influence lending decisions for some private banks, we continue to find that they support the Department's determination that the GOK was capable of influencing, and did influence, the lending decisions of Hynix's creditors with respect to Hynix's financial restructurings during the POR. This is particularly true when the financial experts' views are considered alongside other record evidence and in light of the GOK's track record of entrusting or directing credit to favored industries or companies.

Additional evidence of the GOK's overall influence over Korean creditors is a March 2003 statement made by the Chairman of a Korean bank: "the government has been making telephone instructions more often than it used to since the Financial Crisis...the ordinary course of action would be the Heads of Strategic Bureaus of the Ministry of Finance and Economy and the Financial Supervisory Commission making direct phone calls to Chairmen of banks." See FIS 47-B-23 at 1. Another bank officer stated that "banks could not decline the government instructions because noncompliance with the government's orders could lead to many disadvantages under the situations." See FIS 47-B-23 at 2.

In the Investigation, the Department found numerous instances in which the GOK influenced or coerced the lending decisions of Hynix's creditors. For example, the Department considered "numerous statements on the record relating to the GOK's pressure on Korea First Bank ("KFB") (which was, at that time, 51 percent owned by Newbridge Capital, a U.S. company) to participate in the Fast Track Program." See Investigation Decision Memorandum at 59-60. On January 4, 2001, KFB had rejected a government call for participation in the Hynix bailout, reflecting its assessment that increased credit to Hynix was not commercially warranted. Wilfred Horie, Chief Executive Officer of KFB, observed at the time that KFB's "opposition is the result of sticking to strict principles for profit making. All told, {the KFB directors} said the purchase of the bonds

of insolvent firms would push the bank into further managerial hardship.” See FIS 21-B-66.

Mr. Horie viewed the GOK’s request for participation in the Hynix restructuring and recapitalization measures as coercive. Horie complained: “It is nonsense for the government to force the banks to undertake the corporate bond. Such issue should be left to the banks’ discretion.” See FIS 21-B-38. The FSS bluntly responded that, “{a}t the moment, we will ask {KFB} to undertake Hyundai’s bond one more time. But if the bank rejects again, leading to the collapse of related companies, we will hold the bank responsible.” See FIS 21-B-38. Yong-hwa Chong, Information Director at the FSS, openly threatened that “{s}evere sanctions will be imposed by adding the banks’ willingness to support public policy as a category to the evaluation of bank management”. See FIS 21-B-33. A *Business Week* article indicated that “{t}he next day {after KFB rejected the government demand}, a government agency pulled, then redeposited, \$77 million from a Korea First account. See FIS 21-B-104. This followed at least ten angry phone calls between the FSS and the KFB. See FIS 2-38. *Business Week* reported that: “Word spread that all government agencies would cut ties with Korea First.” See FIS 21-B-104. According to Bloomberg, the government even threatened to demand that one of KFB’s main corporate customers (the SK Group) cease doing business with the bank. See FIS 21-B-71. The press reported that Wilfred Horie later confirmed that “{t}here was someone {at the FSS} who was very angry with the bank’s decision. And it’s true that someone within the government was talking to our clients.” See FIS 21-B-11. Horie further elaborated, explaining that “{a}t some point he {the FSS official} can make our life very miserable. Their comment directly to me was: ‘We have no desire nor do we have the right to insist that you do things against your will, but this is Korea and you should cooperate as much as you can.’” See FIS 21-B-71. Such statements are evidence of the GOK influencing, pressuring or delegating to the banks.

Notwithstanding the KFB’s resistance to participating in the Fast Track Program, KFB ultimately surrendered to the GOK’s pressure by agreeing to participate in the bailout as it related to D/A financing and Fast Track. See FIS 21-B-72 and FIS 21-B-40. Horie committed to finance about \$38 million of the \$1.5 billion funding for Hynix’s D/As after a personal meeting with a high-level FSS official. See FIS 21-B-72. In fact, KFB ultimately participated in a number of the Hynix restructuring and recapitalization measures. Such capitulation by a foreign majority-owned bank simply underscores the even more precarious position of Korean-owned banks when it came to GOK pressure.

Not only did the GOK threaten to impose sanctions on KFB, it also, through the FSC and FSS, threatened to terminate banks’ relationships with either the government or their existing customers. For instance, the GOK threatened KFB with the loss of its customers, interceding directly with them, and raised the possibility of losing tens of millions of dollars in government business unless the bank complied with government demands. See FIS 21-B-71 and FIS 21-B-104. In the Investigation Decision Memorandum, the Department specifically noted a January 29, 2001, *Wall Street Journal* article stating that when KFB refused to participate in the GOK program 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. See FIS 2-38 and Investigation

Decision Memorandum at 60. Other Hynix creditors facing similar pressure from the GOK are likely to have capitulated, as did KFB.

We note that the KFB situation described above occurred in 2001, yet we find that it is relevant to Hynix's December 2002 restructuring because it shows how forcefully the GOK reacted to a creditor that attempted to depart from the GOK policy to save Hynix. We find that the GOK's actions toward KFB not only ensured that KFB would participate in the Hynix restructurings of 2001, despite its opposition to do so, but also served as a warning to Hynix's other creditors not to go against the GOK when it came to Hynix. The severity of these actions, such as threatening to discontinue GOK business with the bank, was such that they served as a warning to Hynix's creditors throughout the POR.

The Department also found that the GOK made threats against KorAm Bank when the bank refused to participate in the May 2001 KRW 1.0 trillion won convertible bond package. The bank had refused, contending that Hynix had failed to deliver a written pledge to use its best effort to reduce its debt. See Investigation Decision Memorandum at 59. The FSS severely rebuked KorAm, with one FSS official stating: "If KorAm does not honor the agreement, we will not forgive the bank." FIS 21-B-69. The same FSS official further threatened stern measures against the bank, such as disapproving new financial instruments and subjecting the bank to a tighter audit. Id. Another FSS official predicted that the bank would extend credit to Hynix even without the Hynix memorandum pledging to reduce its debt: "We don't think KorAm will break the agreement. In particular, the bank yesterday expressed its intention to extend financial support to the semiconductor maker even if Hynix fails to submit the memorandum." Id. As a result of the threats, KorAm Bank capitulated and reversed its decision in a single day. See FIS 8-19 and FIS 21-B-69. In addition, the investigation record shows that, in connection with the D/A extensions in February and March 2001, the GOK engaged in similar pressure tactics against Shinhan Bank, Hanmi Bank, CHB, and Hanvit Bank. See FIS 3-51, FIS 28-7 and FIS 28-12.

We are also not persuaded by Hynix's contention that Commerzbank's 23.6 percent ownership of KEB immunized the bank from GOK influence or control. By comparison, the KFB was 51 percent owned by an American firm and 43 percent owned by the GOK in 2001, yet record evidence shows that the GOK was still able to influence KFB's lending decisions regarding Hynix's 2001 restructurings. See FIS 43-97 at 59. As such, we fail to see how Commerzbank's relatively smaller ownership stake in KEB would automatically immunize the KEB from the GOK's ability to influence KEB's credit decisions regarding the Hynix restructuring. Moreover, the record evidence in this review shows that the GOK remained the KEB's single largest shareholder (36 percent) and, therefore, was able to influence the bank's management and financing decisions. See BPI Memorandum at Attachment 1.

This is further supported by Lee Phil-sang, the Dean of the Korea University's Business School, who wrote, by "...injecting large sums of public funds, the government nationalized banks and kept a firm grip on financial institutions via the Financial Supervisor Commission. Out of ten

existing commercial banks, the government is the major shareholder of seven banks,” including the KEB. See FIS at 54-117. The article goes on to say that the “government has publicly declared it will not intervene in bank management, even when it is the major shareholder, but whenever there is a major shakeup, such as the election of a CEO, the government has been known to exert pressure.” Id. This observation was corroborated by reports from various other sources that the EXIM Bank and the BOK, which are shareholders in the KEB, influenced the Presidential Candidate Recommendation Committee’s recommendation of Kang Won Lee as KEB president and that officials at the KEB and CHB resigned following a dispute with the GOK over the appointment of bank officers. See FIS 48-50 and FIS at 45-175. Thus, we find that through its ownership of KEB, the GOK was indeed able to, and did, influence KEB’s credit decisions with respect to Hynix’s financial restructurings in 2002.

In addition, we note that the KEB was the lead bank of the Creditors’ Council. Record evidence demonstrates that the GOK has historically, and throughout the POI and POR, relied on the lead bank as the primary means of communicating the government’s wishes to creditor councils. See FIS 29-93 at 47, FIS 29-76 at 2, and FIS 51-F-4 at 33. In the investigation, the Department found that the “record evidence illustrates that the KEB acted in accordance with the GOK’s policy objectives.” See Investigation Decision Memorandum at 18. Specifically, the Department found that the KEB justified its participation in the various Hynix restructurings not on the basis of commercial considerations but for reasons that were aligned with the government’s social and economic concern regarding the impact of Hynix’s potential collapse. We find no evidence in this review that the KEB’s motivations changed after the investigation, especially given that the GOK remained the KEB’s largest shareholder, which gave it the means to carry out its policies regarding Hynix. As in the investigation, the KEB’s largest shareholder was the GOK. Thus, the GOK, through the KEB, continued to play a pivotal role on the Creditors’ Council. In summary, the GOK was able to influence not only the KEB, through its ownership, but also the Creditors’ Council overall, through its lead bank, the KEB. We note that, as lead bank, the KEB was responsible for hiring outside consultants and, under the CRPA, was charged with overseeing the troubled company’s restructuring and business normalization efforts. See Hynix SQNR at 44 and FIS 8-14.

Hynix contends that Kookmin and Woori’s SEC filings do not demonstrate that the GOK influenced these banks with respect to Hynix’s financial restructurings. However, as we discussed in the Preliminary Results, Kookmin is a commercial bank with relatively small GOK ownership. In the investigation, the Department found that Kookmin’s September 2001 SEC disclosure was “direct evidence that such direction occurred and provides crucial evidence of the government’s role in directing lending decisions.” Investigation Decision Memorandum at 59. In June 2002, Kookmin filed another disclosure with the SEC which contained language identical to that found in its September 2001 filing. See FIS at 33-11 (“The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow.”). Even though Kookmin itself was not a member of Hynix’s Creditors’ Council in December 2002, it controlled several affiliates who were on the Council. See e.g., Hynix QNR at Exhibit 20 and BPI Memorandum at Attachment 1. Because the 2002 SEC

disclosure occurred during the planning stages of the December 2002 restructuring, our previous findings concerning GOK interference in Kookmin's lending practices with respect to the October 2001 restructuring remain equally applicable to the bank's practices and, by extension, to those of its affiliates on the Creditors' Council, in the context of the December 2002 restructuring.

Woori's Form 20-F explains the risks related to GOK ownership and control of the bank, particularly the risks involved in governmental pressure to lend to certain industries. The filing states:

Risks relating to government control. The KDIC, which is our controlling shareholder, is controlled by the Korean government and could cause us to take actions or pursue policy objectives that may be against your interests. The Korean government, through the KDIC, currently owns 86.8% of our outstanding common stock. So long as the Korean government remains our controlling stockholder, it will have the ability to cause us to take actions or pursue policy objectives that may conflict with the interests of our other stockholders. For example, in order to further its public policy goals, the Korean government could request that we participate with respect to a takeover of a troubled financial institution or encourage us to provide financial support to particular entities or sectors. Such actions or others that are not consistent with maximizing our profits or the value of our common stock may have an adverse impact on our results of operations and financial condition and may cause the price of our common stock and ADSs to decline. . .

Risks relating to government regulation. The Korean government promotes lending and financial support by the Korean financial industry to certain types of borrowers as a matter of policy, which financial institutions, including us, may decide to follow. Through its policy guidelines and recommendations, the Korean government has promoted and, as a matter of policy, may continue to attempt to promote lending by the Korean financial industry to particular types of borrowers. For example, the Korean government has in the past announced policy guidelines requesting financial institutions to participate in remedial programs for troubled corporate borrowers, as well as policies identifying sectors of the economy it wishes to promote and making low interest funding available to financial institutions that lend to these sectors. The government has in this manner encouraged low-income mortgage lending and lending to small- and medium-sized enterprises and technology companies. We expect that all loans or credits made pursuant to these government policies will be reviewed in accordance with our credit approval procedures. However, these or any future government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of that policy.

See Micron's Second RFIS, Exhibit 46 at pages 26-27. Given the timing of these statements

(shortly after the December 2002 restructuring and during its implementation), we find that the references to “troubled corporate borrowers” and “technology companies” indicate that the risks discussed pertained in large part to the December 2002 restructuring of Hynix. As of December 31, 2002, Hynix represented Woori’s largest exposure; the bulk of this exposure was “classified as substandard or below;” and Hynix was Woori’s only substandard exposure that was also a technology company. See id. at 26-27, 75, 85. The Department finds the nexus of these facts to be highly probative. Thus, Woori’s 2003 SEC disclosure provides crucial direct evidence of GOK interference in the lending decisions of GOK-owned or -controlled banks with respect to Hynix.

Both Woori and Kookmin had to disclose these potential risks because, 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. See Investigation Decision Memorandum at 55 and Preliminary Results at 54531. In this instance, Woori and Kookmin were signaling to investors that they must assume risks in making lending decisions not based on commercial considerations but, rather, upon the direction of the GOK and reflective of the GOK’s economic and social policy objectives. Additionally, these disclosures contain a highly telling caveat, stating that, although “. . . credits made pursuant to these government policies will be reviewed in accordance with our credit approval procedures,” nevertheless, “these or any future government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of that policy.” See Second RFIS, Exhibit 46 at 26-27; Investigation Decision Memorandum at 59 (quoting the September 2001 Kookmin disclosure). Thus, we find that both the Kookmin and Woori SEC filings provide crucial direct evidence of GOK interference in the lending decisions of Kookmin and Woori, and indirect evidence of GOK interference in the lending decisions of Hynix’s other creditors.

Given that Woori is a GOK majority-owned bank and that Kookmin is mostly a private bank, the Department finds these two disclosures highly indicative of the general susceptibility of both GOK-owned or -controlled banks and private banks to GOK influence. Indeed, Hynix’s creditors that did not seek listing on a U.S. stock exchange were not legally required to make disclosures similar to Woori’s and Kookmin’s. Nevertheless, both disclosures state that the government promotes lending to certain types of borrowers which “financial institutions” may follow. Id. Thus, these statements strongly suggest that other financial institutions were subject to governmental pressures like those faced by Woori and Kookmin. It is clear from this evidence that the GOK exerted influence over, pressured or handed responsibility to Hynix’s creditors.

Hynix contends that the author of Kookmin’s SEC filing, Cleary Gottlieb, stated that the SEC filing was not intended to refer to Hynix when it mentioned that GOK’s promotion of lending to certain borrowers but rather referred to the CRA in general. We agree with Micron that the Cleary Gottlieb letter regarding Kookmin’s SEC filings is not on the record; rather the letter is merely discussed in Micron’s May 30, 2003, rebuttal brief submitted to the Department during the investigation. See FIS 42-81 at 34. Therefore, the Department need not consider Hynix’s arguments with regard to this letter. Nevertheless, even if the Department were to consider the

Clearly Gottlieb letter, we would find that the letter is nothing more than an *ex post facto* explanation of concrete evidence of the GOK's ability to influence Hynix's creditors, such as Kookmin and Woori. We would also find that Hynix's attempt to rewrite the plain meaning of the SEC filings is without merit. See Micron Rebuttal Brief at Appendix 5.

The record also contains evidence that the FSC's decision to remove the president of Kookmin may have been the result of his opposition to Hynix's restructurings and not the result of an alleged accounting violation. See FIS at 44-B-15, FIS at 54-111. We consider this additional evidence of the GOK's ability to influence myriad private banking activities, including the banks' credit decisions and the selection of their executives.

Hynix argues that Woori's internal credit evaluation of the December 2002 restructuring demonstrates that Woori was clearly driven by its own commercial interests and that the GOK was not involved in the December 2002 restructuring. See Hynix July SQNR at Exhibit 32-19. For a further discussion of Woori's and other banks' internal credit evaluations, see BPI Memorandum at Comments 1-B and 1-C.

In the Preliminary Results, the Department noted that CHB was 80.05 percent directly owned by the KDIC at the time of the December 2002 restructuring, and that CHB had a significant share of voting rights on the Creditors' Council. See GOK SQNR at 29 and Hynix SQNR at Exhibit S-38. By June 2003, the KDIC had injected KRW 2.7 trillion of public funds into CHB, a stake further solidified with an MOU between the two entities. See FIS at 47-A-1 at 93 and FIS at 47-A-2 at 293. Further, as indicated on CHB's website, CHB disburses GOK policy fund loans under various GOK industrial development programs. See FIS at 48-C-7.

The Department requested "copies of any MOU in effect between July 1, 2002, and the end of the POR between Hynix' creditors or Creditors' Council members and the GOK or any GOK entity. . . {i}nclud{ing} any performance plans or management normalization plans required by such MOUs." In response, the GOK stated, "{t}he MOUs concluded between KDIC and the Hynix creditors above are provided as GOK SQR Exhibit 11. Please be advised that due to the limited amount of time coupled with extensive questions and requests in the questionnaire, the GOK was not able to fully translate all MOUs into English. Instead, the GOK attached as an example a full translation of the MOU concluded between the KDIC and Hanvit Bank (later merged to Woori Financial Holdings). The GOK believes that this translation provides the Department with a good overview of the contents of other MOUs as well because they are basically similar to the MOU between KDIC and Hanvit." See GOK SQNR at 54-55 and Exhibit 11. As such, we reviewed the sample MOU and found that, through capital injections and the complementary MOUs, the KDIC acquired extensive ownership stakes in and exercised significant leverage over the day-to-day operations of financial institutions receiving capital from KDIC. For example, the sample MOU states that the KDIC may request creditors to transfer "contracts on financial transactions, such as deposits and loans," or take "any other adequate measure." See GOK SQNR Exhibit 11 at 45-49. In addition, the MOU provides the KDIC with full shareholder rights. As such, we find that Hynix's arguments that the GOK, through the KDIC's stock ownership and the MOU, did not control CHB and could not influence CHB's

lending activities are without merit.

In the Preliminary Results, the Department stated, “we continued to distinguish between those banks found to be ‘government authorities’ within the meaning of section 771(5)(B) the Act, and banks found to be ‘entrusted or directed’ by the GOK, within the meaning of section 771(5)(B)(iii) of the Act. See the “Programs Determined to Confer Countervailable Subsidies During the POR” section, above. No new evidence or changed circumstances exist that would lead us to revisit our prior determination that the KDB and other “specialized” banks are government authorities and that the financial contributions made by these entities fall within section 771(5)(B)(i) of the Act.” We reiterate our preliminary finding regarding the KDB and, therefore, we find that Hynix’s contention that the KDB was not an agent of the GOK is not supported by record evidence.

C. Government of Korea’s Influence over the Creditors’ Council

Hynix’s Argument:

Hynix contends that the options granted by the CRPA to members of the Creditors’ Council and the options presented to creditors in the October 2001 and December 2002 restructuring plans underscore the commercial nature of Hynix’s restructuring process. Hynix also contends that these options, in addition to the statutory right to seek mediation to dispute Creditors’ Council resolutions, demonstrate that the CRPA did not force creditors to accept the terms of the 75 percent Creditors’ Council majority. As such, Hynix contends, whether the GOK controlled a large majority of the Creditors’ Council voting rights is beside the point, particularly given that some creditors did seek mediation regarding the October 2001 and December 2002 restructurings. See CRPA Arbitration Documents, provided in the Hynix QNR at Exhibit 13, and Dissenting Creditor Table, provided in Hynix July SQNR at Exhibit 3S-13. Hynix argues that the fact that only four creditors sought mediation regarding the October 2001 restructuring and only one creditor sought mediation regarding the December 2002 restructuring demonstrates that creditors had choices and that both restructurings were commercially reasonable.

Hynix contends that the creditors that sought mediation for the October 2001 and December 2002 restructurings were not insignificant creditors and that their financing to Hynix should not be countervailed. To support this contention, Hynix notes that the Department stated that “although mediation may have been officially provided for under the CRPA, we do not believe that it was a realistic option for the overwhelming majority of creditors.” See Preliminary Results at 54533. Hynix contends that mediation was a realistic option for creditors, such as KFB, and those with less Hynix debt than KFB.

The GOK’s Argument:

The GOK believes that the Department misunderstood the answers provided by the GOK regarding the role of the GOK in the banks in which it held a majority ownership. The GOK contends that it did not intervene in the daily business decision-making process of banks, but in

some instances, the GOK may exercise its shareholder's rights at shareholders' meetings. According to the GOK, this does not mean that the GOK attended Creditors' Council meetings.

The GOK argues that the GOK-owned or -controlled banks could not impose GOK policy upon the Creditors' Council because the KEB is neither GOK-owned nor -controlled and, therefore, the remaining banks in the GOK-owned or -controlled category did not hold the requisite 75 percent of the Council votes to pass a resolution. In addition, the GOK argues that specific bank decisions, such as how to vote on a Creditors' Council resolution, were made by the management of the individual banks and financial institutions. According to the GOK, Hynix's creditors, regardless of GOK shareholding or the percentage of GOK-owned or -controlled banks on the Council, made their own decisions in December 2002 Hynix restructuring.

Micron's Argument:

Micron states that in the Preliminary Results, the Department found that, "at the time of the December 2002 restructuring, the creditors which were either government entities or in which the GOK held the largest or a majority share accounted for over 80 percent of the voting rights in the Creditors' Council, measured by banks' exposure to Hynix." See Preliminary Results at 54530. Micron points to its July 21, 2005, Pre-Preliminary Comments on the Hynix Bailout ("Micron Pre-Preliminary Comments"), which Micron re-submitted as Appendix 3 in the Micron Rebuttal Brief to further support the Department's findings with respect to the GOK's ownership level in each GOK-owned or -controlled creditor on the Creditors' Council at the time of the December 2002 restructuring. Micron contends that this evidence disproves Hynix's argument that GOK-owned or -controlled banks held less than 75 percent of the Creditors' Council votes. In addition, Micron argues that Exhibit 3 to the Hynix Case Brief, which Hynix claims establishes that privately or foreign-owned creditors on the Creditors' Council accounted for 31 percent of the equity involved in the December 2002 restructuring, is inaccurate. Thus, Micron concludes, Hynix failed to undermine the Department's preliminary finding that, because the GOK-owned or -controlled banks held over 80 percent of the Creditors' Council votes, the government was able to dominate the Creditors' Council and entrust the continuation of its policy regarding Hynix to the Council.

The Department's Position:

The record contains information concerning the GOK's ownership of some, but not all, of Hynix's many creditors that participated in the December 2002 restructuring and voted on the Creditors' Council for that restructuring. The record also contains information concerning the voting rights Hynix's creditors held during the December 2002 restructuring. We note that there are inconsistencies between the charts submitted by Hynix that list 1) the voting rights (see Hynix SQNR, Exhibit S-38 at 1-4); and 2) the monies involved in the December 2002 restructuring for each Hynix creditor (see Hynix QNR at Exhibit 20). For example, Exhibit S-38 lists several lease companies that are not listed in Exhibit 20, and vice versa. Despite the confusion caused by such inconsistencies, the Department has endeavored to compile the most accurate and complete description of the creditors involved and their participation levels in the

December 2002 restructuring. See BPI Memorandum at Attachment 1. We note that this chart also relies on information provided by Micron in Exhibit 3 of the Micron Rebuttal Brief.

Based on this chart, we note that the creditors in which the GOK held at least a 25 percent ownership stake controlled over 75 percent of the votes in the Creditors' Council, and that these creditors owned nearly two-thirds of Hynix in December 2002.¹⁰ We also note that creditors in which the GOK was the majority or single largest shareholder (i.e., the GOK-owned or -controlled banks) held over 72 percent of the Creditors' Council vote and owned over 60 percent of Hynix. As such, we find that, through these creditors, the GOK was indeed the dominating force on the Creditors' Council.

Although government ownership by itself may not be sufficient to find that a financial institution is a government entity, the high level of ownership by the government in most of Hynix's largest creditors, and its smaller yet still significant ownership of less than 25 percent in other Hynix creditors, gave the GOK the ability to exercise substantial influence over the activities of these entities, including their lending decisions with regard to Hynix, and those of the Creditors' Council in general.

The GOK claims in its questionnaire responses that it does not intervene in the internal management and decision-making processes of financial institutions. See GOK SQNR at 5. The GOK also reports, however, that, in "important instances," it exercised its shareholder voting rights through its government entity banks (e.g., KDIC). Id. at 31-33. Such "important instances" included appointment and dismissal of directors or auditors, alteration of the ceiling of directors' remuneration, appointment of senior officers, exemption of directors' and auditors' indemnity responsibility to the shareholders, disposal of all assets of the bank, application for bankruptcy and liquidation by the bank, capital reductions, issuance of new shares, and mergers with related companies. See GOK July QNR at 12-15. Given the significance of these "instances," the Department finds that the GOK exercised substantial influence over those banks in which it retained ownership during the POR.

Furthermore, the record evidence from secondary sources contradicts the GOK's claim that it did not interfere in internal bank affairs. For instance, one report notes that if "some argue that there are government-directed banking practice and parachute appointments, a counter argument that {sic} 'Why are you against the exercise of stockholder's right?' is presented." However, the report continues, the problem is that "the government's exercise of shareholder's rights is politically motivated rather than by business considerations." See FIS 45-175. The article also reports that "7 out of 10 commercial banks are essentially under government management" and that it became "reasonable for the government, as the majority shareholder, to sway the appointment of the Chairman of the bank." Id. Further, the article explained that "strong influence of former officials appointed {as bank officials} after serving in the Ministry of

¹⁰We note that, under the CRPA, a 75 percent majority was required to pass a resolution of any creditors' council formed under the CRPA, including Hynix's Creditors' Council.

Finance and Economy, and the Financial Supervisory Committee, {is} enabling the connection for the government-directed banking practices. . . .” Id.

As discussed in Section B, above, Lee Phil-sang, the Dean of the Korea University's Business School, also notes that the GOK says one thing and does just the opposite with respect to its involvement in and influence over Korean banks. See FIS at 54-117. Further corroboration of similar interference by the GOK is provided in another news article, which reported that any GOK denials regarding its involvement in Hynix’s restructurings “is merely a rhetorical remark for public consumption,” and that whenever banks “. . . shy away from providing support, the government has talked to them, or even twisted their arms, to bring support for Hynix.” See FIS at 21-B-51. Similar sentiments were echoed by a current officer of a city bank who stated, “the government always made a telephone call when the bank tried to process an insolvent corporation through bankruptcy, asking {the} bank’s cooperation in consideration of employment issues and bankruptcy of subcontractors,” and that “the most typical of such a case would be the new financial support extended to Hynix Semiconductors.” See FIS at 47-B-23. Another bank officer reportedly stated that “banks cannot decline the government’s instructions because not complying with the government’s orders can lead to many disadvantages under the situation.” Id. The record also contains evidence that the GOK-dominated Creditors’ Council ignored the concerns of Hynix’s minor creditors, such as investment trust companies:

The proposed bail-out deal for South Korea’s semiconductor producer Hynix has been put in doubt after investment trusts have said they will not agree to terms laid out . . . The trusts want to see a lower price at which debt is converted into Hynix shares than that currently put forth (708 won, above the current trading price of 400 won). However, the clout of the investment companies is limited. Hynix’s main creditor is the state-owned Korea Exchange Bank (KEB), and ultimately it will be able to determine the broad conditions of any deal.

FIS 45-90. In the end, Hynix’s creditors converted debt to equity at a conversion price of KRW 453, which equals a 62 percent premium over the price for Hynix’s shares on the secondary market (KRW 280) at that time. Paying such a premium is exactly what the investment trust companies were trying to avoid doing, but obviously were unable to do. See Hynix’s 2002 Unconsolidated Financial Statements at 40, RFIS at Exhibit 13; Hynix’s 2003 Unconsolidated Financial Statements, Hynix QNR at Exhibit 8, p. 45, RFIS at Tab 3.

As may be expected, evidence of the government’s influence in the lending decisions of banks tends to come from indirect sources. This is especially the case where, as here, the government is concerned about potential trade actions taken against the subsidized company. However, in this case, the record also contains direct evidence of government involvement in the lending decisions of Hynix’s creditors, particularly with respect to the creditors discussed in Section B, above. We find that this evidence further supports the Department’s findings that the GOK dominated the Creditors’ Council and used the Creditors’ Council to effectuate its policy to save Hynix.

In addition, we continue to find that the KDB also played a very prominent role in the December 2002 restructuring and further consolidated the GOK's control over the Creditors' Council. As stated above, the Department considers the KDB to be a government authority. The KDB held a significant share of the voting rights on the Creditors' Council. See Hynix SQNR at Exhibit S-38. In the investigation, the Department found that participation of the policy lending banks, such as the KDB, sent a clear signal of GOK support for the restructurings.¹¹ See Investigation Decision Memorandum at 57-58. Based on the record in this review, the Department finds no evidence that this legitimizing role of the KDB did not continue with regard to the December 2002 restructuring.

Hynix contends that the GOK's influence over the Creditors' Council is irrelevant to the question of whether the GOK directed or entrusted Hynix's creditors to participate in the December 2002 restructuring because the creditors had a statutory right to refuse participation, exercise appraisal rights, and seek mediation under the CRPA. However, we continue to find that the GOK's ability to influence the Creditors' Council, through its dominant share of Creditors' Council votes, gave the GOK the means to effectuate its policy to save Hynix.

We find that the existence of an opportunity for creditors to refuse the terms of the Creditors' Council December 2002 resolution does not negate the GOK's actions taken to provide financial contributions, as defined in section 771(5)(B)(iii) of the Act, to Hynix. In other words, the right to seek better terms through mediation does not erase the well-documented actions of the GOK to entrust or direct Hynix's creditors to save Hynix from bankruptcy. In addition, the statute does not require the Department to find that the government dictated or mandated every step for every creditor in order to establish entrustment or direction. The record shows that only one Hynix creditor, CNH Capital, requested mediation in connection with the December 2002 restructuring. See GOK's July QNR at 50. CNH Capital, however, held only a negligible percentage of Hynix's debt throughout the entire restructuring program, including the December 2002 restructuring. See Hynix SQNR at Exhibit S-4. In our view, this one instance where a relatively insignificant member opted for mediation is insufficient to support Hynix's contentions. Thus, although mediation may have been officially provided for under the CRPA, we do not believe it was a realistic option for the overwhelming majority of creditors, which, as the Department has found in the investigation and in this review, were under continual pressure by the GOK to lend to Hynix.

Moreover, we find that the GOK-dominated Creditors' Council dictated the appraisal terms to be extremely unattractive for creditors and tremendously beneficial to Hynix because they called for forgiving a high percentage of debt. See Micron Rebuttal Brief at 28-31. In addition, given the record evidence demonstrating that the GOK coerced and threatened Hynix's creditors to participate in the 2001 financial restructurings, we continue to find that mediation was not a realistic or meaningful option for Hynix's creditors in December 2002. Based on the record

¹¹In addition to the KDB, the other specialized banks identified by the GOK were the IBK, the Export-Import Bank of Korea ("KEXIM"), the National Agricultural Cooperative Federation ("NAFC"), and the National Federation of Fisheries Cooperatives ("NFFC"). See FIS 18 at page 2.

evidence discussed above and in Section B, we do not believe that the GOK would have permitted all or a significant portion of Hynix's creditors to walk away from Hynix in December 2002, when the consensus was the Hynix was just a few months away from financial ruin, an outcomes squarely at odds with the GOK's stated policies. In conclusion, we find that the GOK used the Creditors' Council as its instrument to effectuate its policy to save Hynix.

D. The Deutsche Bank Report

Hynix's Argument:

Contrary to the Department's preliminary findings, Hynix contends that DB was not merely the KEB's agent, but worked on behalf of all of Hynix's creditors. Hynix argues that the engagement letter demonstrates that the KEB was acting as the authorized representative of the entire Creditors' Council and that DB was responsive to all creditors, not to the GOK. See Hynix QNR at Exhibit 14. Hynix also argues that record evidence does not demonstrate that any creditor objected to DB or questioned the objectivity or reasonableness of DB's analysis of Hynix. In addition, Hynix argues that the record evidence does not demonstrate that the GOK altered DB's financial restructuring plan for Hynix. In fact, Hynix contends that the evidence upon which the Department relied to make its preliminary finding that "the conclusions of the DB Report are {not} completely independent, market-based assessments and, at the very least, should be scrutinized," demonstrates just the opposite. See Preliminary Results at 54526. See also Hynix QNR at Exhibit 18. To support its argument, Hynix points to FIS 45-147, which states that the modifications to the DB Report were "due to the small difference in perspective between the government, which numerously emphasized that sale is the only alternative after failure of international sale of Hynix this past April, and the main creditor bank, which put its focus on maintaining corporate value under the premise that moving forward with sale is not possible for the time being." According to Hynix, the Department's understanding was that the GOK altered the original DB Report, which called for selling Hynix, because the GOK supposedly wanted to sell Hynix. Hynix contends that the Department's understanding of the evidence regarding revisions to the DB Report is without merit and contrary to record evidence.

Hynix contends that DB's analysis of Hynix and the DB restructuring plan were reasonable, despite the Department's finding to the contrary. According to Hynix, none of the reports cited by the Department in the Preliminary Results considered the perspective of Hynix's creditors, nor were the authors of such reports privy to the detailed information DB and Hynix's creditors had at their disposal. Hynix argues that its creditors had far different commercial motivations from the audience of the reports cited by the Department and, therefore, the reports fail to demonstrate that DB's analysis and restructuring plan were unreasonable. For example, MSDW's September 25, 2002, report stated that "having provisioned more than 75% of Hynix's loans on average, the major creditor banks could be willing to undergo at least another round of debt restructuring, although they might balk at additional cash injections." See FIS 44-A-15 at 3. Hynix notes that aspects of the DB Report that Hynix's creditors executed mirrored the sentiments of MSDW's report. According to Hynix, the MSDW report predicted an upswing in the DRAMS market, as did the DB Report: "We have an attractive view on the S. Korean semiconductor industry. We

expected a stronger global economy, a pick-up in PC unit sales, and sequential growth revenue.” See FIS 44-A-15 at 1. Hynix also notes that other reports cited by the Department were so unconvincing that one firm did not heed its own analyst’s recommendation to sell Hynix stock. See Hynix QNR at Exhibit S-25 and FIS 45-A-13.

In the Preliminary Results, the Department pointed to another MSDW report, issued at the time of the DB restructuring proposal, which stated that the restructuring would “be seen as another Korean government bailout given that most of the creditor banks are still government controlled.” See Micron’s September 27, 2004, submission, at Exhibit 15. Hynix contends that this is not evidence of entrustment or direction because the author of this report was merely speculating and relying on misinformation. According to Hynix, the author was speculating about a \$2.5 billion debt forgiveness that never occurred.

Micron’s Argument:

Micron argues that the Department correctly concluded that the DB Report did not reflect “completely independent, market-based assessments” because DB was retained by the KEB and because the GOK influenced the contents of the DB Report. See Preliminary Results at 54526. Micron contends that the credibility of the DB Report is further undermined by the fact that DB’s projections were contradicted by independent analysts. Micron also contends that the DB Report fails to disprove the Department’s finding of GOK entrustment or direction with respect to the December 2002 restructuring. Micron’s other comments regarding the DB Report are discussed in Comment 2, below.

The Department’s Position:

As discussed in the Preliminary Results and in the Equityworthiness section, above, Hynix’s Restructuring Committee hired DB, MSDW, DT, and ADL to evaluate Hynix’s operations, financial situation and the measures necessary to preserve the creditors’ existing investment in the company, and to position the company and/or its assets for future sale. The product of these evaluations was the DB Report.

The DB Report outlined three basic courses of action: (1) liquidation, (2) sale of Hynix’s memory operations, or (3) continued commitment to a turnaround of the company. Regardless of the option chosen, DB concluded that a financial restructuring in the immediate term was absolutely necessary to allow time for the exploration and pursuit of these three options because otherwise, Hynix would run out of cash in the first quarter of 2003. Ultimately, because of the uncertainty surrounding the timing and duration of a liquidation process or a sale of memory assets, which could affect actual recovery for the creditors, the DB Report recommended sequential action, focusing first on a new financial restructuring of the company, followed by parallel pursuits of a turnaround of the company and a sale of its memory operations. Liquidation was proposed only as a fall-back option and would mean significant losses for all creditors involved. In addition to this basic recommendation, the DB Report provided a more detailed financial restructuring plan. See Hynix QNR at 16-17 and Exhibit 18.

Based on the analysis and proposed restructuring plan reflected in the DB Report, the Restructuring Committee requested the approval of the full Creditors' Council to move ahead with the financial restructuring and then pursue the sale of assets and a strategic restructuring of Hynix overall. According to Hynix, the plan was adopted by the Creditors' Council on December 30, 2002, as the best means of maximizing loan recovery and increasing shareholders' value. Under the terms of the restructuring, the Restructuring Committee would continue to search for prospective buyers of Hynix's other business units. Hynix would continue a self-rescue plan as outlined by DB, with regular reports provided to the creditors on the performance of that plan. Finally, the creditors would engage in a new round of debt restructuring, focusing on a new debt-to-equity conversion and the restructuring and rescheduling of interest payments on remaining debt. See Hynix QNR at 14-17.

Under the terms of the December 2002 restructuring, half of the value of unsecured debt held by the creditors was converted to equity or to bonds convertible to equity. Specifically, KRW 1,849,156 million of the debt was converted to common stock and KRW 12,393 million was converted to convertible bonds. One creditor, CNH Capital, exercised its appraisal rights under the CRPA rather than sign on to the new restructuring. Id. at 17-18.

We are not persuaded by Hynix's argument that the December 2002 financial restructuring was motivated purely by commercial reasons and orchestrated by DB and Hynix's other financial expert advisors, such as DT. Substantial record evidence demonstrates that the GOK was the impetus to, and the sustaining force behind, Hynix's restructuring. Based on that evidence, the Department finds that the GOK was the orchestrator of Hynix's restructuring and that DB's role as the expert financial advisor to Hynix and the Creditors' Council does not undermine the finding of entrustment or direction by the GOK. Moreover, we note that, at the time the Creditors' Council approved the December 2002 restructuring, not only did the GOK have a dominant position on the Creditors' Council through the banks the GOK owned, these GOK-owned banks also owned a majority of Hynix outright. See BPI Memorandum at Attachment 1. Essentially, this means that the GOK was entrusting or directing banks that it owned and influenced to bail out a company that the GOK essentially owned through those banks.

The Department's analysis necessarily focuses on the government as the relevant actor in a case involving an indirect subsidy. In other words, it is the government's actions with respect to the financial institutions lending and providing equity to Hynix that are probative in a finding concerning entrustment or direction. Where substantial record evidence demonstrates that the government entrusted or directed private entities to provide financial contributions that conferred a benefit, an indirect subsidy exists. In this case, the Department finds that the GOK's role in Hynix's financial restructuring is analogous to the role of the chief executive of a company. In that capacity, the GOK formulated a policy and an overall objective, and took the necessary actions to ensure that its policy and objectives for Hynix (i.e., the complete financial restructuring of Hynix to prevent its bankruptcy and collapse) were carried out by Hynix's creditors. As discussed in Section C, above, the GOK was the dominating force on the Creditors' Council by virtue of its ownership of Hynix's creditors and its ability to influence them. As such, the GOK was well-positioned to ensure that its policy of saving Hynix was

implemented. Therefore, the GOK left it to the relevant specialists to flesh out the mechanics of that objective. In this case, the specialists were DB and other financial experts such as DT.

Hynix argues that the DB Report was based on objective, reasonable and commercially based assessments of Hynix's financial and operational conditions and, therefore, the GOK did not entrust or direct the December 2002 restructuring. First, assuming, *arguendo*, that these were objective, reasonable and commercially based assessments, this does not mitigate or erase the actions of a government entrusting or directing private entities.¹² Second, given the enormity and complexity of the restructuring, it is not surprising that a financial advisor was hired to provide technical expertise for Hynix's financial restructuring. In the Investigation Final Determination, the Department stated, "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." See Investigation Decision Memorandum at 44. This is because a government generally does not have the resources or expertise to plan the details of multiple financial transactions and because it does not have to micro-manage the process to achieve its policy objectives. This finding is equally applicable to the December 2002 restructuring. The government can, and in this case did, use its authority, through ownership of and/or influence over Hynix's creditors, to ensure that the transactions went forward so that the GOK's policy and objectives were carried out. Much like the chief executive of a company, the GOK formulated an objective and assigned various actors, including creditors and advisors, to attain that objective. Whether the advisors' assessments were objective and based on the economic realities facing Hynix and its creditors is irrelevant to the question of entrustment or direction by the GOK.

Although DB and others advised Hynix, they lacked the ability to ensure that Hynix's financial restructuring went forward. The GOK, on the other hand, did have the ability to ensure that Korean banks took the necessary steps to keep Hynix from going under, as discussed above.

In addition, we continue to find that DB was unable to operate independent of the GOK, despite Hynix's contention otherwise. Record evidence shows that the GOK was heavily involved in seeking a solution to Hynix's financial troubles throughout 2002, as discussed in Section A, above.

The record evidence also shows that the GOK influenced the final conclusions that were presented to the Creditors' Council. For example, "the original restructuring plan endorsed by DB called for dividing and selling the company. Apparently, however, that was not the answer that the GOK was looking for...Another source reported that 'the government and the creditors group altered the original plan.'" See Micron Pre-Preliminary Comments at 41. "A high-level government official also stated, 'we must develop a more specific and secure restructuring plan

¹²We have previously found and continue to find for these final results that the DB Report was not objective, reasonable or commercially based, as discussed in the "Creditworthiness" and "Equityworthiness" sections, above.

in order to remove the uncertainty of the market, and in order to prevent unnecessary misunderstandings during this process, a message was delivered to the creditors group that it is desirable not to make public announcements.” See FIS 45-149. Another media report quoted a spokesman for a group of Hynix’s minority shareholders as saying, “the media has reported on various occasions that the structural change proposal has once again been indefinitely delayed due to the administration’s request to revise its content, and the fact that the administration has broken its promise, which was to not interfere with the inspections made by the foreign organization (Deutsche Bank) as well as the Creditors Group’s proposal with regards to structural changes in the company, is evidence of distorted politics interfering with the course of private companies.” See FIS 45-147. This evidence, and the fact that Citibank/Solomon Smith Barney’s 2001 restructuring plans for Hynix were subject to GOK approval, despite the GOK and Hynix’s declarations to the contrary, support the conclusion that that the GOK influenced the DB Report. See BPI Memorandum at Comment 1-A, and Comment 1-C for a further discussion regarding liquidation.

In conclusion, there is no requirement in the statute that a financial restructuring not be motivated by commercial considerations in order for there to be government entrustment or direction. Even if the restructuring were motivated by commercial considerations, this would not undermine the Department’s finding of entrustment or direction. Indeed, the Preamble stands for this very proposition, stating that “indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party.” Preamble at 65350.

Hynix contends that no Hynix creditor objected to or questioned the reasonableness of the DB Report. However, the record contains evidence that at least one creditor did indeed question the DB Report. See BPI Memorandum at Comment 1-B.

Hynix also argues financial expert reports cited by the Department fail to demonstrate that DB’s analysis and restructuring plan were unreasonable. We address this argument in Comment 5: Hynix’s Equityworthiness.

Comment 2: Whether the December 2002 Restructuring Was Commercial

Hynix’s Argument:

Hynix contends that the December 2002 restructuring itself, and Hynix’s creditors’ decision to participate in the December 2002 restructuring were commercially reasonable because the creditors were following the expert advice of DB, Hynix’s financial advisor, and because the creditors were acting to preserve and, possibly, create value for themselves, given their pre-existing lending exposure to Hynix. According to Hynix, DB and a number of other experts, including DT/Anjin & Co. and De Dios & Associates, engaged in comprehensive reviews of Hynix’s financial and operational status leading up to the December 2002 restructuring. Hynix states that these analyses, which were presented to Hynix’s creditors, considered Hynix’s operational restructuring possibilities, liquidity and capex demands, production costs, and market

prices and demand, among other aspects of Hynix's business and financial situation. Hynix argues that these are the very issues that commercially motivated creditors would consider before deciding whether to engage in a significant debt restructuring of an existing borrower. Hynix further argues that its creditors considered the advice and findings of DB and other advisors, which had access to more detailed information than what was publicly available, to determine whether to restructure Hynix's debt in December 2002. Therefore, Hynix contends, the December 2002 restructuring was a commercial event rather than an event directed by the GOK. Hynix also argues that there were no limitations on DB's evaluation of Hynix and its recommendations, which further attests to the commercial nature of the December 2002 restructuring.

According to Hynix, the Department should consider the facts and circumstances that Hynix's creditors faced leading up to the December 2002 restructuring in determining whether the December 2002 restructuring was commercially reasonable and whether Hynix's creditors were following the "usual investment practices" discussed in 19 CFR 351.507. According to Hynix, its creditors had two options: 1) accept certain and significant financial losses, or 2) convert existing debt to equity and restructure debt terms in the hopes of making a reasonable return on their investments (*i.e.*, loans and equity) in Hynix. Hynix contends that if the creditors' decisions to participate in the December 2002 restructuring are viewed in light of their circumstances as existing lenders, not as new lenders or investors, it becomes clear that they were acting in line with the usual investment practices of private investors. In addition, Hynix argues that, in participating in the December 2002 restructuring, Hynix's creditors expected a reasonable rate of return within a reasonable time period or, at the very least, they hoped the restructuring would give them additional time in which to manage a potential loss on their existing loans to Hynix.

Hynix further argues that its creditors' actions were consistent with the usual investment practices of commercially motivated creditors that face similar circumstances, which are to prolong the life of the company in order to preserve the opportunity for returns if the situation improves and to buy more time to manage losses if the situation does not improve. Hynix contends that these usual investment practices are particularly characteristic of the DRAMS industry, which offers enormous profits during upswings and produces severe losses during industry downswings. In fact, Hynix notes, creditors who converted debt to equity in December 2002 saw their equity increase in value from the KRW 9,513 per share conversion price to KRW 15,900 per share on the open market in May 2005, a 67 percent increase. See DB Report, provided in Hynix QNR at 18; Hynix 2003 Financial Statement at 49, provided in Hynix QNR at Exhibit 8; see also KSE Trading Data for Hynix (January 1, 2002 - May 31, 2003), provided in Hynix SQNR at Exhibit S-51. Hynix contends that this is far better than what creditors could have expected to earn on the debt had they not converted it to equity.

Hynix contends that banks dealing with large corporations experiencing liquidity problems, such as Hynix, have an incentive to restructure existing loans or convert debt to equity to extend the bank's losses over a longer period of time and to contain their debt exposure to the large corporation. In support of this argument, Hynix points to statements made by the chairman of a private Korean bank regarding the failure of a large corporation:

What we hope to do is diversify losses any way we can. May it be additional capital support or extension of loan due dates, we are hoping to postpone the death of a corporation as long as we can so we can carry the one-time loss {over a longer period}. . .

FIS 46-229. Hynix argues that this is the rationale behind Hynix's creditors' decision to participate in the December 2002 restructuring and, therefore, demonstrates that the creditors were commercially motivated to restructure some existing loans to Hynix and to convert the rest to equity pursuant to that restructuring.

The GOK's Argument

The GOK urges the Department to consider what transpired after the December 2002 restructuring. In the GOK's view, the outcome of the December 2002 restructuring shows that the creditors' decision was indeed reasonable and commercial. The GOK argues that the current business performance of Hynix provides probably the strongest evidence that the creditors' decision in December 2002 was commercially reasonable and prudent. According to the GOK, all of the creditor banks have been fully repaid by Hynix or realized a much higher rate of return for their existing Hynix debts as a result of the December 2002 restructuring.

Micron's Argument:

According to Micron, the record evidence demonstrates that no commercially motivated lender would have participated in the December 2002 restructuring absent GOK pressure to do so. Micron contends that, based on Hynix's financial situation and future prospects, the Department correctly found, "that any lender who did provide credit or equity capital to Hynix during that time could not have been acting in accordance with normal commercial considerations." See Preliminary Results at 54533. Micron states that Hynix did not rebut the underlying facts on the record regarding Hynix's abysmal financial condition throughout 2002, and Hynix's dismal future prospects. Therefore, Micron argues, the Department should reaffirm its preliminary finding that the December 2002 restructuring was not a commercial endeavor.

Moreover, Micron contends that the commercial reasonableness of the December 2002 restructuring is not a separate threshold issue that must be established to find entrustment or direction, as Hynix has argued. Instead, Micron argues, commercial unreasonableness of the December 2002 restructuring should be viewed as additional evidence that creditors were motivated by GOK pressure, rather than normal profit seeking. Indeed, Micron notes, the Department considered Hynix's poor financial condition and the commercial unreasonableness of the December 2002 restructuring as further evidence "that the GOK pressured Hynix creditors to lend to the failing company." See Preliminary Results at 54533. Micron contends that even if certain Hynix creditors had some commercial reasons for participating in the December 2002 restructuring, the Department could still find that they were entrusted or directed by the GOK.

According to Micron, Hynix's argument is based on the "Prospect Theory," which posits that

creditors with existing lending exposure to a troubled borrower will continue to extend additional loans simply to delay the creditors' recognition of the losses in their own books. Micron notes that, in the Investigation Final Determination, the Department rejected the Prospect Theory in favor of the "Expected Utility Model" for purposes of analyzing the commercial reasonableness of an investment. See Investigation Decision Memorandum at 92. Micron argues that the Department also rejected the application of an existing-lender theory regarding a debt-to-equity conversion in the Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Canada, 62 FR 54972 (October 22, 1997) ("Wire Rod"). In Wire Rod, the Department stated, "with respect to the GOQ's {(Government of Quebec)} 1988 debt-to-equity conversion, the GOQ asserts that the Department must measure the GOQs action against the standard of a reasonable private investor faced with the same choices as the GOQ under the same circumstances, in determining whether this transaction constituted a countervailable event. The GOQ argues that its decision to convert this debt-to-equity in 1988 satisfies this standard and therefore cannot constitute a countervailable event . . . What the GOQ proposes is essentially an inside investor standard. In past practice, however, the Department has rejected the insider investor arguments which have been forwarded by the GOQ in this case." See Wire Rod at 54984. Micron contends that no new or outside investor would have any commercial motivation to lend to or invest in Hynix during 2002, which is exactly what the Department found in the Preliminary Results. See Preliminary Results at 54525-27. Therefore, under the Expected Utility Model, Micron contends that there is no basis for the Department to find that the December 2002 restructuring was commercially reasonable.

Micron further contends that even from an inside investor's perspective, Hynix's creditors did not behave in a commercially reasonable manner with respect to the December 2002 restructuring. Micron notes that the bank officer quoted in the Hynix Case Brief stated the following regarding the motivation for banks to continue lending to a failing borrower:

May it be additional capital support or extension of loan due dates, we are hoping to postpone death of a corporation as long as we can so that we can carry the one-time loss of 600 billion won over six years at 100 billion won a year. Even if that means that the burden on the bank grows somewhat over a period of time, that is the only way the bank can survive...In other words, the method is to keep a corporation alive long enough to buy enough time to allocate enough bad debt allowances, at the rate of 100 billion a year for example, to prepare against the loss of the loans granted to the corporation. With enough bad debt allowance, the bank can still survive if and when the corporation goes belly up (after six years).

FIS 46-229 at page 2 and Hynix Case Brief at 13-14. Micron argues that even if this lending strategy works, it is clearly not designed to maximize profits, or minimize losses for the lenders who employ such a strategy. Moreover, Micron argues, a rational commercial bank does not endeavor to keep a customer alive just to hide the problems caused by the customer's failure. Instead, "repayment risks created by a borrower's insolvency tend to incentivize creditors to aggressively assert their legal rights and/or business leverage points to stave off further credit risk and ensure that whatever value is available to repay the debt is not dissipated to other creditors."

FIS 51-F-3 at 1. In addition, Micron argues that the lending behavior described in FIS 46-229 demonstrates that banks felt enormous pressure from the GOK to “come up with a way to resuscitate Hynix as soon as possible.” FIS 46-229 at 2.

Micron argues that the DB Report fails to demonstrate that Hynix’s creditors were commercially motivated to participate in the December 2002 restructuring because the KEB, a GOK-owned or -controlled bank, had the power to review, approve and modify the DB Report before it was presented to the Creditors’ Council. See FIS 45-126 and FIS 45-90. Micron also points to FIS 45-147 and FIS 45-146 as additional evidence that the GOK inserted itself into the preparation of the DB Report and played a significant role in manipulating the formulation of the December 2002 restructuring. According to one investor, “the administration has broken its promise, which was not to interfere with the inspections made by the foreign organization (DB) as well as the Creditors Group’s proposal with regards to structural changes in the company, is evidence of distorted politics interfering with the course of private companies.” See FIS 45-146.

Micron contends that, assuming, *arguendo*, Hynix’s creditors agreed with DB’s conclusion that Hynix was worth more as a going concern than in liquidation, they proceeded with the December 2002 restructuring in a way that defied all commercial logic. First, creditors agreed to purchase Hynix’s equity at a huge premium over the stock’s value on the secondary market. According to Micron, the Creditors’ Council agreed to a conversion price of KRW 453 (before adjusting for a reverse stock split), which equals a 62 percent premium over the price for Hynix’s shares on the secondary market (KRW 280). See Hynix’s 2002 Unconsolidated Financial Statements at 40, RFIS at Exhibit 13; Hynix’s 2003 Unconsolidated Financial Statements, Hynix QNR at Exhibit 8, p. 45, RFIS at Tab 3. See also Hynix QNR at Exhibit 19, page 8. Micron argues that the price of Hynix’s stock in May 2005 is irrelevant to the question of whether Hynix’s creditors were commercially motivated to convert debt for equity in December 2002 because the May 2005 stock price was not a fact upon which the creditors could base their decision to convert their debt to equity.

Second, the debt-to-equity conversion gave Hynix’s creditors a minority (43.8 percent) stake in the company. See Micron Rebuttal Brief at 25. Micron contends that when lenders are forced to convert debt to equity, lenders are entitled to and seek to obtain all or nearly all of the company’s equity in exchange for the converted debt. To support its argument, Micron points to the expert report of Mr. Cooper, Senior Managing Director in the Corporate Finance Practice of FTI Consulting, Inc:

The following maxim is widely accepted in the restructuring practice: banks in a restructuring scenario will only agree to a stock distribution on account of a debt default if there is simply no other and better value available under the circumstances. And, if the banks are forced to receive stock, they can be presumed to demand all of it. Otherwise, the bank will liquidate the company and eradicate all remaining enterprise value. Hence the widely accepted maxim in the restructuring practice: if the debt of the senior most creditors is not fully retired as part of the workout, it will own the company.

FTI Report (FIS 51-F-3) at 34-35. Micron contends that a commercially motivated lender would have demanded a larger equity stake. Because Hynix's creditors did not, Micron argues that they were not commercially motivated.

Micron contends that the opportunity for Hynix's creditors to seek mediation does not demonstrate that the December 2002 restructuring was commercially reasonable. Micron notes that the Department has already found that mediation was not a realistic option because creditors feared GOK retribution if they declined to participate in the restructuring. See Preliminary Results at 54533. In addition, Micron contends that selecting appraisal rights and having the possibility of mediation was less favorable to creditors than full participation in the December 2002 restructuring because the appraisal value was so low. The only options afforded Hynix's creditors were to fully participate in the December 2002 restructuring by converting debt to equity and refinancing the remaining debt, or to exercise appraisal rights. According to Micron, the appraisal value was so low that it served more as an incentive to fully participate in the restructuring than as a viable alternative to full participation. Micron contends that the GOK-controlled Creditors' Council set the terms so that whichever option was selected, Hynix would benefit at the expense of its creditors. In addition, Micron argues that the December 2002 resolution deprived creditors of their basic rights to maintain a claim on the full amount of debt they owned and the right to force liquidation. Therefore, Micron argues, neither option was an avenue that a commercially motivated creditor would have pursued on its own or without GOK direction or entrustment.

Department's Position:

As an initial matter, we agree with Micron that the commercial reasonableness of the December 2002 financial restructuring is not a threshold issue with respect to financial contribution, as discussed in Section D of Comment 1, above. The law does not require the Department to make a finding that a financial contribution was commercially unreasonable for there to be government entrustment or direction. We address Hynix's arguments concerning the commercial reasonableness of the December 2002 restructuring and the issue of benefit in Comments 1, 5 and 6. Nevertheless, we consider whether the December 2002 restructuring was commercial for the purpose of clarifying the Department's views.

As Micron correctly notes, the Department rejected the application of the Prospect Theory for the reasons discussed in the Investigation Decision Memorandum, which are consistent with the Department's position in Wire Rod. Thus, based on the information on the record with respect to the Prospect Theory and the Expected Utility Model, we find no reason to depart from our past practice of rejecting the Prospect Theory in favor of the Expected Utility Model.

For these reasons, we continue to find that Hynix's December 2002 financial restructuring was not commercially motivated.

Comment 3: Entrustment or Direction of the October 2001 Restructuring

Hynix's Argument:

Hynix argues that the record of this administrative review contains new information pertaining to the October 2001 restructuring that compels a re-evaluation of the Department's findings on entrustment or direction in the investigation. Specifically, Hynix states that new information reveals that the GOK did not control 75 percent of the voting shares on Hynix's Creditors' Council at the time of the October 2001 restructuring. Hynix claims that the Department's finding of entrustment or direction hinges upon the GOK's control of 75 percent of the voting rights and, therefore, this new information should compel a re-evaluation. Moreover, Hynix argues that without 75 percent of the voting rights, GOK-owned and -controlled banks did not have a blocking majority, as the Department suggests in the Preliminary Results at 54535. Instead, Hynix argues, the independent creditors holding more than 25 percent of the voting rights held the blocking majority and would have stalemated the October 2001 restructuring plans. Hynix contends that the fact that such independent creditors did not stalemate the October 2001 restructuring is evidence that it was a commercially reasonable plan.

Hynix also contends that new information reveals that mediation rights under the CRPA presented a legitimate alternative to the Creditors' Council proposal for the October 2001 restructuring. See Hynix's August 2, 2005, submission at 22. According to Hynix, creditors that chose appraisal rights (option 3 in the October 2001 restructuring) and sought mediation secured better terms than those offered by the Creditors' Council. See Hynix July SQNR at 3S-13. Hynix contends that the possibility of mediation for all creditors eliminates the possibility that Hynix's creditors were entrusted or directed by the GOK. Absent direction or entrustment to provide equity as part of the October 2001 restructuring, Hynix argues, the Department should find no financial contribution and, therefore, no countervailable subsidy.

According to Hynix, the equity issuance under the October 2001 restructuring required the approval of Hynix's shareholders at that time. See Hynix's 2001 Audited Financial Statement at note 16, Hynix SQNR at Exhibit S-9. Therefore, Hynix argues, absent evidence that the GOK entrusted or directed Hynix's shareholders to approve the October 2001 debt-to-equity swap, there is no basis for the Department to find that this equity issuance was a financial contribution. Hynix further argues that the Department should reconsider its investigation determination that the October 2001 equity issuance was a financial contribution despite the fact that information concerning shareholder approval was on the investigation record. Hynix contends that the Department reconsidered an investigation finding in an administrative review based on information on the investigation record in Float Glass Final. See Final Results of Countervailing Duty Administrative Review: Unprocessed Float Glass from Mexico, 55 FR 5870 (February 20, 1990) ("Float Glass Final").

Micron's Argument:

Micron contends that Hynix's argument is not based on new information because the Department knew that GOK-owned or -controlled creditors held less than 75 percent of the Creditors' Council vote for the October 2001 restructuring and found this to be a blocking majority. See

Preliminary Results at 54535. Therefore, Micron contends, there is no reason for the Department to revisit its investigation findings with respect to Hynix's October 2001 restructuring. In addition, Micron contends that the remaining 25-plus percent of voting rights were held by Hynix's creditors that the Department determined were entrusted or directed by the GOK. See Investigation Decision Memorandum at 60.

Micron contends that Hynix's argument with respect to mediation does not rely on new information because record evidence in the investigation shows that Hynix recognized KRW 80,100 million of other payables as current liabilities in connection with objections raised by dissenting creditors entitled to mediation under the CRPA. See RFIS at Exhibit 19, p. 40. Micron further contends that the Department correctly found that "although mediation was a legal option under the CRPA, it was not a practical choice for the overwhelming majority of creditors, which, as the Department found in the investigation, were under continual pressure by the GOK to lend to Hynix" and that the information cited by Hynix does not compel a re-evaluation of the investigation findings. See Preliminary Results at 54535. In addition, Micron notes, the Department concluded in the investigation that the GOK-owned and -controlled creditors "set the terms for all banks" and, "as a result, those banks that were given the option to sever ties with Hynix had to do so on the terms that were established for them." See Investigation Decision Memorandum at 55. Thus, Micron argues, mediation does not demonstrate that the creditors were not entrusted or directed by the GOK. Moreover, Micron contends, the results of mediation demonstrate that seeking mediation was not a true alternative to the three options under the October 2001 restructuring and far from the rights creditors normally have. See BPI Memorandum at Comment 3.

Micron contends that the Department already rejected Hynix's argument concerning shareholder approval requirements for the October 2001 equity issuance. See Preliminary Results at 54535. Micron also contends that Hynix misconstrues the Department's findings in the Float Glass Final. According to Micron, the Department declined to revisit certain aspects of the FICORA program because the petitioner's argument to do so was based on information on the investigation record. Furthermore, Micron argues, the Department reconsidered the FICORA program only because the petitioner raised the issue of high inflation and its impact on peso liabilities, which the Department considered new information. See Float Glass Final at Comment 2. Micron also cites the Department's findings in the Final Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France, 57 FR 62098 (October 3, 2002) ("Sheet and Strip") to support its argument that the Department should not reconsider its investigation determinations absent the presentation of new information that was not on the record of the investigation. In Sheet and Strip, the Department stated, "instead, the petitioners seemingly requested the Department to gather additional facts on the off-chance that this information would bolster their already-rejected arguments from the original investigation...Our obligation in this review is simply to evaluate whether new information or evidence of changed circumstances was provided to revisit our previous determination. Because we find that no new information or evidence of changed circumstances has been provided, we find no need to gather additional information." See Sheet and Strip at Comment 1.

In addition, Micron argues that nothing in the statute, the Department's regulations or the SCM Agreement requires the Department to establish, in a case involving the indirect grant of an equity infusion, that the government entrusted or directed the recipient shareholders to acquiesce. Rather, Micron contends, the Department must establish that the government entrusted or directed private entities to make the equity infusion, which it did in the investigation.

The Department's Position:

As an initial matter, we agree with Micron that, absent the presentation of new factual information that was not on the record of an investigation, the Department does not reconsider its investigation findings in subsequent administrative reviews. See e.g., Certain Pasta from Italy: Preliminary Results and Partial Rescission of Seventh Countervailing Duty Administrative Review, 69 FR 45676 (July 30, 2004), *affirmed in* Certain Pasta From Italy: Final Results of Seventh Countervailing Duty Administrative Review, 68 FR 70657 (December 7, 2004). To do so would essentially burden the Department with having to investigate alleged subsidies not once, but twice. We find that Hynix's arguments are similar to those arguments made in Sheet and Strip, in that they are an attempt to persuade the Department to reconsider Hynix's already rejected arguments from the investigation or to have the Department consider a new argument based on the same record evidence.

We disagree with Hynix that it has presented the Department with new information concerning the allocation of Creditors' Council voting rights as they relate to the October 2001 restructuring, specifically that GOK-owned or -controlled banks held less than 75 percent of the votes. In the Investigation Decision Memorandum, the Department stated, "{i}n 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 or -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." See Investigation Decision Memorandum at 55. As illustrated by the chart contained in FIS 46-277, Hynix's creditors that were wholly or majority owned by the GOK or in which the GOK was the single largest (KEB) or a substantial shareholder (KFB) accounted for over 65 percent of the Creditors' Council vote. (The exact figures are business proprietary information derived from documents submitted to the Department during the investigation and, therefore, are not listed in this public chart.) Thus, the substantial majority referred to in the Investigation Decision Memorandum was above 65 percent, which the Department found to be sufficient for the GOK to dictate the terms of the October 2001 restructuring to the Creditors' Council. Thus, through the GOK's ownership and ability to influence creditors, the Department found that the GOK was able to dictate the terms of the October 2001 restructuring.

Hynix contends that it has presented the Department with new information concerning the allocation of Creditors' Council voting rights as they relate to the October 2001 restructuring. Hynix's contention is simply not true. The Department was already fully aware of how the

voting rights were allocated and that GOK-owned or -controlled banks held over 65 percent of the votes. Thus, we find that Hynix's argument is not based on new information and, therefore, fails to compel the Department to reconsider its findings described in the Investigation Decision Memorandum. In addition, we note that Hynix is incorrect in arguing that the Department's findings with respect to the October 2001 restructuring hinged upon the GOK-owned or -controlled banks holding over 75 percent of the Creditors' Council votes. Control of the Creditors' Council votes was merely one of many factors that the Department relied on to conclude that the GOK entrusted or directed Hynix's creditors to participate in the October 2001 restructuring. See the "Specific Financial Contributions Made Pursuant to the GOK's Direction of Credit" section of the Investigation Decision Memorandum.

Hynix also contends that, absent a finding that the GOK entrusted or directed Hynix's shareholders to approve the October 2001 debt-to-equity conversion, the Department has no basis to find that the equity conversion constitutes a financial contribution. We find that Hynix's argument does not warrant the Department's consideration because it is simply a new argument based on the same facts before the Department in the investigation segment of this proceeding. As discussed above, this administrative review does not provide interested parties an opportunity to raise new arguments that pertain to the Department's investigation findings.

Hynix contends that exercising appraisal rights and seeking mediation was a legitimate alternative for Hynix's creditors in October 2001, which eliminates the possibility of entrustment or direction by the GOK. First, we note that Hynix's argument concerning mediation does not rely on new information. Therefore, we find that Hynix's argument does not warrant a reconsideration of the Department's investigation findings. In addition, for the reasons discussed in Comment 2, above, we find that the possibility for creditors to exercise appraisal rights and seek mediation does not in any way undermine or eliminate the GOK's affirmative actions to entrust or direct Hynix's creditors to provide financing to Hynix to prevent Hynix's bankruptcy.

Comment 4: Private and Foreign Banks as Benchmarks

Hynix's Argument:

Hynix claims that there is no rational basis for the Department to conclude that creditors wholly owned by private parties and foreign institutions were entrusted or directed by the GOK to participate in the December 2002 restructuring. Therefore, Hynix argues, the Department should use these creditors as benchmarks with respect to the December 2002 equity conversion and debt restructuring. To support this argument, Hynix notes that these private and foreign creditors held 31.26 percent of the equity and a comparable share of the unsecured debt rescheduled in December 2002. See Hynix Case Brief at Exhibit 3. According to Hynix, because the terms of the December 2002 restructuring were the same for all creditors and because the creditors wholly owned by private parties and foreign institutions accounted for a significant percentage of equity and debt, the December 2002 restructuring resulted in no benefit for Hynix.

Micron's Argument:

Micron argues that Hynix does not dispute the following: the Department's finding that Hynix was financially unsound in 2002; that no creditors extended new loans to Hynix during the bailout period; and, that loans from Citibank were not proof of Hynix's creditworthiness under 19 CFR 351.505(a)(4)(i) because (i) the size of the restructured loans was too small and (ii) even if not entrusted or directed, Citibank was subject to GOK influence. See Preliminary Results at 54527; see also the Department's September 2, 2005, "Update to Proprietary Creditor Memorandum" ("Update to Proprietary Creditor Memorandum"). Micron discounts Hynix's claim that Hynix was creditworthy because more than 30 percent of the restructured loans were attributable to private and foreign creditors. See Hynix Case Brief at 63 and Exhibit 3. Micron contends that many creditors Hynix describes as "foreign-owned" were in fact GOK-owned. Micron asserts that the Department correctly found that even privately owned creditors were subject to GOK influence and concluded that they had been entrusted or directed by the GOK to participate in the December 2002 restructuring. See Preliminary Results at 54533. Accordingly, Micron believes that there is no basis to use wholly owned private and foreign creditors as a benchmark.

The Department's Position:

Although lumped together by Hynix, the Department makes a distinction between privately owned Korean banks and foreign creditors. As in the investigation, we find that foreign creditors (*i.e.*, Korean subsidiaries of foreign-owned banks) were not entrusted or directed by the GOK, and consequently, financial contributions made by these banks are not countervailable. See Investigation Decision Memorandum at 4. Private creditors (*i.e.*, banks wholly owned by private Korean entities), however, were entrusted or directed by the GOK. See Comment 1, above. Accordingly, their financial contributions are countervailable. Because we do not use the financial contributions of entrusted or directed entities as benchmarks, the only question is whether the financial contributions from the foreign creditors can serve as benchmarks.

To identify which institutions are properly classified as Korean subsidiaries of foreign-owned institutions, we examined information on the record of this review regarding ownership and credit held as of December 2002. Of the institutions listed by Hynix, we find that only Citibank, Blue One ABS, Black One ABS, Citiglobal Market Securities can be identified as Korean subsidiaries of foreign-owned banks. Blue One ABS is 100 percent owned by Lend Lease International Pty Limited (an entity 100 percent owned by Citigroup Financial Products Inc.). See BPI Memorandum at Comment 4. See also Hynix July SQNR at Exhibit 3S-11 and Hynix's SQNR at Exhibit S-3.

Based upon our analysis of ownership and the level of the exposure to Hynix of the relevant foreign creditors, we find that the share of Hynix's equity and remaining debt held by foreign creditors was significantly less than what Hynix claimed. On this basis, we find that the participation of the relevant foreign creditors is too small and insignificant to serve as a benchmark. See Preamble, 63 FR at 65367 (relatively small loans are not dispositive of creditworthiness). See BPI Memorandum at Comment 4.

Comment 5: Hynix's Equityworthiness

Hynix's Argument:

Hynix states that the basic test for determining equityworthiness is whether, from the perspective of a 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 amount of time. Hynix notes that, under 19 USC 1677(5)(E)(i), an equity infusion will normally be deemed to confer a “benefit” if the investment decision is “inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made.” Hynix reasons that the examination of usual practices requires a descriptive approach as opposed to a normative approach for assessing whether a particular investment by a foreign government should be actionable. Hynix claims that the intent of Congress was for the Department to examine the ways investors actually behave rather than how investment decisions should be made.

Hynix argues that, since the Department does not distinguish between inside and outside investors, the Department's approach in applying the “reasonable investor test” is thereby a mechanical and arbitrary approach to investor decision-making. See Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, 58 FR 37217 (July 9, 1993) (“Certain Steel from Austria”); see also Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Venezuela, 62 FR 55014, 55016 (October 22, 1997). Hynix argues that this approach is not objective and strays from the statutory directive and the United States' WTO obligations.

Hynix states that one criterion of determining whether a company is equityworthy is whether private investors made a similar investment. See 19 CFR 351.507(a)(4)(i)(D). Hynix argues that the Department has underestimated the significant private/foreign participation in the debt-to-equity swap, including Citibank's level of participation. See BPI Memorandum at Comment 5-A. Hynix contends that the record reflects that 31.26 percent of the equity out of the December 2002 restructuring is related to participation by wholly private or foreign institutions, serving as a basis for Hynix's equityworthiness. See Hynix Case Brief, at Exhibit 3 (based on the Hynix QNR at Exhibit 20 and Hynix July SQNR at Exhibit 3S-1).

Hynix argues that, although neither 19 CFR 351.507(a)(4)(i) nor the statute defines “reasonable private investor,” it is assumed to be determined by “usual investment practice.” In the interest of objective analysis, Hynix claims that a distinction should be made between a reasonable committed investor and a reasonable new investor, including the usual investment practices of each group. Hynix argues that, in the Preliminary Results, the Department did not consider the DB Report prepared for Hynix's existing creditors and largest owners in its finding. Further, Hynix asserts that the Department determined that the analysis was overly optimistic and biased. See Preliminary Results at 54526. Hynix contends that the DB analysis and recommendations were crafted to creditors who had no intention of providing new investment. See Hynix July

SQNR at Exhibit 3S-23. Hynix asserts that the calculus of potential risk versus expected return at the heart of the Department's analysis is very different when it comes to these creditors. Hynix contends that the Department did not conduct any real analysis of the risk involved and it fails to appreciate that the debt-to-equity swap did not change the status quo for unsecured debt. Hynix argues that all the creditors did, with low risks, was to enhance their prospect of a greater return than the calculated liquidation value.

Hynix further claims that the Department second-guessed experts who were far better equipped to assess Hynix's situation and had access to far better information than the Department. Hynix contends that the Department's reliance on outside analyst reports does not provide an objective analysis since these reports are geared to a different audience and lack access to inside information. Hynix notes that the analysts cited by the Department recognized that Hynix's creditors might reasonably be expected to restructure Hynix's debt. In fact, Hynix contends that the restructuring of its debt is exactly what happened.

Finally, Hynix argues that DB has demonstrated that its assumptions were conservative. See Hynix July SQNR at Exhibit 3S-23 and Hynix's August 10, 2005, Pre-Preliminary Rebuttal Comments. Hynix claims that the Department set an unreasonable standard in saying that "while the DB Report forecast Hynix to be nearly debt-free by 2006, it was predicated upon certain predictions regarding DRAM prices and capital expenditures, and it was not certain that these scenarios would come to pass." Preliminary Results at 54526. Hynix claims that the Department's statement means that a rational actor would only act based upon 100 percent certainty about a particular outcome. Hynix also challenges the Department's finding that DB offered only one possible outcome. See Hynix QNR at Exhibit 18. Hynix claims that the Department focuses on the short term while Hynix's creditors had a longer-term perspective.

Micron's Argument:

Micron contends that there was no significant participation in the debt-to-equity swap by any creditors not entrusted or directed by the GOK. Micron notes that the Department determined that the value of the equity acquired by Citibank and its affiliates was not significant according to 19 CFR 351.507(a)(2)(iii) and was, therefore, not used as a benchmark. Micron also argues that Citibank's affiliate, Blue One ABS, had been entrusted or directed by the GOK making it inappropriate for use as a benchmark. See BPI Memorandum at Comment 5-B. In any event, Micron contends that the amount of equity (as discussed in the BPI Memorandum at Comment 5-C) - regardless of who owned it during December 2002 - is insignificant.

Micron claims that the Department correctly found that even the privately owned creditors were subject to GOK pressure, and concluded that they had been entrusted or directed by the GOK to participate in the December 2002 bailout. See Preliminary Results at 54533.

Micron states that irrespective of whether Citibank's participation is "significant," its investment does not represent the "usual investment practices of private investors" pursuant to 19 CFR 351.507(a)(1). Micron argues that, even if Citibank's participation was not the result of the

GOK's entrustment or direction, Citibank's participation was not purely voluntary. See Investigation Decision Memorandum at 10. According to Micron, the GOK-owned and -controlled banks still maintained more than 75 percent of the voting shares on the Creditors' Council, which would invalidate Citibank or other private or foreign creditors' participation as evidence of equityworthiness and its use as a benchmark. See Update to Proprietary Creditor Memorandum, at 3.

Micron rejects the appropriateness of the DB Report as it contradicts every independent analyst and was influenced by the GOK. Micron further notes that the report is irrelevant to the Department's equityworthiness analysis. See Preliminary Results at 54526. Citing 19 CFR 351.507(a)(4)(i) and Wire Rod at 54984-85, Micron argues that the Department has rejected Hynix's proposed "prospect theory" and assesses the reasonableness of an investment decision from the perspective of an outside private investor.

Micron also mentions that the DB Report does not recommend that any outside investor purchase Hynix's equity since the report's purpose is to evaluate how existing creditors could minimize their losses. Micron argues that, even if it makes sense for an existing creditor to "cut its losses," it does not mean that it makes commercial sense for an outside private investor to purchase a similar new issuance. Therefore, Micron asserts that the DB Report is not evidence that Hynix was equityworthy at the time of the December 2002 debt-to-equity swap.

The Department's Position:

We continue to find that Hynix was unequityworthy at the time of the initiation and implementation of the December 2002 restructuring process through 2003.

As we stated in the "Equityworthiness" section of this memorandum, "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." We find no merit to Hynix's claim that, by disregarding the usual investment practices of Hynix's "committed" or existing "investors," the Department is taking a "mechanical and arbitrary approach" in its application of the "reasonable investor" standard. The Department's practice in this regard goes back to Certain Steel from Austria, in which we state,

Although we agree that we have found that creditors may have special reasons for investing in firms which are indebted to them, this has no bearing on the Department's "reasonable investor" standard. Respondents' reliance on Groundfish is, therefore, misplaced. In that case, the Department found it inappropriate to use the motivations of a creditor exchanging debt for equity as a gauge for determining the reasonableness of an investor's infusion. In Groundfish, as well as in these steel investigations, the Department has based its equityworthiness determinations on the commercial soundness of the equity

investment itself. A determination of equityworthiness cannot be measured by, nor equated with, the decision of a creditor exchanging its debt for an equity position in a company in order to improve its chances for recouping money already loaned to that enterprise.

See Certain Steel from Austria, 58 FR 37217, 37250. We note that “Groundfish” refers to Preliminary Affirmative Countervailing Duty Determination: Fresh Atlantic Groundfish from Canada, 51 FR 1010 (January 9, 1986) in the above quote.

This reasoning speaks precisely to the Prospect Theory that Hynix has advanced in these proceedings in support of its claims, and which, as noted by Micron and in the Investigation Decision Memorandum, the Department has consistently rejected.

In any event, we find that Hynix mischaracterizes the level of equity from wholly private or foreign institutions because its calculation is inclusive of entities entrusted or directed by the GOK. See Comment 4, above. Specifically, we note that all investors, with the exception of Korean subsidiaries of foreign-owned banks (i.e., Citibank and Blue One ABS), were entrusted or directed by the GOK. See BPI Memorandum at Comment 4 and Comment 5-D. Therefore, only the participation of Citibank and Blue One ABS could potentially be used as a benchmark. We find that the value of the equity acquired by these three banks in the December 2002 restructuring is insignificant and small in comparison with that of the GOK-owned, -controlled or -directed banks combined. See Preliminary Results at 54526. The Department finds that the prices paid by these foreign creditors relevant to the December 2002 debt-to-equity swap cannot serve as a benchmark for the purposes set forth under 19 CFR 351.507. Id. Even if we were to include the value of the equity acquired by the third bank cited by Hynix, we still find that the value of the equity remains insignificant.

We disagree with Hynix that we should rely on the DB Report produced for existing creditors in our equityworthiness analysis. As stated in Wire Rod at 54972, the Department’s analysis is “fundamentally concerned with whether it would have been reasonable for a private investor to invest money in the company in question.” The DB Report does not consider the issue of “new” money being invested into Hynix. As Micron accurately notes, the DB Report evaluates how existing creditors could minimize losses, but does not provide guidance for new investors.

Hynix asserts that DB had access to more detailed information than the Department and other experts. While the Department does not dispute this claim, we note that this access to “inside” information leads the Department to question the objectiveness of the report. Specifically, DB was retained by KEB in the capacity as Hynix’s lead bank. We have found that the KEB previously acted in accordance with the GOK’s policy objectives, and that the GOK had significant influence over the bank’s lending decisions. See Preliminary Results at 54527-54528; see also Micron’s Pre-Preliminary Comments, at 41. Accordingly, we note that reports such as the DB Report do “not provide the Department with a reliable means of distinguishing between

those inside investor motivations that may be commercially based and those that are not.” See Wire Rod at 54972.

Therefore, given DB’s relationship with KEB and the GOK, the Department finds that the DB Report does not constitute the objective analysis within the meaning of 19 CFR 351.507(a)(4)(i)(A) and 351.507(a)(4)(ii), which can serve as evidence that Hynix was equityworthy.

Even if we were to consider the DB Report to be objective and independent of KEB and the GOK’s policy regarding Hynix, the DB Report’s proposed debt restructuring contains statements supporting Hynix’s unequityworthiness. See BPI Memorandum at Comment 5-E.

Also, we continue to find that the DB Report’s overall findings were based on optimistic assumptions not shared by other independent analyses on the record and not consistent with Hynix’s past financial performance. Additional analyst reports confirm this finding: “Hynix is technically bankrupt, kept alive only through debt restructuring programs.” Morgan Stanley Hynix Semiconductor Equity Research (September 25, 2002), at Petitioner’s September 27, 2004, submission, at Exhibit 15. “{T}he risks of dilution from a debt-to-equity swap and write-down plans present a negative investment case. We maintain our sell recommendation.” Merrill Lynch: Hynix Semiconductor, Inc: Comment (November 27, 2002), at FIS, at Volume 44, Exhibit A-13. “Hynix is not an investment grade company.” Morgan Stanley Hynix Semiconductor Equity Research (February 13, 2003), at Petitioner’s September 27, 2004, submission, at Exhibit 10. For a detailed description of the other analyses, see Preliminary Results at 54526.

For these reasons, as well as the reasons articulated in the Preliminary Results, we continue to find that Hynix was unequityworthy at the time of the initiation and implementation of the December 2002 restructuring process through 2003.

Comment 6: Hynix’s Creditworthiness

Hynix’s Argument:

Hynix states that according to 19 CFR 351.505, the Department may look at factors, such as receipt of comparable commercial long-term loans, present and past financial health of a company, past and present ability to meet financial obligations, as evidence of the company’s future financial position when determining whether a company is creditworthy. Hynix argues that the receipt of comparable commercial loans is a particularly significant factor and is dispositive of a firm’s creditworthiness. Hynix argues that the Department must be objective and appreciate the difference between existing lenders and new lenders in determining whether Hynix was creditworthy. Additionally, Hynix contends that loan restructurings and new financing decisions are motivated by different factors.

Hynix claims that wholly owned private and foreign creditors were responsible for 31.26 percent of the equity in the December 2002 debt-to-equity swap. See Hynix Case Brief at 63, and Exhibit 3. Thus, Hynix argues, these creditors are responsible for a comparable amount of the unsecured debt that was restructured in December 2002. In addition, Hynix contends that there is no reasonable, objective basis for the Department to conclude that the wholly owned private and foreign creditors were entrusted or directed by the GOK. As such, Hynix asserts that the wholly owned private and foreign creditors' participation in the December 2002 restructuring demonstrates that Hynix was creditworthy, particularly in the context of debt restructuring, during the December 2002 restructuring.

Hynix claims that DB's May 2002 report on Hynix gave the creditors a detailed review of Hynix's future financial performance. Hynix asserts that the DB Report was written for Hynix's existing creditors, not new potential lenders, with the understanding that no new loans would be provided. Hynix adds that it is important that the Department note that no new loans were in fact provided, according to the understanding at the time of the DB Report. Hynix claims that because creditors used this report to determine Hynix's future financial standing, this report is evidence of Hynix's creditworthiness. Hynix also notes that other consultants performed internal evaluations of Hynix which confirmed that the December 2002 restructuring presented a "good opportunity" for the creditors involved. Hynix argues that the DB Report, along with other internal evaluations, provided the basis for the creditors' decisions not to liquidate Hynix, but instead to restructure Hynix's debt. See Hynix Case Brief at 64. Accordingly, Hynix claims that the Department should find that Hynix was creditworthy.

Micron's Argument:

Micron contends that the fact that more than 30 percent of the restructured loans were attributable to wholly owned private and foreign creditors does not indicate Hynix's creditworthiness. Micron contends that the Department correctly found that many of Hynix's creditors were owned by the GOK or were GOK-influenced. Micron also contends that the DB Report is not evidence of Hynix's creditworthiness, but rather that DB had concluded differently in its report. See BPI Memorandum at Comment 6-A, for a full discussion. Micron notes that in accordance with 19 CFR 351.505(a)(4)(i), the Department will find a company to be uncreditworthy if it determines that "the firm could not have obtained long-term loans from the conventional commercial sources." Micron argues that the DB Report is not evidence of Hynix's creditworthiness because it did not address the question of whether Hynix could have obtained new long-term loans from conventional commercial sources.

Department's Position:

In Comment 4, above, we analyze Hynix's assertion that the participation of wholly owned private and foreign creditors' in the December 2002 restructuring was 31.26 percent. Our analysis concludes that private banks were entrusted or directed and that Korean subsidiaries of foreign-owned banks held a small percentage of Hynix's debt as of December 2002. We find

that the participation of these foreign creditors is too insignificant to constitute dispositive evidence that Hynix was creditworthy under 19 CFR 351.505(a)(4)(ii).

Additionally, we note that in the investigation we found that Citibank loans cannot be considered reasonably comparable and, therefore, do not constitute dispositive evidence or provide the appropriate benchmarks. See Investigation Decision Memorandum at 11; see also 19 CFR 351.505(a)(4)(i). This conclusion was based on a consideration of various factors, of which two are still relevant in these final results. We examined the size of the credit extended by Citibank and the influence of the GOK, which we found to extend to Citibank, even if we had not found Citibank to be entrusted or directed *per se*. See Investigation Decision Memorandum at 9-10; see also Update to Proprietary Creditor Memorandum at 2. Hynix has not provided further evidence regarding Citibank to support its claim. Therefore, we continue to find that Citibank's participation in the December 2002 restructuring does not provide dispositive evidence of Hynix's creditworthiness within the meaning of 19 CFR 351.505(a)(4)(i)(A).

For a discussion of the DB Report, other analysts' reports, and DB's relationship with KEB and the GOK, see Comments 1 and 5, above. Also, the DB Report contains statements supporting the finding that Hynix was uncreditworthy. See BPI Memorandum at Comment 6-B. Accordingly, we continue to find that the DB Report is not evidence of Hynix's creditworthiness. On the basis of these considerations, as well as those articulated in the Preliminary Results, we continue to find that Hynix was uncreditworthy in 2002 and 2003. Consequently, we have used an uncreditworthy benchmark rate in calculating the benefit from loans received during this time period, and have used an uncreditworthy discount rate in calculating any non-recurring benefits received by Hynix that were allocable to the POR.

Comment 7: Alleged Ministerial Error Regarding Financing from Foreign Banks

Hynix's Argument:

Hynix claims that the Department erroneously countervailed loans from HSBC, Citiglobal Market Security, Blue One ABS, Black One ABS, Hanmi Capital, Asian Diversified Total Returns Ltd., Lehman Brothers, and other creditors. See BPI Memorandum at Comment 7-A, for a complete list of creditors. Consistent with the Department's prior practice and finding that the GOK does not control the lending practices of Korean branches of foreign-owned financial institutions, Hynix maintains that loans from these creditors should not be countervailed. See Investigation Decision Memorandum at 4.

Micron's Argument:

Micron first notes that Hanmi Capital was not a foreign-owned creditor at the time of the December 2002 bailout. See Hynix July SQNR at Exhibit 1. See also RFIS Exhibit 10 at 15. With respect to the other creditors named in Hynix's case brief, Micron states that none of these creditors were members of the Creditors' Council at the time of the December 2002 restructuring. See BPI Memorandum at Comment 7-A, for a full discussion.

Specifically, Micron contends that Hynix acknowledged in its July 11, 2005, supplemental questionnaire response that all foreign-owned creditors acquired their Hynix debt on the market after the December 2002 restructuring. See Hynix July SQNR at 12 and Exhibit 3S-10-12. Based on this fact, Micron alleges that these transactions are, therefore, irrelevant because they did not provide fresh loans, modify terms of loans, or alter the benefit received by Hynix. Instead, Micron argues that these loans reflect the non-commercial terms imposed by the GOK through Korean creditors. Micron counters that Hynix does not provide any evidence that allows the Department to find that a transfer of a loan by an entrusted entity to an entity not on the Creditors' Council eliminates the benefit. Therefore, the Department must continue to countervail loans that foreign-owned banks purchased from entrusted or directed Korean banks.

In Micron's rebuttal brief, it summarizes the history of the CRPA and how the GOK exerted control through the Creditors' Council. See Micron Rebuttal Brief, at 106-109. With respect to Citibank, Micron claims that it was subject to GOK pressure and Creditors' Council control similarly to any other creditor. Micron points to the Department's Preliminary Results to show that Citibank believed that the Creditors' Council, under the CRPA, could impose its decisions upon all lenders, including foreign-owned creditors. See Update to Proprietary Creditor Memorandum, at 3.

Micron notes that while the Department's determination in the investigation that Citibank was unable to act outside of the will of GOK-directed creditors was made in the context of analyzing Citibank as a benchmark, the determination should also apply to whether Citibank was entrusted or directed by the GOK. Micron alleges that Citibank was subject to the same GOK audits and regulatory controls. Further, Micron claims, there is no evidence that Citibank participated in the 2002 restructuring with a commercially based risk analysis of Hynix's equityworthiness or creditworthiness. Micron contends that Citibank was a financial advisor for the GOK, had a "special" relationship with it, and previously participated in phases of Hynix's restructuring based upon non-financial factors, *i.e.*, assurances that ROK banks were committed to supporting Hynix. Micron also alleges that Citibank has a record of accommodating GOK policies, including those for the restructuring. See Micron Rebuttal Brief at 111-112, and footnotes 334-349.

Accordingly, Micron argues that the evidence supports the Department's finding that Citibank loans cannot be used as benchmarks and moreover that the GOK entrusted or directed Citibank to make financial contributions to Hynix during the December 2002 restructuring.

The Department's Position:

We disagree with Hynix that Hanmi Capital was a foreign-owned bank at the time of the December 2002 restructuring. Upon further analysis, we find that Hanmi Capital was owned by certain Korean banks until the end of 2002. Thus, we have continued to countervail obligations held by Hanmi Capital during the December 2002 restructuring for the final results. See Hynix SQNR at Exhibit S-32 detailing Hanmi Capital's ownership as of December 2002.

Consistent with our determination in the investigation that the GOK did not entrust or direct Korean subsidiaries of foreign-owned financial institutions, we have not countervailed transactions made by Citibank, Citiglobal Market Security, Blue One ABS, Black One ABS, or HSBC. See BPI Memorandum at Comment 7-B. We have continued to countervail all loans from creditors not specifically mentioned above.

Comment 8: Alleged Ministerial Error Regarding KDB Fast Track Bonds

Hynix's Argument:

Hynix notes that in the Preliminary Results, the Department calculated benefits with respect to KDB Fast Track bonds ("Fast Track bonds") not held by Hynix's creditors, which is not how the Department treated these bonds in the investigation. Hynix claims that to be consistent with the investigation, the Department must calculate a benefit only with respect to Fast Track bonds held by Hynix's creditors during the POR, and specifically those held by certain banks. See BPI Memorandum at Comment 8-A. Hynix notes that all other KDB Fast Track bonds held by its creditors had been eliminated through other debt restructuring or were paid off by May 2001. For the same reason, Hynix argues that the Department should not calculate a benefit for Fast Track bonds converted to equity by asset backed security ("ABS") institutions holding bonds as part of the December 2002 restructuring.

Micron's Argument:

Micron acknowledges that the Department originally excluded from its benefit calculations the portion of Hynix's Fast Track bonds assigned to the Collateralized Bond Obligation and Collateralized Loan Obligation ("CBO/CLO") program. However, Micron claims that Hynix is incorrect when it argues that the Fast Track bonds outstanding and those converted into equity should not be countervailed. Even though the Department did not countervail these bonds in the investigation, due to lack of specificity, Micron argues that this point became moot after the December 2002 restructuring. Micron claims that the fact that the CBO/CLO program was available to every debtor in Korea lost its relevance in the December 2002 restructuring when the bonds were subject to a restructuring available only to Hynix. See BPI Memorandum at Comment 8-B, for a full discussion. Therefore, Micron asserts that the Department should countervail all of the Fast Track bonds outstanding during the POR as well as the portion of the Fast Track bonds that were converted to equity during Hynix's December 2002 restructuring.

The Department's Position:

While Hynix is correct that the Department adjusted its calculation in the investigation to eliminate the bonds placed in the CBO/CLO program, we agree with Micron that the Fast Track bonds involved in the December 2002 restructuring are new financial contributions because they were either restructured into debt with new terms or because they were converted to equity. Hence, the Department's finding of specificity in the investigation is no longer pertinent.

Therefore, we have continued to include the Fast Track bonds involved in the December 2002 restructuring in our calculation of benefit.

Comment 9: Adjustment of Benefit to Account for Sale of Hynix's Subsidiaries

Hynix's Argument:

Hynix contends that, in the investigation, the Department attributed the benefit associated with the October 2001 debt-to-equity conversion and debt forgiveness to Hynix's consolidated sales. Hynix notes that the consolidated turnover included sales by majority-owned subsidiaries that were spun-off during the POI and sold. See Investigation Decision Memorandum at Comment 14. Hynix claims that the Department's benefit calculation in the POR should reflect that these subsidiaries have been sold and the amount of the benefit assigned to Hynix should be reduced accordingly.

Micron's Argument:

Micron states the methodology cited by Hynix only applies where "a privatization occurred in which the government sold its ownership of all or substantially all of a company's assets, retaining no control of the company or its assets, and that the sale was an arm's length transaction for fair market value." See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (Dept. of Commerce, June 23, 2003) ("Modification Notice"); see also Certain Pasta from Italy: Preliminary Results and Partial Rescission of the Eighth Countervailing Duty Administrative Review, 70 FR 17971 (April 8, 2005), at n. 2. Micron asserts that Hynix (the parent company) received the original subsidy and to permit the sale of certain non-DRAM subsidiaries to extinguish a portion of the benefit received by the parent company makes no sense.

The Department's Position:

In its past practice, the Department took the position that subsidies followed assets, so that when a business unit was sold off, the subsidies traveled with the assets. That practice was struck down by the CAFC in Delverde Srl v. United States, 202 F.3d 1360, 1365 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000). More recently, the Department has adopted the Modification Notice to address changes in ownership. Under this new methodology, the Department would examine whether the company was sold at arm's length and for fair market value. If the sale of the company met these criteria, the Department would find that the subsidies remain with the seller.

To date, the Department has not faced the situation described by Hynix, *i.e.*, a sale of business units by the producer of the subject merchandise, since adopting the methodology established in the Modification Notice. Assuming, *arguendo*, that the Department were to examine these transactions within the framework of the new methodology, Hynix has not established that the

sale of its subsidiaries was not at arm's length or for less than fair market value. Therefore, we find that the subsidies remain with Hynix.

Comment 10: Benefits Relating to Creditors Exercising Appraisal Rights

Hynix's Argument:

Hynix claims that the five-year interest free debentures which were supposed to be issued to banks that exercised their appraisal rights under option 3 of the October 2001 restructuring were never issued because those creditors sought and received different terms through the CRPA Mediation Committee. See Hynix QNR at Exhibit 13. Hynix states that it repaid some of the principal for certain creditors, and that some of the remaining principal carried interest terms. See also Hynix July SQNR at Exhibit 3S-13. Hynix further states that all appraisal rights claims from the October 2001 restructuring including interest owed were paid out by the end of 2003.

Hynix contends that the Mediation Committee process was a commercial option for the five creditors that exercised appraisal rights and sought better terms through mediation. Therefore, Hynix argues, the Department should exclude the debt forgiven by these creditors from its benefit calculations for the October 2001 and December 2002 restructurings.

Hynix also argues that mediation was a viable alternative for insignificant creditors, as defined by their debt holdings, and that KFB's debt holdings are the threshold level for insignificant creditors. See Preliminary Results at 54533. Therefore, Hynix argues that mediation was a viable option for all creditors that held less Hynix debt than KFB, and that their participation in Hynix's financial restructurings should not be countervailed. See Hynix SQNR Exhibit S-38 and Hynix QNR at Exhibit 20.

Micron's Argument:

Micron contends that, according to the Department's Preliminary Results, exercising appraisal rights and mediation was not a realistic option because creditors feared GOK retribution if they failed to participate in the restructuring. See Preliminary Results at 54533. In addition, Micron argues that the Department has already determined that option 3 banks were entrusted or directed by the GOK and that their participation in the October 2001 restructuring conferred countervailable subsidies.

Micron also contends that Hynix's argument regarding the repayment of debt to option 3 creditors is based on information that existed during the investigation but was only proffered by Hynix in this segment of the proceeding. Therefore, Micron argues, Hynix has waived its right to seek an adjustment.

However, Micron states, if the Department accepts Hynix's assertions, the Department should continue to use its normal loan methodology to calculate the benefit during the POR for debt that

was not forgiven by the option 3 creditors. In addition, Micron argues that the Department should continue to countervail the debt forgiven by option 3 creditors in October 2001.

The Department's Position:

As an initial matter, we note that Hynix's argument pertains, in large part, to the October 2001 restructuring. As part of the October 2001 restructuring, option 3 creditors forgave debt and converted the remaining debt to five-year debentures. See Investigation Decision Memorandum at Comment 9. We also note that the Department has already determined that the debt forgiven, and the remaining debt that was converted to five-year debentures (i.e., loans), by option 3 creditors conferred countervailable subsidies to Hynix because the option 3 creditors were entrusted or directed by the GOK.¹³ See Investigation Decision Memorandum at Comment 8.

Hynix has not presented new information that would compel the Department to reconsider its investigation determinations regarding the GOK entrustment or direction of option 3 creditors. In fact, the premise of Hynix's argument in this administrative review is the same as its arguments that are discussed in the Investigation Decision Memorandum at Comment 8. As such, our determination that the debt forgiven and the five-year debentures provided by option 3 creditors as part of the October 2001 restructuring are countervailable subsidies stands.

Therefore, we have continued to countervail the entire amount of debt forgiven by option 3 creditors. However, Hynix has presented new information regarding the option 3 creditors' five-year debentures. Specifically, Hynix reported that some of the five-year debentures were changed to interest-bearing loans as a result of mediation, and that Hynix has repaid some of the debentures. See Hynix July SQNR at Exhibit S-13. Therefore, we have adjusted our loan benefit calculations to reflect the change in the interest terms and Hynix's payments against the original debentures for our final results. See the Department's March 14, 2006, Final Results Calculation Memorandum ("Final Results Calculation Memorandum").

With respect to the one creditor that exercised appraisal rights and sought mediation in connection with the December 2002 restructuring, we note that, as discussed in the Preliminary Results, this creditor held a negligible amount of Hynix's debt. See Preliminary Results at 54535. See also GOK July QNR at 50 and Hynix SQNR at Exhibit S-4. Moreover, as discussed in Comments 2, 5 and 6, above, we do not find that the December 2002 restructuring was commercial, despite the existence of an opportunity to exercise appraisal rights and seek mediation. In addition, we continue to find that, although mediation was a "legal" option under the CRPA, it was not a practical choice for the overwhelming majority of creditors, which, as the Department found in the investigation, were under continual pressure by the GOK to lend to

¹³ We note that this finding did not apply to one of the four option 3 creditors and, therefore, we did not countervail that bank's debt forgiveness or interest-free debentures in the investigation. We have not departed from this finding for purposes of this administrative review. See Investigation Calculation Memorandum at 4.

Hynix. See Preliminary Results at 54535. Therefore, we continue to find that Hynix's creditors, including those below the "KFB threshold," were entrusted or directed and we have continued to countervail their December 2002 financial contributions.

Comment 11: Ministerial Errors Regarding Benchmarks

Micron's Argument:

Micron requests that the Department correct certain clerical errors made in the Preliminary Results. Specifically, Micron alleges that the Department under-counted the principal amounts for certain loans, which in turn resulted in incorrect benchmark interest payments being used in the Department's calculations. Micron also contends that the Department excluded certain interest payments, which were shown in Hynix's loan worksheets, from the Department's total benefit calculations. These alleged errors are described further in the BPI Memorandum at Comment 11.

Micron did not rebut Hynix's comments regarding D/A financing, which are summarized below.

Hynix's Argument:

Hynix did not rebut Micron's comments regarding the alleged clerical errors described above. However, Hynix contends that the Department used the wrong benchmark for calculating the benefit conferred by D/A financing for the Preliminary Results.

The Department's Position:

We agree with Micron that certain clerical errors were made in the Preliminary Results and have revised our calculations accordingly for the final results. We also agree with Hynix that we used the wrong benchmark in calculating the benefit conferred by D/A financing. For a discussion of the specific changes made for the final results, see Final Results Calculation Memorandum.

Comment 12: Value of October 2001 and December 2002 Equity

Hynix's Argument:

Hynix objects to the Department's equity methodology which treats the shares issued in the October 2001 and December 2002 debt-to-equity conversion as worthless. Hynix contends that the Department's own rules concede that the equity is not worthless (citing Preamble at 65375), and that finding the equity worthless is contrary to Article 14 of the SCM Agreement (citing Panel Report, European Communities- Countervailing Duties on Dynamic Random Access Memory Chips from Korea, WT/DS299/R (June 17, 2005) ("EC DRAMS") at paras. 7.211-7.215).

Hynix states that the Department's regulations only set forth an "in general" method of allocation. See 19 CFR 351.524(d). Thus, Hynix asserts that the Department's regulations do not prevent it from adjusting the allocable benefit from equity infusions based on the "inherent nature of the equity." Hynix maintains that the same logic the Department uses to adjust up the face value of a non-recurring benefit to reflect its time value can be applied to adjust down the face-value of a non-recurring benefit by its appreciation value.

Hynix believes that if the Department continues to find that a subsidy exists as a result of the October 2001 and December 2002 debt-to-equity conversions, the Department could build into its benefit calculations an adjustment to reflect the appreciation of the October 2001 and December 2002 share values from the Department's original value of zero. Hynix believes that a reasonable approach would be to use ratios of the debt conversion prices of the October 2001 and December 2002 equity to the average share price for Hynix's shares over the POR as a deflator of the annual allocable benefit. Hynix maintains that this method is reasonable because the conversion prices were market-derived prices, while the average share price represents the shareholders' expectations from their investments at any given point in time after the new shares were issued.

Micron's Argument:

Micron believes that the Department should reject Hynix's proposal to reduce the POR benefit from the equity to reflect the appreciation of Hynix's stock.

Micron contends that the Department's equity methodology correctly ignores the value of the shares received through an equity infusion by an unequityworthy firm. This reflects the common sense, "but for" presumption that the company would not have received any new equity capital absent government involvement, according to Micron.

Moreover, Micron states that the Department's regulations require that in the case of an unequityworthy company, the benefit "exists in the amount of equity infusion," and that the full amount must be allocated over the AUL. See 19 CFR 351.507(a)(6) and 19 CFR 351.524(b). Whether Hynix becomes equityworthy during the AUL is irrelevant, according to Micron, because the determination of equityworthiness is made at the time of the infusion (19 CFR 351.507(a)(4)(i)).

Department's Position:

Under 19 CFR 351.507(a), the benefit of an equity infusions to an unequityworthy firm is equal to the amount of the equity infusion. The rationale underlying this treatment is that, "because a reasonable private investor could not expect a reasonable return on the invested capital, no such investor would provide the infusion." See Preamble at 65374. While the Department acknowledges that the issued shares may have value, the Preamble states that:

The comparison here is what the company actually received with what the company would have received absent the government intervention. In the case of an unequityworthy firm, the amount the company would have received is zero. Thus, although the government equity infusion is not *per se* a grant, it is appropriate to consider the full amount of the infusion as a benefit because the government provided a sum of money that would not have been provided by a private investor.

Preamble at 65375. As this language indicates, the Department's methodology focuses on what the company received, which is consistent with the benefit-to-recipient approach.

We disagree with Hynix that our methodology is inconsistent with Article 14 of the SCM Agreement. We note that Article 14 does not stipulate any particular method for calculating the amount of a benefit. Hynix seeks to read into the SCM Agreement obligations which are not there. Additionally, Hynix's reliance on EC DRAMS at paras. 7.211-7.215, is misplaced. The United States was not a party to that dispute, and therefore the findings do not apply to our methodologies.

Nor do we agree with Hynix that the Department has the authority to adjust the allocated benefit stream to reflect any changes in the value of the equity over time. The decision of whether a company is unequityworthy is made as of the "the time the government provided equity infusion was made" (19 CFR 351.507(a)(4)). Once the finding of unequityworthiness has been made, the benefit to the recipient of the equity is the amount of the equity (19 CFR 351.507(a)(6)). That amount is then allocated as a non-recurring subsidy in accordance with 19 CFR 351.524(d). Any reduction to the amount of the allocated subsidy would be an impermissible offset (see section 771(6) of the Act and the discussion in the Preamble to the CVD Regulations at 65372 regarding the Department's rejection of the so-called "RORs" methodology which allowed allocated equity benefits to be reduced by dividends).

Therefore, we are not making the adjustment requested by Hynix.

Comment 13: Timing of Benefits from the December 2002 Restructuring

Micron's Argument:

Micron argues that the Department should treat the benefit of the December 2002 debt-for-equity swap as having been received in 2003. Citing 19 CFR 351.507(b), Micron contends that the benefit from an equity infusion should be considered "to have been received on the date on which the firm received the equity infusion." Micron argues that, in the case of a debt-to-equity swap, the benefit occurs "in the year the swap was made" (i.e., 2003). See Certain Cold-Rolled Carbon Steel Flat Products from Brazil: Final Affirmative Countervailing Duty Determination, 67 FR 62128 (October 3, 2002), and accompanying Issues and Decision Memorandum ("Cold-Rolled Steel from Brazil").

Although the creditors agreed to the terms of the debt-to-equity swap on December 30, 2002, Micron asserts that the program was not finalized or made effective until 2003, the swaps did not occur until 2003, and the swaps were accounted for in Hynix's 2003 financial statements. To support its claim, Micron points to the events that follow the December 30 resolution.

On January 7, 2003, Hynix's board of directors approved the December 30 resolution. See Hynix SQNR at Exhibit S-17 at 221-222. See BPI Memorandum at Comment 13-A. On January 22, 2003, Hynix issued its 2002 audited financial statements with notes stating that creditors had by this time announced their intentions to convert 1,844,378 million KRW of debt to common stock, and 12,393 million KRW to convertible bonds ("CBs"). See Hynix QNR at Exhibit 8 (2002 Financial Statements at page 40). Because the debt had not been swapped for equity, Hynix made a capital adjustment in 2002 in which it treated "the amount net of discounts on present value and discounts on debt issuance," (i.e., 1,818,303 million KRW), as "convertible bonds." Id. The notes to the financial statements state that these "convertible bonds will be converted into the Company's common stock or new convertible bonds after the approval of resolution of capital reduction during the shareholders' meeting." Id.

On January 28, 2003, Hynix's board of directors introduced a resolution to implement the 21:1 capital reduction required by the Creditors' Council. See Hynix SQNR at Exhibit S-17. On February 25, 2003, a general shareholders' meeting approved the board's January 28 resolution for a 21:1 capital reduction. Id. at 230-231. On March 31, 2003, the 21:1 capital reduction was implemented. See Hynix QNR at Exhibit 8 (2003 Financial Statements at page 45).

On April 2, 2003, Hynix's board of directors approved the issuance of (i) 193,904 thousand common shares (worth 1,844 billion KRW) and (ii) CBs worth 12 billion KRW. See Hynix SQNR at Exhibit S-17, page 236-237; see also Hynix QNR at Exhibit 8 (2003 Financial Statements at page 45; 2002 Financial Statements at page 40). On April 15, 2003, the debt-to-equity swap officially occurred, and the banks received the new securities which had been approved on April 2, 2003. See Hynix QNR at III-18 and Exhibit 8 (2003 Financial Statements at page 45). See BPI Memorandum at Comment 13-B.

Finally, on January 30, 2004, in Hynix's 2003 financial statements, Hynix made capital adjustments (to account for the above-referenced transactions) to its capital stock and its discount on stock issuance. See Hynix QNR at Exhibit 8; see also Hynix SQNR at 48-49.

According to Micron, the Department will allocate the benefit from a debt-to-equity swap over an AUL beginning with "the year of receipt." See 19 CFR 351.524(d). Micron contends that the "year of receipt" is not necessarily the same as the year in which the government first agreed to provide the subsidy. Micron argues that 19 CFR 351.524(d)(3)(i) states that the Department "will select a discount rate based upon data for the year in which the government agreed to provide the subsidy." Micron asserts that the formulations referring to the year of "receipt" of the subsidy (i.e., 19 CFR 351.507(b) and 19 CFR 351.524(d)(1)) and the year the government "agreed to provide" the subsidy (i.e., 19 CFR 351.524(d)(3)(i)), demonstrate that these are separate events which can occur in different years. Micron contends that the swaps did not

occur, and the subsidy was not “received” by Hynix, until April 15, 2003. Accordingly, Micron argues that the benefit of the December 2002 restructuring should begin in 2003. See BPI Memorandum at Comment 13-C.

Micron contends that, consistent with the Department practice in debt-to-equity swap situations of determining the time of the receipt of the benefit as of the date of the swap itself, the Department found that the benefit of the August 8, 2003, debt-to-equity swap was received in 2003. See Cold-Rolled Steel from Brazil. Accordingly, the April 15, 2003, swap also should be allocated to a period beginning with the year in which the benefits were received (i.e., 2003).

Hynix’s Argument:

Hynix contends that Micron’s argument to change the receipt year to 2003 is incorrect. Hynix argues that the focus should be on the disposition of debt, not the receipt of equity. Hynix claims that the equity itself creates no benefit, but imposes an obligation on the company through the rights granted to shareholders. It is the infusion, represented by the release from obligations on underlying debt, that confers the benefit. See 19 CFR 351.507(b).

According to Hynix, the December 30, 2002 resolution created an obligation on the creditors to accept equity, enforceable under the CRPA. See FIS at Volumes 6-8 (Hynix’s January 27, 2003, questionnaire response in the investigation, at Exhibit 14). Hynix contends that the debt was set aside; only the mechanics of the creditors’ obligation to convert the outstanding balance to equity was left undetermined. See Hynix QNR at Exhibit 19, page 8. Also, Hynix recognized the effect of the December 30, 2002, resolution, in its 2002 financial statement as a capital adjustment, not debt. See Hynix QNR at Exhibit 8 (2002 Financial Statements, page 63). Hynix notes that its short-term borrowings, current portion of long-term debts, and long-term debts, net of current maturities and discount on present value, as recorded in its 2002 financial statement show a commensurate reduction in liabilities. Id. at 24. Hynix contends that there were no contingencies placed on the status of what had effectively become equity positions as a result of the December 30, 2002, resolution.

Hynix asserts that Micron is misguided in its interpretation of the law and the Department’s regulations as providing an inflexible rule for debt-to-equity swaps demanding that a benefit accrues only when the equity is received. Hynix argues that 19 CFR 351.507(a) focuses on the equity infusion, as distinct from the equity itself, which is not relevant to the issue of advantage (i.e., benefit). In this context, Hynix asserts that the payment or investment comes in the form of terminated debt obligations.

Hynix states that, under 19 CFR 351.507(b), the Department will “consider the benefit to have been received on the date on which the firm received the equity infusion.” Hynix claims that the regulations do not address when the investors received the equity. Hynix explains its point using the following scenario. Suppose creditors provided a firm new risk capital in Year 1 with the understanding that the firm was obliged to provide equity to the creditors in year 2. Because the

firm has access to and utilizes the new capital in Year 1, Hynix claims that any benefit accrues in Year 1, not Year 2.

Hynix notes that the instant case is distinguished from Cold-Rolled Steel from Brazil because in that case both the infusion (*i.e.*, termination of debt obligations) and the receipt of equity occurred contemporaneously, if not simultaneously (*i.e.*, in the same year). Hynix argues that the Department's statement that "each debt-for-equity swap constitutes an equity infusion in the year in which the swap was made" is a restatement of the Department's practice of treating debt conversions as equity infusions, and that the particular infusion occurred in the same year as the receipt of the equity. See Cold Rolled Steel from Brazil (Decision Memorandum) at 15. Hynix asserts that it does not stand for the proposition that, in debt-to-equity conversions, the benefit is associated with the receipt of the equity.

Hynix asserts that the December 30, 2002, resolution set aside 50 percent of the unsecured debt held by its creditors, and the creditors released Hynix from any obligations under the debt and an obligation was assumed by the creditors to take equity in return for terminating the debt obligations. Hynix contends that these events occurred in 2002, and were recognized in Hynix's 2002 financial statements. According to Hynix, in the investigation, the Department rejected arguments that the year of receipt of any alleged benefit was the year Hynix's creditors received equity. See Investigation Decision Memorandum at Comment 11. Hynix points out that the facts relating to the December 2002 restructuring are virtually identical to those of the October 2001 restructuring examined in the investigation. For the forgoing reasons, Hynix argues that the Department should continue to treat the year of receipt of any alleged benefit from the December 2002 debt-to-equity swap as 2002.

The Department's Position:

For the reasons stated below, we find that the receipt of the benefit from the December 2002 restructuring occurs in 2002. For transactions where creditors forgive debt in exchange for equity shares, *i.e.*, debt-to-equity conversions, the Department's regulations instruct us to "determine the existence of a benefit under 351.507 (equity infusions)." See 19 CFR 351.508(a). In accordance with 19 CFR 351.507(b), the Department considers the benefit "to have been received on the date on which the firm received the equity infusion." In addressing the October 2001 debt-to-equity swap in the investigation, the Department "treated the benefit as having been provided to Hynix in 2001." Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 16766, 16778 (April 7, 2003). To support our position, we cited the fact that the debt-to-equity swap was recorded as a capital adjustment in Hynix's 2001 financial statements. Id.

Therefore, the decision to treat the benefit from the December 2002 restructuring as having been received in 2002 is consistent with the investigation. We note that, for the December 2002 restructuring, Hynix recorded 1,818,303 million KRW (the debt-to-equity conversion amount net of discounts on present value and discounts on debt issuance) in its capital adjustment account, a component of its shareholders' equity. See Hynix QNR at Exhibit 8 (2002 Financial Statements

at pages 34 and 63). As a result, Hynix was released from its debt obligations and recorded the amount as equity in its 2002 financial statements.

We acknowledge that Hynix's 2002 financial statements indicate that the CBs derived from the debt-to-equity swap "will be converted into {Hynix's} common stock or new CBs after the approval of resolution of capital reduction during the shareholders' meeting." As pointed out by Micron, this contingency, as well as the events related to the debt-to-equity swap including the approval of the restructuring by Hynix's Board of Directors and the shareholders' approval for issuing the equity, occurred in 2003. Although these events might be significant in other instances, we find that the facts of this case deem these events pro forma. Instead, the Creditors' Council's approval on December 30, 2002, is the singular factor in effectuating the restructuring. This is because the Creditors' Council controlled Hynix and because those creditors were entrusted or directed by the GOK to carry out the December 2002 restructuring. See BPI Memorandum at Comment 13-D; see also Comment 1A and 1B, above. As such, many of the entities that approved the restructuring in December 2002 as members of the Creditors' Council were the same entities that would approve the mechanics of the restructuring in February 2003 as shareholders of Hynix. Because of this, the Department finds the benefit was bestowed at the time of the December 2002 restructuring.

The citation by Micron to Cold-Rolled Steel from Brazil does not provide the Department guidance in evaluating the timing of the benefit in this case. Micron quotes the phrase "in the year the swap was made" from the Department's decision memorandum in the case, but does not provide a factual basis for how this statement supports Micron's arguments in the instant proceeding. Hynix contends that Cold-Rolled Steel from Brazil can be distinguished from the instant proceeding because, in Cold-Rolled Steel from Brazil, the events of the debt-to-equity swap occurred in the same year. The Department is unable to evaluate Hynix's assertion because Cold-Rolled Steel from Brazil does not provide evidence on whether the release from debt obligations and the equity infusion occurred in different years.

In the Preliminary Results, we treated an amount (totaling 12,393 million KRW) converted from "new" CBs to common stock on August 8, 2003, and the net outstanding (remaining) bonds as a benefit received in 2003. See Preliminary Results Calculation Memorandum at 5. For the final results, we find that the benefit associated with the August 8, 2003, conversion to common stock and the net outstanding (remaining) bonds was received in 2002. In its 2002 financial statements, Hynix made an entry into its capital adjustment account for the entire amount of the debt-to-equity swap, regardless of monetary instrument or conversion date. See Hynix QNR at Exhibit 8 (2003 Financial Statements at page 40, 63). The capital adjustment account balance reflected the amounts converted to common stock on April 15, 2003, and August 8, 2003, as well the amount of the unconverted bonds. Therefore, we have revised the December 2002 Debt-to-Equity Swap calculation worksheet and treated the entire benefit from the December 2002 Debt-to-Equity Swap as having been received in 2002. See Final Results Calculation Memorandum.

Comment 14: Benchmark for Creditworthy Companies / Discount Rate for Debt Forgiveness

To calculate benchmark interest rates and discount rates for uncreditworthy companies, the Department uses the formula specified in 19 CFR 351.505(a)(3)(iii). One of the variables in this formula is “the long-term interest rate that would be paid by a creditworthy company.” Micron challenges the Department’s calculation of the uncreditworthy rate for both 2001 and 2002.

Micron’s Argument:

Micron contends that the Department should use the BOK BBB- corporate bond rate as the long-term rate that would be paid by a creditworthy company for purposes of calculating the uncreditworthy rate. Micron notes that in the investigation, the Department used the AA- bond rate in its preliminary determination, but then for the final determination agreed with the petitioner that the BBB- rate more accurately reflected the credit status of the firms under investigation. Thus, Micron claims, the Department should use the BBB- rate in calculating the uncreditworthy rate for 2002.

Alternatively, if the Department decides not to use the BBB- rate for calculating the uncreditworthy rate for 2002, Micron contends that the Department should use an average of the AA- and BBB- rates as the long-term interest rate that would be paid by a creditworthy company. Micron states that use of an average would be consistent with the Department’s calculation of another variable in the formula for the uncreditworthy rate, “the probability of default by a creditworthy company.” That variable is calculated as an average of all A- rated and B-rated default rates.

Regarding the uncreditworthy rate for allocating benefits received in 2001, Micron argues that the Department should not have recalculated this rate for the Preliminary Results of this first review. According to the calculation memo prepared by the Department for the Preliminary Results, the Department intended to apply the 2001 uncreditworthy rate used in the investigation.

Hynix’s Argument:

Hynix contends that the AA- bond rate is the appropriate value for “the long-term interest rate that would be paid by a creditworthy company” variable in the Department’s formula. Because Hynix has been found uncreditworthy and unequityworthy, the Department has moved beyond calculating a company-specific rate company to a theoretical rate, according to Hynix. Moreover, in Hynix’s view, the Department has no evidence that the AA- rate, the base rate published by the BOK, is not the most probative in determining the rate applicable to creditworthy companies in Korea. Therefore, Hynix claims, the Department should not use the BBB- rate either alone or in combination with the AA- rate.

Hynix further contends that the Department should use the recalculated 2001 uncreditworthy rate, relying on the AA- rate rather than the BBB- rate, because it is the correct rate. Hynix points out that the Department also made a clerical error in the Preliminary Results regarding the discount rate for the October 2001 debt forgiveness and equity conversion.

The Department's Position:

We have continued to use the AA- rate as “the long-term interest rate that would be paid by a creditworthy company” in calculating the uncreditworthy benchmark and discount rates for 2001 and 2002. As indicated in the preamble to the proposed regulation establishing the formula, “By adjusting the interest rate that *a healthy, low-risk company would pay* in the country in question upward to account for the greater likelihood of default by an uncreditworthy borrower, we capture more precisely the speculative nature of loans to uncreditworthy companies and the premium they would have to pay the lender to assume that risk” (emphasis added). See 62 FR 8830. There is no evidence to indicate that the BBB- rate is the rate that would be paid by a creditworthy borrower. Instead, it is more reasonable to expect that a “healthy, low-risk company” would pay the AA- rate. Thus, we do not agree with the petitioner that the BBB- rate should be used in calculating the uncreditworthy rate singly or in an average with the AA- rate.

Micron’s statement that the Department agreed that use of the BBB- rate was appropriate in the investigation is misleading. The Department was not addressing the calculation of the uncreditworthy rate. Instead, we agreed that where company-specific benchmarks were not available it would be appropriate to use a national average rate that corresponded to the credit rating of the companies under investigation.

We further disagree with the petitioner’s contention that the manner of calculating the default rate for creditworthy companies dictates using the average of the AA- and BBB- rates. As stated in 19 CFR 351.505(a)(3)(iii), the average cumulative default rates are normally based on Aaa and Baa rated borrowers, not all B-rated borrowers as the petitioner suggests.

Finally, we agree with Hynix that we made a clerical error and have corrected that error for these final results. See Final Results Calculation Memorandum.

Comment 15: Ministerial Errors Regarding G7/Highly Advanced National Program

Micron’s Argument:

Micron contends that there are two errors in the Department’s benefit calculation for the G7/HAN program. See BPI Memorandum at Comment 15. Micron alleges that the Department over-counted the amount of the principal paid and, therefore, under-counted the benchmark interest payment for the POR. See Final Results Calculation Memorandum at worksheet entitled “G7/HAN R&D Program.”

Hynix’s Argument:

Hynix did not comment on this issue.

The Department’s Position:

We agree that a clerical error has been made and have revised our calculations accordingly for the final results. See Final Results Calculation Memorandum.

Comment 16: Evasion of the Countervailing Duty Order

Micron's Argument:

Micron's argument is based, in large part, on business proprietary information. See BPI Memorandum at Comment 16-A.

Micron contends that the Department should issue liquidation instructions designed to ensure that the values declared by Hynix are appropriate bases for appraisement. In particular, Micron notes that the Department is required to assess duties "to the entered value of the merchandise." See 19 CFR 351.212(b)(2). Micron argues that, under 19 USC 152.103(l)(1)(i), U.S. Customs and Border Protection ("CBP") has an obligation to examine the circumstances of the sale if it has reason to believe the relationship between the parties influenced the price paid.

Micron notes that such customs instructions would be consistent with the Department's past practice. Micron points to where CBP, at the urging of the Department, implemented special procedures to ensure the correct collection of cash deposits (see Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 FR 22570 (May 28, 1992), Liquidation Instructions Message Nos. 2153111 (June 1, 1992) and 3294114 (October 20, 1992); see also Red Raspberries From Canada; Final Results of the Antidumping Duty Administrative Review, and Revocation in Part of the Antidumping Duty Order, 57 FR 49686 (November 3, 1992), Liquidation Instructions Message No. 3104111 (April 14, 1993)) and cases when the Department has specified the assessment rate be applied to a specific value (see Liquidation Instructions Message No. 4167111).

Hynix's Argument:

Hynix claims that Micron's attempt to show a price difference between Hynix DRAMS fabricated in Korea (subject) and Hynix DRAMS fabricated in Eugene, Oregon (non-subject) is not an appropriate comparison. Hynix argues that DRAMS are sold in different densities and configurations which would make comparing average unit values of gross sales meaningless. Therefore, Hynix asserts that, for example, an individual 64 MB component would have a very different unit price from a 256 MB module. Hynix contends that there is little difference in unit pricing between the DRAMS fabbed in Korea and those (non-subject) DRAMS fabbed in the United States. In fact, Hynix points out that the entered value of subject DRAMS fabbed in Korea is higher.

Hynix also argues that Micron's comparison of invoices does not support its allegation, since the shipments never officially entered the United States and were not subject to CVD duties. See BPI Memorandum at Comment 16-B. Hynix notes that Micron's citation to a specific invoice is not evidence of evasion of CVD duties because the merchandise was shipped to Hynix's foreign

trade zone (“FTZ”) and, therefore, CVD duties were never owed. See Hynix November 7, 2005, Rebuttal Brief, at Attachment 1. In addition, Hynix notes that Micron’s estimate of CVD cash deposits can be dismissed because it does not take into account that a significant portion of Hynix’s U.S. exports were shipped to an FTZ. Further, Hynix argues that, for accounting purposes, the sales shipped to an FTZ were recognized as U.S. sales although the DRAMS were ultimately sent to a third country.

Petitioner’s Rebuttal:

See BPI Memorandum at Comment 16-C. Micron argues that the FTZ Board’s regulations require that “items subject to AD/CVD orders or items which would otherwise be subject to suspension of liquidation under AD/CVD procedures, if they entered U.S. Customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone.” See 15 CFR 400.33(b)(2). See BPI Memorandum at Comment 16-D. Micron argues that the Department should require CBP to examine the circumstances of sale surrounding these entries. Also, Micron asserts that the Department should request that CBP and the FTZ Board ensure that all countervailing duties were appropriately paid and determine whether Hynix’s FTZ privileges should be revoked.

The Department’s Position:

Reflecting the Department’s commitment to strong enforcement of the antidumping and countervailing duty laws, we have reviewed the claims submitted by Micron and the information from Hynix in response to those claims. Additionally, Department officials, including members of Import Administration’s Customs Liaison Unit, met with officials from Micron and Infineon Technologies North American Corp. on October 18, 2005, regarding Micron’s concerns about Hynix’s possible under-reporting of entered values (see Memorandum to the File, “Meeting with Counsel for Micron Technology, Inc. and Infineon Technologies North America Corp.”, dated October 20, 2005).

At this point, we are not including in our customs instructions special procedures for CBP to follow, as Hynix has adequately explained the unit values and invoiced values raised by Micron. Moreover, with respect to Micron’s arguments related to FTZs, the Department finds, under section 777(b)(1)(A)(i) of the Act, that we are unable to provide any proprietary information to FTZ officials because they are not “directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise.” We note that there are procedures in the FTZ Board’s regulations, 19 CFR part 400, by which Micron may be able to address its concerns to the FTZ Board.

Comment 17: Hynix and the GOK’s Cooperation and Disclosure of Information

Micron’s Argument:

Micron contends that the GOK and Hynix failed to disclose information relating to the GOK’s

policy and practices towards Hynix's restructuring to the Department, despite the Department's request for such information. Specifically, Micron argues that the GOK failed to answer the Department's requests for information about GOK meetings and communications regarding Hynix's restructuring. According to Micron, the GOK knows which agencies and which officials were handling the Hynix restructuring, and the GOK undoubtedly knows where its own files and records concerning Hynix are located because the GOK-owned or -controlled the vast majority of the banks on the Creditors' Council. Micron contends that the GOK's response to the Department's requests - that it was logistically impossible for the GOK to search its archives and to track the meetings of Economic Ministers, and impossible to respond to the Department's request - is absurd. Micron believes that the GOK has the ability to provide the Department with documentation and information regarding, at the very least, Cabinet-level planning sessions at which Hynix was discussed because minutes of such meetings must be kept according to law and because Micron itself was able to locate such documents and information. See RFIS 2-26. Moreover, Micron argues, it is implausible that the GOK could not locate documentation of high-level GOK meetings regarding Hynix when, in fact, the MOFE reported to the National Assembly that Hynix's structural adjustment was one of its main policy issues for the second half of 2002. See FIS 24-I-2. According to Micron, the GOK simply refused to provide complete and accurate responses to the Department's clear and targeted requests for information despite the GOK's ability to do so.

With respect to information regarding the July 24, 2001, Ministerial meeting, Micron notes that the Department asked questions of the GOK in the investigation and in its first and third supplemental questionnaires to the GOK in this administrative review. See Micron Pre-Preliminary Comments at 72-75. However, it was not until the GOK responded to the third supplemental questionnaire that the GOK listed this meeting among 200 other Economic Minister meetings and did not even indicate that Hynix was discussed at this meeting. In addition, Micron argues that the GOK's attempt to downplay the significance of this meeting with respect to Hynix is unpersuasive because an official MOFE press release concerning the meeting states that there had been "a lack of transparency as to the prospects of subsequent handling of the major big businesses such as Hynix" and that the government planned to "expeditiously finalize the policies in handling these companies" and to "forcefully follow through with the restructuring of the 6 companies subject to swift takeover including Hynix..." See FIS 47-A-7 at 6. In addition, the MOFE press release and other media reports regarding this meeting demonstrate that the focus of this meeting was the financial restructuring of Hynix and other Hyundai Group companies, according to Micron. See e.g. FIS 44-A-1 and FIS 48-44. Thus, Micron argues, the GOK was disingenuous in suggesting that this meeting was not significant with respect to Hynix. In addition, Micron argues, the GOK was not forthcoming with information regarding Ministers' meetings on November 28, 2000, January 21, 2001, and April 10, 2001, at which the GOK took steps to alleviate Hynix's cash crunch and ordered Hynix's lead bank to carry out the GOK's plan for Hynix. Had it not been for Micron, the Department may never have known about these and other numerous GOK meetings that occurred between December 2000 and May 2002, according to Micron. See Micron Pre-Preliminary Comments at 87-90. Thus, Micron contends, the Department was correct in finding that the GOK did not fully cooperate with the Department and that Micron provided information to the

Department which the GOK supposedly was unable to find.

Micron also contends that the KEB failed to cooperate with the Department by disallowing the release of CRA and CRPA meeting documents during the investigation and by not providing them to the Department in this administrative review. Micron alleges that these documents could be informative to the Department and, as Hynix's lead bank, the KEB should be able to provide such documents to the Department.

Micron argues that the Department correctly found that the GOK and Hynix adopted a policy of silence with respect to their collaborative efforts to save Hynix. See Preliminary Results at 54533-34. In support of this finding, Micron points to statements made by the media and the GOK itself. For example, one commentator stated that due to rising trade tensions the "government has to avoid trade disputes while trying to keep Hynix alive. Hence the government is not in a position to openly talk about support." See FIS 21-51. Another example is a GOK official's statement that "we must develop a more specific and secure restructuring plan in order to remove the uncertainty of the market, and in order to prevent unnecessary misunderstandings during this process, a message was delivered to the creditors group that it is desirable not to make public announcements beforehand." See FIS 45-149. Micron contends that the record contains ample evidence supporting the Department's preliminary finding that "when the respondent government strives to keep its actions off the written record, and when the respondents evade their responsibility to provide all requested information, the inferential value of the circumstantial and other evidence on the record increases. Therefore, the GOK's secretive practices and evasive questionnaire responses, when coupled with the substantial evidence on the record, are further indicia of entrustment or direction in this case." See Preliminary Results at 54534-35.

Hynix's Argument:

Hynix disagrees with the Department's observations that the GOK and/or Hynix were evasive and secretive with respect to providing the Department with requested information during the course of the administrative review. Hynix claims that Hynix's and the GOK's discretion in discussing the Hynix restructuring was intended to reduce speculation in the market and to avoid misunderstandings. In support of its claim, Hynix cites Chairman Lee's statement that, "public discussions regarding the individual company's restructuring plan in itself may decline the corporate value," and that "from now on, regarding items related to the process of Hynix's normalization, all will keep silence consistently." See FIS 45-148. Hynix argues that creditors expressed the same sentiment. See e.g. FIS 45-149. Hynix contends that the alleged policy of silence of the GOK is neither reasonable nor supported by record evidence.

Hynix also contends that the GOK acted in good faith at all times to provide thousands of pages of documentation and explanations of the limitations the GOK had in responding to certain of the Department's requests for information. According to Hynix, the Department's primary example of GOK evasiveness concerns the availability of Creditors' Council documents. See Preliminary Results at 54534. Hynix contends that the Department's finding of evasiveness by the GOK and

Hynix is based on a misunderstanding of the facts. According to Hynix, the Department verified summaries of pre-CRA Council meetings (which took place on December 28, 2000, and January 4, 2001) that were in the possession of the KDB, which were the only documents that the KDB had regarding such meetings. See FIS 41-59 at 15. Hynix states that the Department was able to review summaries of CRA and CRPA council meetings at the KDB and was able to view translated summaries and other documents related to CRA and CRPA meeting at the KEB. See FIS 41-58 at 15-16. Hynix contends that neither Hynix nor the GOK was evasive with respect to documents regarding these meetings.

GOK's Argument:

According to the GOK, the Department's allegation that the GOK failed to cooperate in the administrative review is unreasonable and baseless. In addition, the GOK claims that the Department's accusation of non-cooperation is a pretext to justify the Department's heavier reliance on so-called "indirect evidence." In the GOK's view, the Department's accusations are without merit. The GOK contends that given the number of questions and the extent of information requested in each question, the GOK strived to make its best effort under the time constraints set by the Department. The GOK claims that questions, such as 29, 32, and 35 of the Department's May 4, 2005, First Supplemental Questionnaire, were unreasonably general and overly broad.

Furthermore, the GOK objects to the Department's assertion that the GOK should have made efforts to clarify Department requests for information. The GOK states that the Department's questions were clear. However, the GOK contends that it could only respond to general and broad questions with general and broad answers. According to the GOK, the GOK explained to the Department the practical difficulties in responding to general and broad questions and, therefore, asked the Department to provide more specific information to guide the GOK's search for information. In doing so, the GOK states that it promised the Department that it would continue its efforts to provide information and promised to cooperate during verification in this regard. See GOK SQNR at 60-61 and GOK July QNR at 32-33 and 41.

The GOK contends that the Department's statement in the Preliminary Results that "the GOK did not provide all of the information requested by the Department, including information that was later revealed by the petitioner" is inaccurate and disingenuous. See Preliminary Results at 54528. The GOK asserts that although not explicit, it believes this statement refers to Micron's Second RFIS, which contained information on the GOK's July 24, 2001, Economic Ministers Meeting. The GOK contends that it did not hide the existence of the Economic Ministers Meeting from the Department and that, in a supplemental questionnaire response, the GOK provided a list of the GOK Economic Ministers Meetings, which included the July 24, 2001, Economic Ministers Meeting. See GOK July QNR at Exhibit 7. Moreover, the GOK contends that the Economic Ministers Meeting was not a Hynix-specific meeting but rather a meeting about six financially troubled Korean companies in the context of addressing uncertainties in the Korean market. The GOK claims that this meeting was about the Korean restructuring process, in general, proceeding at that time. According to the GOK, the ministers were reviewing the

status of the restructuring and discussing how to improve the overall restructuring system.

The GOK objects to the Department's claim in the Preliminary Results that the GOK and Hynix's creditors adopted a policy of secretiveness and silence at the time of restructurings and feared potential trade remedy investigations. According to the GOK, the Department does not provide any evidence to substantiate this theory that the GOK may have feared imminent CVD investigations. The GOK views these allegations as simply speculation by the Department.

Furthermore, the GOK argues that it had repeatedly stated that it had communicated with Hynix's creditors through conversations, rather than written communication in the course of the FCS/FSS's regulation of the financial institutions. See GOK July QNR at 1-3, 17, 36-38. The GOK argues that it is unreasonable to find that the GOK abruptly decided to go into a silence mode in 2002. In addition, the GOK contends that the Department's apparent reliance on a presumed policy of silence does not justify the lack of evidence in this administrative review. In the GOK's view, it is incumbent on the Department to collect evidence and prove the existence of "entrustment or direction" as opposed to attributing its failure to accumulate sufficient evidence to the so-called GOK policy of silence.

Department's Position:

We continue to find that Hynix's creditors and the GOK adopted a policy of secretiveness regarding Hynix, and that the GOK has been less than completely forthcoming with regard to our requests for information and documentation related to Hynix.

On June 5, 2002, Infineon filed a CVD petition against DRAMS from Korea with the European Communities and a petition was filed by Micron in the United States on November 1, 2002. See FIS at 50-16. Throughout many of the articles on the record these impending trade disputes were mentioned, and it became clear that the Hynix restructurings would be subject to trade remedy actions. As such, it is not surprising that reports at the time indicated that the creditors and the government would not discuss Hynix's restructuring publicly, but would only do so informally. Therefore, as would be expected, a silence policy was adopted. For instance, according to the Maeil Business Newspaper, KEB Chairman Kangwon Lee stated that "{f}rom now on, regarding items related to the process of Hynix's normalization, all will keep silence consistently. . . When having discussions with the government in the future, it will be conducted orally, instead of in writing, whenever possible." See FIS 45-148. In another news article, a bank official is quoted as saying that "the government tends to make all communications via telephone when it needs something done in order to avoid leaving any evidence." FIS 47-B-23. The GOK and Hynix contend that this policy of silence was intended to prevent uncertainty in Korea's financial markets, which is a plausible explanation. However, we find that the possibility of trade remedy actions was an equally motivating force behind this policy of silence.

The Department also continues to find that the GOK was reluctant to reveal information concerning its involvement in Hynix's restructurings throughout the investigation and this review. This reluctance is reflected in the GOK's questionnaire responses. For example, the

Department asked the GOK to “identify each meeting of Korean Economic Ministers, Vice-Ministers or Ministry officials, Blue House officials, FSS/FCS officials, Korea Development Bank Officials, Korean agencies or other Korean governmental entity from January 1, 2000 through December 31, 2003 at which the subject of Hynix’ financial condition or restructuring was discussed.” See question 29 of the Department’s May 4, 2005, supplemental questionnaire issued to the GOK. In its June 1, 2005, response, the GOK stated,

{a}s for the Economic Ministers’ Meeting, basically no record or minute is kept after the meeting except for rare occasions where public announcement or distribution of information is necessary due to the nature of the issues discussed. To provide further explanation on the rationale in this respect, most of the issues discussed at the Economic Ministers’ Meeting are not publicly disclosed or announced, because full disclosure of GOK officials’ frank views on the key economic issues expressed in the high-level cabinet meeting would affect, in one way or another, decision making process of various private entities involved, which would sometimes further deteriorate the problem. Hence, it is not feasible to confirm whether the Hynix issue was raised or discussed in those meetings except for such meetings as occurred on November 28, 2000, January 12, 2001, and April 10, 2001, the results of which were notified to the relevant agencies. From time to time, press releases are provided to the public and media, as appropriate, after the Economic Ministers’ Meeting. The GOK notes that Hynix issue was not mentioned in the press releases concerning the Economic Ministers Meetings held during the period specified above.

GOK SQNR at 58-61. Yet, at the time of the GOK’s June 1, 2005, questionnaire response, the record contained a MOFE press release, and accompanying MOFE report, concerning a July 24, 2001, meeting of Economic Ministers at which Hynix’s restructuring was discussed in detail. We note that these documents were provided to the Department by Micron on April 25, 2005. See FIS 47-A-7. Thus, we find that the GOK’s June 1, 2005, response was incomplete, inaccurate, and misleading, based on the information on the record at that time.

The Department again asked the GOK to provide information concerning any meetings involving any GOK agency or official and at which the subject of Hynix’s financial restructuring or financial condition was discussed. See the Department’s June 22, 2005, supplemental questionnaire issued to the GOK at questions 17 and 22. In response, the GOK stated, “{g}iven the lack of official records detailing ‘all’ kinds of meetings taking place inside the GOK apparatus and the ‘broad and general’ nature of the question, it is impossible to provide a meaningful response to this question.” See GOK July QNR at 32-36 and 41. The GOK promised to collect relevant information only if the Department provided “the specific title of the meeting and hosting agency, preferably with the exact date of such alleged meetings.” Id.

We note that prior to a preliminary finding in these proceedings, the Department’s primary role is that of fact-finder. To this end, the Department often asks numerous and detailed questions in order to reach informed decisions based on the facts of a case. However, the parties involved in

these proceedings control the facts. Hence, the Department could not possibly know “the specific title of the meeting and hosting agency” or the “exact date” of such meetings unless the GOK first provided a sufficient survey of those meetings. Id. Indeed, the GOK did not offer to continue to make every effort to uncover the information requested by the Department. Rather, the GOK qualified its response by placing the burden on the Department to point to the “hosting agency,” “specific title,” and the “exact date” of the meeting before it would provide an answer to the question. Moreover, the GOK provided an essentially useless list of dates on which the GOK Economic Ministers met during the time period we specified. See Id. at Exhibit 7. Not only does this exhibit contain meaningless information, it fails to fully address the Department’s questions.

The GOK states that “it is impossible to provide a meaningful response to this question.” Id. If a request from the Department is unclear, needs to be clarified, or the respondent would like to consult with the Department about, for instance, limiting its response to information reasonably available, it is incumbent upon the party, not the Department, to assist the administrative process and clarify the precise information sought. See Carpenter Technology Corp. v. United States, Consol. Court No. 00-09-00447, Slip Op. 02-77 (CIT July 30, 2002) at 10, citing Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560; Persico Pizzamiglio, S.A. v. United States, 18 CIT 299, 304 (1994).¹⁴ The GOK requested no consultation with the Department to clarify any question or questionnaire it may have found unclear.

The MOFE document relating to the July 24, 2005, Economic Ministers meeting states that there had been a “lack of transparency as to the prospects of subsequent handling of the major big businesses such as Hynix” and that the government planned to “expeditiously finalize the policies in handling these companies” and to “forcefully follow through with the restructuring of the (6) companies subject to swift takeover including Hynix in order to eliminate the market uncertainties expected after the Swift Takeover Policy ends.” See FIS 47-A-7. The MOFE document also states, “{i}n the case of Hynix, the lead managers, SSB and Korea Exchange Bank, will discuss and analyze Hynix cash flow and afterwards set up additional restructuring plans.” Thus, we find it troubling that the GOK did not report this meeting to the Department in response to numerous requests to do so. We also find it troubling that the GOK does not consider this a meeting in which Hynix was a primary topic of discussion, despite evidence to the contrary. In addition, we find that the GOK’s reluctance to provide such information hindered our ability to fairly conduct a complete and accurate analysis of all of the evidence relevant for reaching a decision. This also raises the question as to whether other documents were withheld by the GOK.

Hynix stated that the KEB would only allow “on site disclosure” of the CRA and CRPA Creditors’ Council meeting documents at verification, because the KEB considered these

¹⁴These cases specifically dealt with antidumping duty proceedings, however, the essential administrative principle at issue applies with equal force to countervailing duty proceedings.

documents highly sensitive. See Hynix July SQNR at 1-2, and 16. See also Hynix SQNR at 34. However, a review of the information at verification, as the respondents have offered, is both insufficient and inappropriate. The Department collects relevant information in making its findings. Hence, verification is designed to confirm the accuracy of the factual information already submitted on the record. It is not an opportunity for parties to submit new information, especially information the parties knowingly possess and which would otherwise be responsive to the Department's questionnaire. Otherwise, the Department and other interested parties do not have adequate opportunity to review the factual information, and, if necessary, ask additional questions. Given that the KEB is Hynix's lead bank, that the KEB has considerable ownership equity in Hynix, and that the GOK is the KEB's single largest shareholder, the Department is highly doubtful of the claim that the KEB could not be persuaded to provide the information. Id. ("KEB will simply not release control of these documents"). Thus, by continuing to withhold information requested by the Department, we find that Hynix and the KEB have impeded the administrative process of this administrative review.

Throughout this administrative review, the Department has asked the GOK to provide information concerning how the GOK exercises its ownership stakes in Hynix's creditors. See e.g. GOK July QNR at 12. In response, the GOK has stated,

As was explained in the GOK SQR submitted on June 1, 2005, despite its shareholdings in some financial institutions the KDIC exercised its voting rights only in "important instances." For all other instances, the KDIC's voting rights were delegated to other persons or entities such as the Board of Directors of the financial institutions. For the Department's information, the GOK provides below, by each bank, occasions where the KDIC exercised its voting rights."

See GOK July QNR at 12.

With respect to Woori, the GOK stated that it approved "the financial statements, partial amendment of the articles of incorporation, amendment of the regulation for the retirement payment of the senior officers, appointment of directors," at Woori's March 26, 2003, shareholder meeting. See Id. at 14. However, in Woori's September 25, 2003, 20-F SEC filing, Woori stated,

{t}he KDIC, which is our controlling shareholder, is controlled by the Korean government and could cause us to take actions or pursue policy objectives that may be against your interests. The Korean government, through the KDIC, currently owns 86.8% of our outstanding common stock. So long as the Korean government remains our controlling stockholder, it will have the ability to cause us to take actions or pursue policy objectives that may conflict with the interests of our other stockholders. For example, in order to further its public policy goals, the Korean government could request that we participate with respect to a takeover of a troubled financial institution or encourage us to provide financial support to particular entities or sectors. . .Through its policy guidelines and

recommendations, the Korean government has promoted and, as a matter of policy, may continue to attempt to promote lending by the Korean financial industry to particular types of borrowers.

Micron's Second RFIS, Exhibit 46 at pages 26-27. Yet, throughout this review, the GOK has conveyed to the Department that it does not have the ability to intervene in the specific lending decisions and/or credit evaluations of the banks in which it has ownership, through the KDIC or otherwise. See e.g. GOK SQNR at 3-6 and 30-33. Thus, the record contains direct evidence that the GOK has provided the Department with inaccurate, misleading and incomplete information regarding its involvement in the lending decisions of Korean banks. We find that this is another example of the GOK's reluctance to provide the Department with accurate and complete information, despite our attempts to obtain such information.

In indirect subsidy cases, the most direct evidence of entrustment or direction usually will be held by governments and foreign interested parties, who may wish to conceal their actions. Such evidence therefore is often very difficult for outside parties to obtain. A "silence" policy, such as the one adopted by Hynix's creditors and the GOK, enhances the difficulty of obtaining direct evidence. Accordingly, a finding of entrustment or direction must be based in large part on circumstantial evidence. When the respondent government strives to keep its actions off the written record and provides misleading information, and when the respondents evade their responsibility to provide all requested information, the inferential value of the circumstantial and other evidence on the record increases. Indeed, it is appropriate to treat the circumstantial evidence in support of our conclusions regarding the role of the GOK in Hynix's restructurings as highly probative in light of the GOK's inadequate responses and secretiveness. Therefore, the GOK's secretive practices, and evasive, incomplete and inaccurate questionnaire responses, when coupled with the substantial evidence on the record, are further indicia of entrustment or direction in this case.

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 _____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)