

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

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

DATE: March 10, 2008

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

Background

On September 10, 2007, the Department of Commerce (“the Department”) published the preliminary results of this administrative review. See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 72 FR 51609 (“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 Issues” section, below, which also contains the Department’s responses to the issues raised in the briefs.¹ We recommend that you approve the positions described 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: Timing of the Benefit on a Previously Countervailed Debt-to-Equity Swap (“DES”)

Comment 2: Allegation that Hynix is Circumventing the Order

Comment 3: Application of Adverse Facts Available (“AFA”) for Undisclosed Grant Presented at Verification

¹ The Department received a case brief and rebuttal brief from Micron Technology, Inc. (Micron), a joint case brief and joint rebuttal brief from Hynix Semiconductor, Inc (Hynix) and the Government of the Republic of Korea (GOK), and a rebuttal brief from Qimonda North America (Qimonda).

Comment 4: Whether the Deposit Rate Should Be Adjusted to Provide a Reasonable Estimate of Future CVD Liability

Comment 5: Whether There Are Errors that Lead to Double and Triple Counting of Benefits of Principalized Interest Loans

Comment 6: Whether the Import Duty Reduction Program is Specific to Hynix

Changes in Ownership

Effective June 30, 2003, the Department adopted a new methodology for analyzing privatizations in the countervailing duty (“CVD”) context. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) (“Modification Notice”). The Department's new methodology is based on a rebuttable “baseline” presumption that non-recurring, allocable subsidies continue to benefit the subsidy recipient throughout the allocation period (which normally corresponds to the average useful life (“AUL”) of the recipient's assets). However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a change in ownership occurred in which the former owner sold all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.

Hynix’s ownership changed during the AUL period as a result of debt-to-equity conversions in October 2001 and December 2002, and various asset sales. However, during the current administrative review, Hynix has not rebutted the Department's baseline presumption that the non-recurring, allocable subsidies received prior to the equity conversions and asset sales continue to benefit the company throughout the allocation period. See Hynix's November 21, 2006, supplemental questionnaire response at page 10; see also Preliminary Results, 72 FR at 51610.

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the 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”), as updated by the Department of the Treasury. For dynamic random access memory semiconductors (“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

For loans that we found countervailable in the investigation or in the first two administrative reviews, and which continued to be outstanding during the period of review (“POR”), we have used the benchmarks from the first and second administrative review. These benchmarks are described below.

Long-Term Rates

For long-term, won-denominated loans originating in 1986 through 1995, we used the average interest rate for three-year corporate bonds as reported by the Bank of Korea and the International Monetary Fund (“IMF”). For long-term, won-denominated fixed-rate loans originating in 1996 through 1999, we used an annual weighted-average of the rates on Hynix’s corporate bonds, which were not specifically related to any countervailable financing. We did not use the rates on Hynix’s corporate bonds for 2000-2003 for any calculations because Hynix was found to be uncreditworthy in those years.

For U.S. dollar-denominated loans, we relied on the lending rates reported in the IMF’s International Financial Statistics Yearbook.

For the years in which we previously determined Hynix to be uncreditworthy (2000 through 2003), we used the formula described in 19 CFR 351.505(a)(3)(iii) to determine the benchmark interest rate. For the probability of default by an uncreditworthy company, we used the average cumulative default rates reported for the Caa- to C- rated category of companies as published in Moody’s Investors Service, “Historical Default Rates of Corporate Bond Issuers, 1920-1997” (February 1998). For the probability of default by a creditworthy company, we used the cumulative default rates for investment grade bonds as published in Moody’s Investor Services: “Statistical Tables of Default Rates and Recovery Rates” (February 1998). For the commercial interest rates charged to creditworthy borrowers, we used the rates for AA- won-denominated corporate bonds as reported by the Bank of Korea (“BOK”) and the U.S. dollar lending rates published by the IMF for each year.

Short-Term Loans

Consistent with the methodology used in the first and second administrative reviews, we relied on the money market rates as reported in the IMF’s International Financial Statistics Yearbook for short-term interest rates. For countries (or currencies) for which a money market rate was not reported, we used the lending rate from the same source.

Analysis of Programs

I. Programs Previously Determined to Confer Subsidies

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

A. GOK Entrustment or Direction Prior to 2004

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 Hynix through its financial difficulties. The financial assistance provided to Hynix by its creditors took various forms, including new loans, convertible and other bonds, extensions of maturities and interest rate reductions on existing debt (which we treated as new loans), Documents Against Acceptance (“D/A”) financing, usance financing, overdraft lines of credit, debt forgiveness, and debt-for-equity swaps. The Department determined that these were financial contributions that constituted countervailable subsidies during the period of investigation.

In the first and second administrative reviews, the Department found that the GOK continued to entrust or direct Hynix’s creditors to provide financial assistance to Hynix throughout 2002 and 2003. The financial assistance provided to Hynix during this period included the December 2002 DES and the extensions of maturities and/or interest rate deductions on existing debt.

In an administrative review, we do not revisit past findings unless new factual information or evidence of changed circumstances has been placed on the record of the proceeding that would compel us to reconsider those findings. See, e.g., Certain Pasta from Italy: Preliminary Results and Partial Rescission of Seventh Countervailing Duty Administrative Review, 69 FR 45676 (July 30, 2004), unchanged in Certain Pasta From Italy: Final Results of Seventh Countervailing Duty Administrative Review, 69 FR 70657 (December 7, 2004). With the exception of the 2002 DES discussed below, no such new information regarding the financial contributions described above has been presented in this review. Thus, we find that a re-examination of the Department’s findings in the investigation, first administrative review, and second administrative review with respect to the debt forgiveness, 2001 DES, loans, and extensions of maturities and/or interest rate deductions on existing debt is unwarranted.

With respect to the DES that Hynix recorded in 2002, however, we are revisiting the findings of the previous administrative reviews based on new factual information placed on the record by the petitioner. For a full discussion on this issue, see Comment 1 below. We continue to find, consistent with our decision in the first administrative review, that Hynix received the benefit from the December 2002 restructuring and the associated DES in 2002. Therefore, we are including in our benefit calculation the financial contributions countervailed in the investigation,

the first administrative review, and the second administrative review: bonds, debt-to-equity swaps, debt forgiveness, and long-term debt outstanding during the POR. In calculating the benefit, we have followed the same methodology used in the first and second administrative reviews.

Because we found Hynix to be unequityworthy at the time of the debt-for-equity swaps in 2001 and 2002, we have countervailed the full amount of the equity infusions and allocated the benefit over the five-year AUL. See 19 CFR 351.507(a)(6) and (c). We 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 above. We divided the total benefits from the various financial contributions by Hynix’s POR sales to calculate a countervailable subsidy rate of **23.69** percent ad valorem for the POR.

B. 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. The purpose of this program was to raise the GOK’s technology standards to the level of the G-7 countries. The Department found that the G7/HAN Program ended in 2001. See Investigation Decision Memorandum at 25.² However, during the POR, Hynix had outstanding interest-free loans that it had previously received under this program. See Hynix’s November 21, 2006, questionnaire response at page 16 and Exhibit 12. We found that the Operation G-7/Han Program provided countervailable subsidies in the investigation. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we have calculated a benefit for these loans.

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 “Subsidy Valuation Information” section of this notice. Next, we divided the total benefit by Hynix’s total sales of subject merchandise for the POR to calculate the countervailable subsidy. On this basis, we determine that countervailable benefits of **.05** percent ad valorem existed for Hynix.

C. 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. The 21st Century Program provides long-term interest-free loans in the form of matching funds.

² See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003) (Investigation Decision Memorandum).

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 reported that it had loans from the 21st Century Program outstanding during the POR. See Hynix’s November 21, 2006, questionnaire response at page 17 and Exhibit 12. During verification, Hynix also reported an additional outstanding loan under the program. See Hynix Verification Report³ at pages 15-16.

In the investigation, we determined that this program conferred a countervailable benefit on Hynix. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we have calculated a benefit for these loans.

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 “Subsidy Valuation Information” section above. We then divided the total benefit by Hynix’s total sales in the POR to calculate the countervailable subsidy rate. On this basis, we calculated a subsidy rate of **zero ad valorem** for this program. Because the rate is de minimis, we did not include this program in our net CVD rate, which is consistent with our past practice. See, e.g., Notice of Preliminary Results of Countervailing Duty Review: Certain Softwood Lumber Products from Canada, 70 FR 33088, 33091 (June 7, 2005).

II. Program Found to Confer Countervailable Subsidies During the POR

A. Import Duty Reduction Program for Certain Factory Automation Items

We initiated a review of this program in the New Subsidy Allegations - DOC Initiation Memorandum.⁴ Based on our analysis of the GOK’s submissions and the results of verification, we find that the Import Duty Reduction Program provided a countervailable subsidy to Hynix during the POR. Specifically, we determine that the import duty reductions provide a financial contribution in the form of revenue forgone by the GOK and a benefit in the amount of the duty savings. See section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.510(a).

Regarding specificity, information submitted by the GOK shows that the import duty reductions under the program are available to any company importing factory automation equipment eligible for the duty reduction. Therefore, there is no basis to find this program de jure specific under section 771(5A)(D)(i) of the Act. Accordingly, we have examined whether this program is

³ See Memorandum to the File from Shane Subler and David Neubacher, International Trade Compliance Analysts, to Susan Kuhbach, Office Director, Re: Verification Report: Hynix Semiconductor Inc. (December 20, 2007) (Hynix Verification Report).

⁴ See Third Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea: New Subsidy Allegations Memorandum (March 28, 2007) (New Subsidy Allegations - DOC Initiation Memorandum) at 6-8.

de facto specific under section 771(5A)(D)(iii) of the Act. We find that the actual recipients of the subsidy are not limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act. Further, we find that the record does not demonstrate predominant use of the subsidy by an enterprise or industry (or groups thereof) within the meaning of section 771(5A)(D)(iii)(II) of the Act. However, our review of usage data submitted by the GOK shows that a group of enterprises, of which Hynix is a part, received a disproportionately large amount of the subsidy. See Third Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea: Analysis Memorandum for Business Proprietary Information on Korean Import Duty Reduction Program (August 31, 2007). For more discussion on this issue, see Comment 6 below. Therefore, we find that the Import Duty Reduction Program is de facto specific under section 771(5A)(D)(iii)(III) of the Act.

To calculate the benefit, we divided the total duty savings Hynix received by Hynix's total sales during the POR. On this basis, we determine the countervailable subsidy to be .04 percent during the POR.

III. Programs Previously Found Not to Have Been Used or Provided No Benefits

We determine that the following programs were not used during the POR:

- A. Short-Term Export Financing
- B. Reserve for Research and Human Resources Development (formerly Technological Development Reserve) (Article 9 of RSTA / formerly, Article 8 of TERCL)
- C. Tax Credit for Investment in Facilities for Productivity Enhancement (Article 24 of RSTA /Article 25 of TERCL)
- D. Tax Credit for Investment in Facilities for Special Purposes (Article 25 of RSTA)
- E. Reserve for Overseas Market Development (formerly, Article 17 of TERCL)
- F. Reserve for Export Loss (formerly, Article 16 of TERCL)
- G. Tax Exemption for Foreign Technicians (Article 18 of RSTA)
- H. Reduction of Tax Regarding the Movement of a Factory That Has Been Operated for More Than Five Years (Article 71 of RSTA)
- I. Tax Reductions or Exemption on Foreign Investments under Article 9 of the Foreign Investment Promotion Act ("FIPA")/ FIPA (Formerly Foreign Capital Inducement Law)
- J. Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates
- K. Export Insurance
- L. Electricity Discounts Under the RLA Program
- M. Import Duty Reduction for Cutting Edge Products

See Hynix's November 21, 2006, questionnaire response at pages 21-22 and the GOK's November 21, 2006, questionnaire response at pages 12-13.

In the first administrative review, the Department found that "any benefits provided to Hynix under the System IC 2010 Project are tied to non-subject merchandise" and, therefore, that

“Hynix did not receive any countervailable benefits under this program during the POR,” in accordance with 19 CFR 351.525(b)(5). See AR1 Decision Memorandum⁵ at page 15. No new information has been provided with respect to this program. Therefore, we preliminarily find that Hynix did not receive any countervailable benefits from the System IC 2010 Project during the POR.

Analysis of Comments

Comment 1: Timing of the Benefit on a Previously Countervailed Debt-to-Equity Swap (“DES”)

Micron’s Argument: Micron argues that the Department erred by not reversing its decision from the first administrative review to allocate the benefit of the 2002 DES beginning in 2002. Micron notes that under the Department’s regulations, the benefits of non-recurring subsidies, such as DES’s, are allocated over a fixed period beginning in the year of receipt.⁶ Micron explains that the issue in this case revolves around whether the year of receipt for the benefits given to Hynix through a DES should have been 2002 or 2003. Micron alleges that the issue is important in this case because it determines whether the allocation period will expire in 2006 or 2007 and because any portion of the benefit considered to have been received in 2002 cannot be countervailed because the suspension of liquidation occurred on April 7, 2003.⁷

Micron explains that on December 30, 2002, Hynix’s creditors (organized as a Creditors’ Council) voted to approve an agenda under which creditors would convert 1,861,529 million won of debt to equity. Micron asserts that the DES was subject to at least three contingencies – approval by the board of directors of the agenda and the new stock issuance, and approval of a capital reduction or reverse stock split by Hynix’ shareholders. Micron notes that these events did not occur until 2003. In addition, according to Micron, Hynix’s 2002 financial statements, issued in January 2003, characterized the debt to be converted to equity as convertible bonds that will be converted after the approval of resolution of capital reduction at the shareholders’ meeting. Micron notes the financial statements also discussed the restructuring under a “Commitments and Contingencies” note stating the company should do its best to facilitate the capital reduction and debt restructuring pursuant to the resolution of the Creditors’ Council. Micron asserts that the DES officially occurred on April 15, 2003, when Hynix issued shares for this swap. Micron explains that in the final results of the first administrative review, the Department concluded that Hynix received the benefit in 2002, finding that the Creditors’ Council’s approval on December 30, 2002, was the singular factor effectuating the restructuring and that all subsequent contingencies were pro forma.

5 See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 71 FR 14174 (March 21, 2006), and accompanying Issues and Decision Memorandum at Comment 13 (AR1 Decision Memorandum).

6 See 19 CFR 351.524(d)(1).

7 Micron asserts that the Department’s decision effectively enabled Hynix’s creditors, by approving the transaction at the end of 2002, to artificially shield one fifth of the subsidy from U.S. trade remedies.

Micron notes that in the present review, it submitted new evidence to refute the Department's reasons for the Department's conclusion in the first review. Specifically, Micron states that it presented evidence to show that 1) Hynix's creditors continued to characterize 1.86 trillion won in claims as debt at the end of 2003; 2) Hynix's accounting methodology was distortive and contrary to Korean generally accepted accounting principles; and 3) the contingency requiring shareholder approval of the reverse stock split was not pro forma but the subject of bitter controversy. Micron asserts that in Preliminary Results of the instant review, the Department declined to reverse its finding from the first administrative review, by explaining that 1) the contingencies subsequent to the Creditors' Council's approval were pro forma because the Creditors' Council controlled Hynix with respect to the restructuring and 2) in accordance with 19 CFR 351.507(b), the receipt of benefit occurs on the date on which the firm received the equity infusion.

Micron argues that the new evidence that events subsequent to the Creditors' Council 2002 meeting were not pro forma, was either not addressed by the Department in the Preliminary Results or was summarily dismissed. Micron asserts that it was not certain in 2002 that Hynix's shareholders would agree to a capital reduction, pointing to news articles earlier in 2002. Micron also asserts that the shareholders' February 2003 meeting regarding the capital reduction was contentious, citing to a press report stating that the meeting erupted into chaos and violence. In addition, Micron alleges that some shareholders filed suit in March 2003 seeking to enjoin implementation of the capital reduction, although the court ultimately dismissed the suit. Micron asserts that similar creditor-led restructuring plans at other Korean companies have been blocked by minority shareholders. Therefore, according to Micron, the possibility that the shareholders might reject the capital reduction was real, and thus it was a genuine contingency, not a pro forma conclusion.

Micron also argues that new evidence shows the Hynix board was free to reject the restructuring. Micron asserts that Hynix's board was not controlled by the creditors and did not just rubber stamp Creditors' Council actions. As evidence of this, Micron alleges that Hynix's board rejected a previous creditor recommendation to sell the company. Thus, Micron argues that there was no guarantee that the board would approve the Creditors' Council agenda. Micron asserts that the Department dismissed this evidence by stating that the circumstances behind the December 2002 restructuring and those behind a potential sale are not comparable, without providing analysis or facts to justify its summary distinction between these two transactions and control of the board in each.

Micron alleges that the same accounting firm that approved Hynix's capital adjustment in 2002, also audited the financial statements of Shinbo Capital Corporation, which was one of Hynix's creditors. According to Micron, the accountant included language in Shinbo's quarterly financial statements dated December 31, 2002, indicating that claims against Hynix were subject to conversion, but due to uncertainties in the requirements of restructuring the claims, the statements do not reflect any adjustments related to the restructuring. In addition, Micron argues that another of Hynix's creditors, KEB Capital Inc.,⁸ also classified the entire amount due from

⁸ Micron notes that KEB Capital Inc. was audited by the Anjin Accounting Firm, a financial advisor to Hynix

Hynix as loans in the quarterly statement for the period ended December 31, 2002. Also according to Micron, the creditors continued to account for the claims as debt owed by Hynix in the March 31, 2003 quarterly statements. Micron asserts that this undermines the Department's previous finding that the December 30, 2002 resolution was the singular factor in effectuating the restructuring. Micron notes that the Department concluded in the Preliminary Results of the instant review that this evidence does not outweigh the fact that Hynix received the benefit in 2002 when it recorded the transaction as a capital adjustment. Micron alleges, however, that the Department did not say why Hynix's financial statement or accounting treatment were more reliable than Shinbo's, nor did it address the point that at the time of the Creditors' Council resolution, there was considerable uncertainty that the requirements of restructuring would be met.

Micron argues that Korean accounting standards required Hynix to account for the DES as a 2003 event. Micron asserts that as new information in this review, it provided Statements of Korean Financial Accounting Standards ("SKAS") No. 13. Micron states this rule describes how and when a company should account for a DES, namely at the date of actual consummation of the restructuring. Micron notes that this is the date of agreement or court order, except that if events such as transfer of equity interests do not occur because certain conditions are not satisfied, the time of restructuring is the date on which restructuring is consummated with complete satisfaction of those conditions. Micron asserts that "agreement" in SKAS 13 refers to a contract between debtor and creditor. Micron alleges this means, in Hynix's case, that the earliest a contract could have occurred was January 2003 at Hynix's board meeting, but probably later at the date of full stockholder approval (February 2003). Micron asserts that creditors agreed among themselves on December 30, 2002, but Hynix was not a part of that deal and was in no legal position to enforce it, so there could be no contractual agreement.

Micron alleges the Korean tax authority had made clear that the relevant gain from Hynix's DES can be no earlier than the date the swap actually occurs. Micron points to evidence that the Korean Ministry of Finance and Economy issued a ruling to the Korean Exchange Bank instructing it that the date of a DES under the Corporate Restructuring Promotion Act (CRPA) is not considered when convertible bonds are issued but when they are converted to stock. Moreover, Micron asserts that relevant tax provisions state the timing of a DES is the earlier of when the conversion is made and the date on which registration of change capital is made – both dates are in April 2003 in Hynix's case. Micron also argues that SKAS 13 also requires that a capital adjustment cannot be made until the number of shares to be issued has been established. According to Hynix, the number of shares to be issued in Hynix's case was not established in the Agenda but was contingent on the secondary market prices at the time of conversion. Micron notes that the Department dismissed SKAS 13 on the grounds that it was not in effect at the time of the December 2002 restructurings. Micron acknowledges that SKAS 13 was not officially adopted until November 2003, but Micron argues that the statement merely clarifies and restates existing Korean accounting principles. Micron notes that one of these is Interpretation of Korean Financial Accounting Standard ("IKFAS") 55-67, which defined the time of restructuring as

during the restructuring.

when all of the contents of restructuring such as transfer of assets, issuance of shares, change of contract terms, etc., are actually confirmed, which can be no earlier than the date of mutual agreement. Micron summarizes that every potentially relevant date, under the accounting standards, that could be used to determine the date of Hynix's benefit for the DES, is in 2003.

Micron asserts that Hynix's audited financial statements are unreliable. Micron points to the difference in treatment, for the same DES by the same accountant, between Hynix's and Shinbo's financial statements. In addition, Micron alleges that the accountant was found to have engaged in fraudulent activity, by Korea's regulatory agency, for approving Hynix's unlawful accounting positions. Micron notes that in any case, the Department is not bound by Hynix's accounting treatment, as nothing in the statute or regulations states that such deference is owed to respondent's treatment in making this determination.

Micron notes that in the Preliminary Results, the Department defended its position on the grounds that even if Hynix should not have recognized the benefit until 2003, this does not mean that it did not, in fact, receive the benefit in 2002. Micron asserts that the Department's defense is nonsensical given that the Department's own test ties the receipt of benefit in a DES to the date the recipient recognizes the capital adjustment in its financial statements. Therefore, Micron argues that in order for the Department's own test to have meaning, the date of recognition of benefit must be made in accordance with financial accounting standards. Micron goes on to assert that if it is not made in accordance with financial accounting standards, the Department has improperly delegated the respondent authority to determine when a benefit is received and, thus, control of the CVD law.

Micron argues that the Department's regulations and longstanding practice require that the benefit of a DES is to be considered as having been received in the year of the swap. Micron asserts that DES's, by their nature, involve elements of both forgiveness of debt and infusion of equity, for which there are separate governing regulations – 19 CFR 351.508 and 19 CFR 351.507, respectively. However, according to Micron, the Department's rules make clear that the equity provisions of 19 CFR 351.507 are controlling in the case of DES's. Micron notes that the Department acknowledged that the existence and timing of benefits from Hynix's DES must be analyzed under 19 CFR 351.507. According to Micron, the regulations state the Department will consider the benefit to be received on the date on which the firm received an equity infusion for government-provided equity infusions. In addition, Micron asserts that the Department's longstanding practice has been that the receipt of benefit in DES occurs in the year the swap was made.⁹ According to Micron, this longstanding practice reflects the only reasonable way to interpret 19 CFR 351.507(b): a firm cannot receive an equity infusion before its creditors

⁹ See Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62128 (October 3, 2002) and accompanying Issues and Decision Memorandum at Section I.A (Cold-Rolled Brazil); Preliminary Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod From Brazil, 67 FR 5967, 5973 (February 8, 2002) (Carbon and Alloy Steel Wire Rod from Brazil); Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 64 FR 38742, 38748 (July 19, 1999) (Hot-Rolled Brazil); Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France, 58 FR 37304, 37312 (July 9, 1993) (Certain Steel Products from France).

actually exchange their old debt for newly issued equity shares. Micron argues that if the regulations had intended the benefit to begin at an earlier time, such as when the government first agreed to provide the subsidy, they would have said so. As proof of this, Micron points to 19 CFR 351.524(d)(3)(i), which uses just such language in the section regarding selecting a discount rate used to allocate non-recurring benefits over time. However, Micron argues, when determining the time of receipt of benefit, the Department must look to the date on which the firm received the equity infusion.¹⁰ Micron asserts that the varying regulatory language demonstrates that the year of receipt of the subsidy and the year the government agreed to provide the subsidy are separate events which can occur in different years.

Micron asserts that in this case, the Department departed from its established practice that the benefit from a DES occurs in the year of the conversion. Micron argues that the CIT has stated that agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.¹¹ According to Micron, there is no reason, in this case, to depart from the Department's longstanding practice. Micron notes that the Department's determination was based on the following factors: 1) the Creditors' Council approval of the Agenda on December 30, 2002, was the singular factor effectuating the restructuring and all subsequent contingencies were pro forma; and 2) Hynix accounted for the transaction in its 2002 financial statements with an adjustment to its capital account. Micron argues that these findings are not correct and have no bearing on when Hynix received the benefit under 19 CFR 351.507(b).

Micron argues that in previous cases where a government entity commits to swap debt for equity and the recipient accounts for the swap at the time of such commitment, the Department has consistently found that no equity infusion benefits accrue until the swap actually occurs. Micron asserts that in GOES from Italy,¹² an Italian government-owned bank contributed money during 1992 to the respondent who, like Hynix, accounted for the cash contribution, not as debt, but as a provisional capital increase. According to Micron, in GOES from Italy, the reason the capital increase was considered provisional in 1992 is that it required approval by the EC, which did not occur until 1993. Micron argues that despite the Italian bank's intention to make an immediate capital increase, the Department concluded that no equity infusion took place during 1992 and treated the payments as short-term interest free loans which are rolled over until such time as they are repaid or converted to equity upon EC approval. Micron asserts that in GOES from Italy, the Department refused to treat the Italian respondent as the recipient of an equity infusion until the equity was actually issued. In addition, Micron points out that the facts that the Italian government intended to make a contribution in 2002 and the Italian respondent treated the contribution as a provisional capital increase rather than a liability, were not relevant. Micron points out that in the instant case, as in GOES from Italy, the funds remained contingent liabilities (*i.e.*, debt) because of the potential obligation to repay in the event the capital reduction was not approved and the other contingencies were not resolved. Micron asserts that the facts in the instant case are less supportive of a finding that the benefits of an equity infusion occurred in

¹⁰ See 19 CFR 351.507(b).

¹¹ See Pohang Iron & Steel Co. v. United States, 23 CIT 778,788 (1999).

¹² See Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy, 59 FR 18357, 18360 (April 18, 1994) (GOES from Italy).

the year prior to the swap as the GOK intended to convert their debt to equity at some point in the future, whereas the Italian bank clearly intended to make an immediate contribution.

Micron asserts that in other cases, the Department has similarly held that the recipient's accounting treatment for a DES is not dispositive or probative of when the benefit was received. Micron points out that in Certain Steel Products from France, the Department found it can only countervail the equity portion of debt-to-equity conversions in the year of conversion.¹³ According to Micron, that case involved conversion of hybrid instruments known as PACS to common shares, and the Department rejected the accounting classification of the PACS as equity and concluded the PACS were debt until converted to common shares. Micron asserts in previous cases, even where the plan to convert debt-to-equity is a done deal, the recipient does not receive the benefit of the equity infusion until the plan is implemented and the swap officially occurs.¹⁴ According to Micron, in Textile Products from The Philippines, the Philippine bank had agreed to convert its debt in a textile company and an apparel company, and it was no longer charging interest on its loans. Micron notes that in that case, the financial statements of the textile company explain that the conversion had not officially taken place during the period of review only because the company had to amend its Articles of Incorporation to finalize the deal. Micron states that in that case, the Department found no equity infusion had taken place because the swaps had not yet officially occurred.

Micron argues that the Department's reliance on its findings during the investigation,¹⁵ for an earlier DES, was misplaced. Micron explains that the Department has stated that its decision to allocate the benefit in this situation was consistent with an earlier DES approved by GOK creditors in 2001, implemented in 2002, and allocated by the Department beginning 2001 (when Hynix made a capital adjustment to account for the transaction). Micron asserts that the finding from the original investigation is not a reliable precedent because all parties (except the Department, but including Hynix) agreed that the funds in that case should be countervailed as a loan during the interim period between the date of the Creditors' Council resolution (October 2001) and the date of the swap (May 2002), and then countervailed as an equity infusion in May 2002. Micron notes that the Department disagreed with all sides in the final determination and stated that Hynix's accounting treatment was dispositive of when the benefit was received. Micron asserts that because the Department made this conclusion, which no party had proposed, in the final determination, there was no opportunity to brief the agency on why it was wrong. Therefore, Micron notes, the Department did not attempt to distinguish its decision from its established practice, such as the cases noted above.

Micron argues that the CIT's decision in the appeal of the first administrative review¹⁶ is inapposite. Micron asserts that the CIT did not have a concrete view on the timing of the benefit

¹³ See Certain Steel Products from France, 58 FR at 37312.

¹⁴ See, e.g., Preliminary Affirmative Countervailing Duty Determination: Certain Textile Mill Products And Apparel From The Philippines, 50 FR 1607, 1610 (January 10, 1985) (Textile Products from the Philippines).

¹⁵ See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors From the Republic of Korea, 68 FR 37122 (June 23, 2003), and accompanying Issues and Decision Memorandum at Comment 11.

¹⁶ See Micron Technology, Inc. v. United States, Slip Op. 07-183, No. 06-00133 (CIT December 19, 2007) (CIT

from the DES, but it considered the question inherently difficult and deferred to the Department's final determination. In addition, Micron notes that the CIT's decision was tied to the facts of the first review, and the CIT did not express an opinion on whether the facts Micron sought to be added to the record would have mandated a different outcome. Micron argues that compelling new evidence has been placed on the record of the instant review, and this requires the Department to review the timing of the DES in light of the new evidence.

Hynix's Rebuttal: Hynix and the GOK argue the Department correctly found, in the first administrative review and the Preliminary Results of the present review, Hynix's accounting date to be the benefit receipt date associated with the 2002 DES. Hynix and the GOK assert that Micron's narration of the events surrounding the DES is incomplete and inaccurate. Hynix and the GOK note the following facts, in addition to those cited by petitioner: 1) at the time that the creditors approved the Hynix debt restructuring,¹⁷ they already owned 67 percent of Hynix's shares and wielded substantial management influence over the company as CRPA creditors and shareholders; 2) the restructuring plan key to Hynix's survival was formulated in cooperation with Deutsche Bank, which served as a financial advisor to both Hynix and the creditors; 3) the restructuring plan was subject to the CRPA and could lead to sanctions against creditors who deviated from the plan. Hynix and the GOK allege that the December 30, 2002 agreement made it certain restructuring would happen and did take effect on that date. Hynix and the GOK argue that the creditors called the shots as the dominant majority and legally controlling shareholders, with overlapping assent by the Hynix Board. Hynix and the GOK note that after the failed sale of the company to Micron, the creditors removed all of Hynix's outside directors that opposed the sale and installed their own CEO and CFO to oversee decisions related to the restructuring. Hynix and the GOK assert that as such, Hynix's board was not a factor, nor were minority shareholders given the creditors' stake in the company. Hynix and the GOK note that the Department found the purported contingencies noted by Micron could not overcome the biggest factor with regard to when the benefit accrued to Hynix – Hynix's accounting of the DES in its 2002 financial statements.

Hynix and the GOK argue that Micron's case brief (and prior submissions) present old information from prior segments of this proceeding to support Micron's receipt year argument, and that any unique documents Micron submitted cover the same information presented in other recycled documents from the first administrative review. Hynix and the GOK assert that that record was examined by the Department and was before the CIT. Hynix and the GOK assert that the alleged contingency associated with Hynix's Board's approval of the restructuring agreement was known and fully considered by the Department in the first administrative review. While Micron alleges new evidence that the Hynix Board was free to reject the restructuring plan, Hynix and the GOK assert that Micron cited to information on the record of the first administrative review. Hynix and the GOK note that they agree with the Department that the proposed sale and the debt restructuring plan were not comparable and the Board's actions with respect to the proposed sale do not shed light on whether its consideration of the debt

DRAMS Decision).

¹⁷ Hynix notes that the debt restructuring was approved under the auspices of the Corporate Restructuring Promotion Act (CRPA).

restructuring plan was pro forma. Specifically, Hynix and the GOK assert that the transactions were very different, with one concerning possible elimination of the company and one concerning actions to sustain the company, and they were considered by two very different Boards. Hynix and the GOK argue that the fact that creditors ousted all board members opposed to the sale demonstrates their iron control of the company.

Hynix and the GOK argue that opposition of minority shareholders to the restructuring plan is not new information and the Department gave it specific consideration in the first administrative review. Hynix and the GOK assert that Micron relies on factual sources that were on the record in the first administrative review and none of it detracts from the fact that Hynix creditors were the dominant and legally controlling shareholder group. While Micron argues that because certain Hynix creditors accounted for the DES in 2003 not 2002, the receipt year must be 2003, Hynix and the GOK argue that this is irrelevant. Hynix and the GOK assert that what is relevant is what Hynix did, and this treatment is undisputed. Hynix and the GOK note that consistent with the benefit-to-recipient standard, the Department is required to measure subsidies in terms of the benefit to the recipient rather than the cost or benefit to the government or entities directed or entrusted by the government.¹⁸ Thus, according to Hynix and the GOK, the focus of the examination must be on the effect and the manner in which the recipient treated the transactions.

Hynix and the GOK assert that Micron's speculation regarding Korean accounting standards should be rejected. Hynix and the GOK argue that how Hynix accounted for the swap is hardly evidence of Hynix usurping control of U.S. trade law or delegating the respondent authority to determine when a benefit is received. Hynix and the GOK note that the Department, citing the creditors' majority stake in Hynix, verified that Hynix's accounting treatment of the DES as a 2002 event was appropriate because the creditor's approval of the swap represented the date of agreement between the parties involved in the restructuring.¹⁹ Hynix and the GOK also note that Micron acknowledged that Hynix's accountant specifically confirmed the company's accounting of the 2002 DES in its 2002 financial statements to be proper, and that Hynix's financial statements were the subject of rigorous scrutiny by Korean regulators, who found no irregularities with respect to Hynix's accounting of the DES.

Hynix and the GOK argue that the CIT's determination did consider Micron's argument and all relevant facts and that the Department's finding is consistent with its regulations and past practice. Hynix and the GOK note that the CIT rejected Micron's appeal of the receipt year issue from the first administrative review.²⁰ Hynix and the GOK assert that it is the same argument Micron presented in this proceeding, specifically, the argument that in the case of a DES, the Department's regulations and practice somehow require that a firm does not receive an equity

18 See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from South Africa, 66 FR 50412 (October 3, 2001) and accompanying Issues and Decision Memorandum at Comment 11; Final Results of Countervailing Duty Administrative Review: Ferrochrome from South Africa, 56 FR 33254 (July 19, 1991); and 19 USC 1677(5)(E); Statement of Administrative Action, H.R. Doc. 103-316, 103d Cong., 2d Sess. at 927 (1994).

19 See Memorandum from Shane Subler and David Neubacher, International Trade Compliance Analysts, to Susan Kuhbach, Office Director, Re: Verification Report: Government of Korea ("GOK Verification Report") at 2.

20 See CIT DRAMS Decision at 12 – 14.

infusion until the equity is in the hands of the creditors. Hynix and the GOK assert that while Micron tries to downplay the significance of the CIT's opinion, it is clear the CIT understood the Department's regulations and past practice and expressed no problem with the Department's interpretation of such in the first administrative review. Hynix and the GOK argue that the CIT was comfortable with the correctness of the Department's approach under its regulations and past practice, as it focused on the factual record, stating there is nothing in this record which compels Commerce to choose the pro forma actions of 2003 over the crucial decision-making that occurred in 2002.²¹ Hynix and the GOK assert that the CIT took time to distinguish the facts in this case from the facts in GOES from Italy,²² which indicates that the CIT understood the issues raised by Micron and was attuned to the facts.

Hynix and the GOK assert that Micron misconstrues the object of the Department's benefit analysis with respect to equity. Specifically, Hynix and the GOK note that while Micron proposes that the Department focus on when the equity was actually received, as opposed to when the infusion was made, Micron's position is inconsistent with the intent of the law and the Department's regulations. Hynix and the GOK state that the purpose of the CVD statute is to offset the unfair competitive advantage that foreign producers otherwise would enjoy. Hynix and the GOK go on to explain that there is no intrinsic advantage associated with equity, as it creates a right in the shareholder that the company is obliged to honor. Hynix and the GOK argue that this is why the Department's regulations focus on the equity infusion²³ rather than equity itself (which is not relevant to the issue of advantage or benefit). Hynix and the GOK assert that the regulations emphasize the provision, payment, or investment of the infusion, versus the receipt of equity, and this comes in the form of terminated debt obligations in the case of DES's. Hynix and the GOK note that with respect to the timing of the receipt of benefit, the regulations state that the Department will consider the benefit to have been received on the date on which the firm received the equity infusion,²⁴ and there is no consideration of when investors received the equity. Hynix and the GOK assert that the Department has consistently treated equity infusions into unequityworthy companies as grants given in the year the infusion was received,²⁵ not when the equity was received. Hynix and the GOK assert that Micron's reliance on other regulations regarding the selection of discount rates triggered by the year in which the government agreed to provide the subsidy is misplaced, as the facts of this case indicate the alleged benefit was actually received by Hynix in 2002.

Hynix and the GOK argue that past Department determinations raised by Micron are easily distinguished from this case. According to Hynix and the GOK, in Hot-Rolled Brazil and Cold-Rolled Brazil, the Department examined three debt-to-equity conversions involving two companies and found that each DES constitutes an equity infusion in the year the swap was made. Hynix and the GOK assert that the Department did not say the receipt year was the year

21 See CIT DRAMS Decision at 13.

22 Id. at n. 11.

23 See 19 CFR 351.507(a).

24 See 19 CFR 351.507(b).

25 See, e.g., Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing duty Determination with Final Antidumping Duty Determination: Stainless Steel Sheet and Strip in Coils From Italy, 63 FR 63900, 63904 (November 17, 1998).

in which the equity was actually received by the creditor, and that a reasonable reading of the Department's decision suggests both the infusion and the receipt of equity occurred in the same year. Hynix and the GOK note that, thus, the Department's statement that each DES constitutes an equity infusion in the year in which the swap was made was technically correct in those case-specific circumstances. According to Hynix and the GOK, in Carbon and Alloy Steel Wire Rod from Brazil, the Department found the year of receipt for an equity infusion to be 1988, the year of the DES; however, this was also the year the recipient cleansed past due debt from its financial statements in exchange for equity. In Certain Steel Products from France, the Department's decision, according to Hynix and the GOK, turned on case-specific facts regarding the PACS instruments. Hynix and GOK assert that the debt restructured by the Hynix creditors shares none of the characteristics with the PACs instruments, and thus, there is no comparison. Hynix and the GOK point out that Micron acknowledges that in GOES from Italy, the commitment was in fact provisional and contingent upon approval by the EC. Hynix and the GOK assert that this very different from the pro forma contingencies raised in the instant case, and the CIT found as much when Micron attempted to use the same case in its appeal of the Department's final results in the first administrative review.²⁶ Hynix and the GOK argue that with regard to Textile Products from the Philippines, Micron cites to facts that are inapposite to the case at hand. Hynix and the GOK assert that in that case, the Department did not find an equity infusion for the responding textile company because that company had not yet accounted for the DES (unlike the instant case) and had recognized in its financial statements that the transaction would not be executed until it could amend its Articles of Constitution. Hynix and the GOK assert that this not like the instant case, because a real contingency existed in that case, given that amending the Articles of Constitution would require shareholder approval. Hynix and the GOK assert that Micron presents no evidence that the overlap between the creditors prepared to swap debt for equity and the shareholders was such that the contingency was illusory, as it was in the instant case. According to Hynix and the GOK, there was no done deal in that case, as Micron suggested. In addition, Hynix and the GOK assert that while one of the respondents in that case merely noted a plan, the existence of a plan without more is not a basis to find such a transaction.

Department's Position: For the final results, we continue to find that Hynix received the benefit from the restructuring and DES in December 2002 and find Micron's new information does not provide sufficient support to reverse our prior decision.

As described above, the Department does not reconsider past findings in a countervailing duty proceeding absent new factual information or changed circumstances that would compel us to reconsider those findings. See PPG Industries v. United States, 978 F.2d 1232, 1242 (Fed. Cir. 1992) ("Because the allegedly new information submitted by PPG was previously considered by the ITA ... and because the allegedly new information does not cast substantial doubt on the ITA original determination, the ITA's conclusion that the new evidence submitted did not justify a further investigation in this review cannot be an abuse of discretion and, therefore, must be affirmed"). See also Certain Pasta from Italy: Preliminary Results and Partial Rescission of

²⁶ See CIT DRAMS Decision at n. 11.

Seventh Countervailing Duty Administrative Review, 69 FR 45676 (July 30, 2004), unchanged in Certain Pasta From Italy: Final Results of Seventh Countervailing Duty Administrative Review, 69 FR 70657 (December 7, 2004).

Pursuant to 19 CFR 351.507(b), in the first administrative review we determined that Hynix received a benefit from the 2002 DES in 2002, as opposed to 2003. This finding was based on the evidence that the entrusted or directed Creditors' Council was the driving force behind the 2002 restructuring and that its 2002 vote was the singular event in the restructuring. It was based also on Hynix's financial statements, which demonstrated that Hynix received the equity infusion in 2002. The CIT upheld our determination. See CIT DRAMS Decision at 12-14. In the instant review, Micron has presented some of the same arguments from the first administrative review, but has also presented some new evidence. Consistent with our countervailing duty practice, we will reconsider our first review decision in light of the new evidence. Below we discuss this new evidence.

To support its claim that decisions by Hynix's board and the shareholders after the December 2002 Creditors' Council decision were not pro forma, Micron submitted several news articles.²⁷ First, we note that some of the articles in Micron's NSA were filed in prior reviews, which the Department has previously considered in its analysis of this issue.²⁸ Also, we find that several of the news articles placed on the record by Micron in fact suggest that the board and shareholders' meetings on the restructuring were indeed pro forma. For example, some of the articles considered new information state:

“A Hynix Official said the plan will be carried out despite resistance from minority shareholders because it had been approved by the company's creditor banks...Creditors own about 67 percent of Hynix and took control of the company in June 2002...Hynix's board approved the capital reduction plan...after receiving the green light from creditor banks.”²⁹

“the management in charge of organizing the meeting railroaded through two items...capital reduction.”³⁰

In addition, Micron provided a news article concerning a court petition by some of the minority shareholders to suspend the validity of Hynix's February 2003 general shareholders meeting, which included the vote on the capital reduction. However, there is no evidence to suggest the capital restructuring was enjoined nor any insight as to how the court ruled on the petition request. Furthermore, the article does not suggest that the eventual outcome of the vote was questionable or that another outcome would emerge from another shareholder vote. With regard to the Daewoo Group's minority shareholders enjoining the restructuring (Exhibit 20 of Micron's

27 See Letter from Micron to the Department, Re: “Dynamic Random Access Memory Semiconductors From South Korea/Petitioner's New Subsidies Allegation and New Issues Presented” (December 11, 2006) (Micron's NSA).

28 See Hynix and the GOK's rebuttal brief at page 12, footnote 35.

29 Id. at Exhibit 18.

30 Id. at Exhibit 17.

NSA), we find Micron's reliance on this fact to be misplaced. The record lacks information as to the ownership, shares, and structure of the minority shares of the Daewoo Group companies that would allow us to assess whether this would be comparable to the Hynix situation where the vast majority of ownership of Hynix (67%) by June was made up of its creditors who were found to be entrusted or directed by the GOK. Finally, Micron cites information regarding a previous recommendation by the Creditors' Council to sell the company. We note that Micron relies on information submitted by Hynix and considered by the Department in the course of the first administrative review.³¹ Moreover, the ownership percentages of the creditors and Hynix's board composition changed in June 2002 to favor the creditors, which further calls into question Micron's reliance on statements in Hynix's questionnaire response relating to the relationship between the board and Creditors' Council prior to June 2002.³²

As stated in the AR1 Decision Memorandum and the Preliminary Results, the Creditors' Council owned a majority of shares of the company and effectively controlled the company.³³ This situation effectively made its December 2002 approval the singular factor in effectuating the restructuring and the new information does not call into question the Creditors' Council's dominant role in the process nor raise questions as to whether the minority shareholders' opposition was significant enough to have an impact on or to alter the eventual terms and passage of the agreement.

Micron also placed the SKAS No. 13 and IKFAS No. 55-67 on the record. Micron has acknowledged that SKAS No. 13 was not adopted until November 2003, but insists that the standards, along with IKFAS 55-67, merely clarified and restated existing accounting procedures in effect in 2002.³⁴ However, pages 11 – 12 of the document make it clear that SKAS No. 13 would only be applied after December 31, 2003, and that it supersedes IKFAS No. 55-67.³⁵ Therefore, as in the Preliminary Results, we continue to find that SKAS No. 13 had no regulatory effect in 2002.³⁶ At verification, we examined IKFAS No. 55-67, which was in effect in 2002. GOK officials from the Financial Supervisory Service (FSS) and Financial Supervisory Commission (FSC) both confirmed that Hynix's booking of the restructuring in 2002 was appropriate under the standards of IKFAS No. 55-67.³⁷

We also note that the 2002 debt restructuring is not part of the fraudulent accounting practices that Micron has alleged with regard to Hynix. At Exhibit 8 of Micron's NSA, Micron presented a September 2004 press release from the FSC and FSS announcing sanctions against Hynix for accounting violations on its 2003 financial statements. The press release states that the accounting violations involved Hynix's overstatement of certain assets, improper treatment of deferred selling and administrative expenses, and misreporting of error corrections as non-

31 See Micron's NSA at Exhibit 21.

32 See Micron's NSA at Exhibit 18 and 74.

33 See AR1 Decision Memorandum at 77. See also Preliminary Results, 72 FR at 51611.

34 See Micron's case brief at 19-20.

35 See Micron's NSA at Exhibit 1.

36 See Preliminary Results, 72 FR at 61611.

37 See GOK Verification Report at 2 and Exhibit 2.

operating expenses instead of as adjustments to retained earnings.³⁸ The press release makes no reference to Hynix's accounting treatment of the DES. These unrelated violations are no basis for us to reject all of Hynix's financial statements as unreliable information to consider in our analysis. In addition to being unrelated to the DES, the violations involve Hynix's financial statements for 2003, which is not the year in which Hynix declared the restructuring and associated DES as a capital adjustment. A representative of FSS, the agency that discovered Hynix's unrelated accounting violations, confirmed at verification that FSS found Hynix's accounting treatment of the DES to be appropriate. Therefore, the absence of any sanctions by FSS against Hynix's treatment of the DES supports our consideration of Hynix's financial statements in our analysis.

As Micron's new information regarding the Korean accounting standards, Samil's accounting procedures and Hynix's alleged accounting violations do not lead the Department to reconsider the veracity of Hynix's 2002 financial statements, we do not believe there is reason to reverse our prior decision to use the company's financial information and consider receipt of the DES to be in 2002. This practice also conforms with our regulatory provision on when to consider the benefit received from an equity infusion at 19 CFR 351.507(b). Further, with respect to the creditors' accounting of the DES, we find that 19 CFR 351.507(b) is concerned with when the recipient received the financial contribution, not when the provider considered it to be completed.

In sum, Micron's new information does not provide sufficient support to reverse our prior decision. We further note that a majority of the arguments presented by Micron on this issue were also provided in the first administrative review and are addressed therein. With respect to Micron's reliance on past administrative cases, we note that these do not constitute new factual information. More importantly, these were considered in the litigation on the first administrative review, and the CIT found them not analogous. See CIT DRAMS Decision at 12-14. For these reasons, we continue to find that the GOK-entrusted or directed Creditors' Council decision was the singular event in the restructuring and that Hynix received a benefit from the equity infusion in 2002, as evidenced by its financial statements and consistent with 19 CFR 351.507(b).

Comment 2: Allegation that Hynix Is Circumventing the Order

Micron's Argument: Citing the Hynix Verification Report, Micron argues that Hynix is circumventing the CVD order. First, Micron argues that Hynix provided no support at verification for the breakdown of sales reported at Exhibit 2S-2 of its July 16, 2007, response. Micron also cites other findings in the Hynix Verification Report to support its contention. For example, Micron alleges that the Department found inconsistencies between three databases it examined at verification. Furthermore, Micron notes that Hynix's consolidated and unconsolidated financial statements show a significant difference in Hynix's sales to the United States. Micron argues that the difference in the sales values, combined with the Department's findings at verification, demonstrate that Hynix misreported certain sales that were shipped to the United States.

³⁸ See Micron's NSA at Exhibit 8.

Micron offers three proposals to address the alleged circumvention. First, Micron proposes that the Department use adverse facts available (“AFA”) to determine Hynix’s margin. Citing section 776(a)(1) of the Act, Micron claims that the use of facts available is appropriate because necessary information is not on the record. Furthermore, citing section 776(b) of the Act, Micron argues that the application of AFA to Hynix’s margin is appropriate because Hynix has failed to provide necessary information. As a second option, Micron finds that the Department should conclude that circumvention has occurred and instruct U.S. Customs and Border Protection (CBP) to re-liquidate entries of subject merchandise that entered the United States duty-free. For the third option, Micron urges the Department to verify the records of Hynix Semiconductor America (HSA), Hynix’s affiliated U.S. sales division.

Qimonda’s Comments: In its rebuttal comments, Qimonda expresses its support for Micron’s allegations of circumvention. Qimonda claims that information gathered by the Department at verification indicates that circumvention has occurred. Therefore, Qimonda states that it supports Micron’s requests for verification of HSA and application of facts available to prevent circumvention of the CVD order.

Hynix’s Rebuttal: Hynix contends that the Department already examined topics related to Micron’s circumvention allegation during verification in Korea and found no merit to the allegations. Citing the Hynix Verification Report, Hynix asserts that the Department noted no discrepancies in the databases it reviewed. First, Hynix contends that it should be no surprise that a small volume of subject merchandise entered the U.S. market during the POR because of the level of the deposit rate. Second, Hynix contends that two of the databases, the Hynix Semiconductor International (“HSI”) and HSA databases, should not be exactly the same because the HSI database is based on the date of exportation, while the HSA database is based on the date of importation. Third, in response to Micron’s claims over differences between the Hynix databases and another database reviewed at verification, Hynix argues that the Department noted the difference and fully explored the reasons behind it. Furthermore, Hynix contends that the Department thoroughly tied the database in question to Hynix’s accounting records and found no discrepancies of note. Hynix also argues that it properly reported a transaction questioned by Micron and asserts that Exhibit 24 of the Hynix Verification Report demonstrates this. Finally, in response to Micron’s allegation over differences between the sales totals in Hynix’s consolidated and non-consolidated financial statements, Hynix argues that the totals are on different bases and, therefore, are not comparable. Hynix concludes that there is no reason to verify HSA, and that doing so would intrude on the responsibilities of U.S. Customs and Border Protection (CBP).

Department’s Position: First, we disagree with Micron’s claim that the Hynix Verification Report indicates Hynix is circumventing the CVD order. We spent a significant portion of the verification in Korea addressing Micron’s and Qimonda’s pre-verification comments on circumvention.³⁹ Micron and Qimonda based their comments on information in the quantity and

³⁹ See generally submission from Micron to the Department, Re: Pre-Verification Comments (October 22, 2007) at 1-5. Also, see generally submission from Qimonda to the Department, Re: Pre-Verification Comments (October

value chart Hynix submitted at Exhibit 2S-2 of its July 16, 2007, response. Therefore, our principal objective during this segment of the verification was to reconcile specific information in this chart to Hynix's accounting system. For the type of sales that Micron addresses in its case brief, we verified that the quantity and value reported in the July 16, 2007, response tied to Hynix's accounting system.⁴⁰ In addition, we verified that Hynix's total reported sales tied to its accounting records⁴¹ and performed additional completeness tests to confirm the accuracy of these accounting records. Because Micron's allegations over the results of verification include business proprietary information, we have addressed them in a separate memorandum.⁴² The end result from verification, however, was that information in Hynix's accounting system tied to the information in its July 16, 2007, response. All of Micron's alleged discrepancies are either not actual discrepancies or are variances between disparate sets of information. Based on the overall results of verification, we have no convincing evidence to question the integrity of Hynix's accounting records. Therefore, we also have no basis to conclude that circumvention occurred.

One of Micron's proposals for addressing the alleged circumvention is to apply AFA under section 776(a) of the Act to Hynix's margin. Section 776(a) of the Act states that the Department will apply facts otherwise available ("FA") in reaching a determination if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person
 - (A) withholds information that has been requested by the administering authority or the Commission under this title,
 - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
 - (C) significantly impedes a proceeding under this title, or
 - (D) provides such information but the information cannot be verified as provided in section 782(i).

Section 776(b) of the Act provides that the Department may use an adverse inference (i.e., AFA) in selecting from the facts otherwise available if it finds that an interested party has failed to cooperate.

22, 2007) at 2-7.

40 See Hynix Verification Report at 9; see also Memorandum from Shane Subler, International Trade Compliance Analyst, to Susan Kuhbach, Office Director, Re: Business Proprietary Information Memorandum for the Final Results (March 10, 2008) ("BPI Memorandum") at Comment 1.

41 See Hynix Verification Report at 5-6.

42 See BPI Memorandum at Comments 2.B.1 – 2.B.5.

Hynix provided its sales data at Exhibit 9 of its November 21, 2006, questionnaire response. In Exhibit 2S-2 of its July 16, 2007, supplemental questionnaire response, Hynix provided a breakdown of this sales information in accordance with instructions in our July 2, 2007, supplemental questionnaire. We verified that this information tied to Hynix's accounting system. Therefore, there is no basis for concluding that Hynix withheld information, failed to provide verifiable information in the form or manner requested, or significantly impeded the review. Hynix also provided all the information we requested, so there is no basis to conclude that necessary information is not on the record. As a result, there is no basis to apply FA or AFA to Hynix's margin. Because there is no basis to apply FA or AFA, there is also no basis for accepting Micron's second proposal, which is that we instruct CBP to re-liquidate entries of DRAMS that entered the United States duty-free. We do not have any evidence that DRAMS improperly entered the United States duty-free.

Micron's final proposal for addressing the alleged circumvention is to conduct a verification of HSA. Micron's case brief clearly indicates that the purpose of this verification will be to search for evidence of customs fraud.⁴³ By conducting this type of verification, the Department would be taking over CBP's responsibility to enforce customs laws and regulations. Although the Department is alert to evidence of potential customs fraud, conducting a verification only to search for evidence of customs fraud is outside of the Department's authority in conducting a CVD administrative review. If the Hynix Verification Report did not satisfy Micron's and Qimonda's concerns over customs fraud, then Micron and Qimonda must address this issue further outside the context of a CVD administrative review. There are appropriate ways for Micron and Qimonda to address their concerns. If Micron and Qimonda believe customs fraud is occurring, then they may file a complaint with CBP. If Micron and Qimonda find evidence of circumvention under section 781 of the Act, then they may file an anti-circumvention inquiry request with the Department. The Department is thoroughly committed to enforcement of the antidumping and CVD laws. This does not mean, however, that we may take over the responsibilities of CBP by incorporating customs law enforcement into our administration of a CVD review.

Comment 3: Application of Adverse Facts Available ("AFA") for Undisclosed Grant Presented at Verification

Micron's Argument: Citing page 15 of the Hynix Verification Report, Micron notes that Hynix disclosed an additional grant it received under the 21st Century New Frontier R&D Program (21st Century Program) during the POR. Micron argues that the Department should apply AFA to the previously unreported grant under the 21st Century Program. Citing 19 C.F.R. 351.301(c)(2)(ii), Micron contends that Hynix failed to provide a complete, timely, and accurate response to the Department's requests for information on the program.

Hynix's Rebuttal: Hynix contends that the reporting discrepancy occurred because Hynix does not treat the 21st Century Program grant as a loan in its accounting system. Hynix contends that it disclosed the reporting discrepancy to the Department as soon as it discovered the discrepancy.

⁴³ *Id.* at Comment 2.C.

Furthermore, Hynix notes that the amount of the grant is the equivalent of an infinitesimal rounding error in the subsidy margin calculation. Therefore, Hynix argues that there is no basis to determine that it was uncooperative and no basis to apply AFA.

Department's Position: We agree with Hynix that there is no basis to apply AFA because of Hynix's disclosure of the grant. Hynix disclosed the omitted portion of the grant during the minor corrections presentation at verification, and we verified the total amount of the grant to Hynix's accounting records. See page 15 of the Hynix Verification Report. Therefore, there is no evidence that Hynix withheld information or failed to cooperate with the Department's requests. Furthermore, the amount of the grant is extremely small relative to other parts of the subsidy margin calculation. For the final results, we have adjusted the amount of the grant to account for the additional portion disclosed at verification, but we have not applied AFA to the grant program as a whole.

Comment 4: Whether the Deposit Rate Should Be Adjusted to Provide a Reasonable Estimate of Future CVD Liability

Hynix's Argument: Hynix and the GOK argue that the Department should adjust the deposit rate to provide a reasonable estimate of future CVD liability and comply with U.S. obligations under the WTO agreement on subsidies and countervailing duties. Hynix and the GOK assert that the Department erroneously denied Hynix's request in the Preliminary Results, in spite of the fact that record evidence demonstrates a substantial change to and termination of known non-recurring subsidy benefit streams in 2005 and 2006, as well as termination of the program to which they relate.

Hynix and the GOK argue that in the previous administrative review, the Department determined that the single program found in the investigation and first administrative review ended in 2003. Specifically, Hynix and the GOK note that the Department determined Hynix's commercial creditors were entrusted or directed by the GOK to provide countervailable subsidies to Hynix in the form of various financing and debt restructuring transactions.⁴⁴ Hynix and the GOK assert that the Department reached its conclusion on this single program in the investigation on the basis of a two part test⁴⁵ and that the Department continued to apply the same test in the second administrative review covering 2004.⁴⁶ Hynix and the GOK argue that since the Department found in the second administrative review that the GOK did not entrust or direct Hynix's creditors to reduce or forgive Hynix's debt in 2004,⁴⁷ the single program found in the

44 See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors From the Republic of Korea, 68 FR 37122 (June 22, 2003), and accompanying Issues and Decision Memorandum at 48 – 49 (Investigation Final).

45 1) The GOK had in place a governmental policy to support Hynix's financial restructuring and prevent the company's failure, and 2) the GOK acted upon that policy through a pattern of practices to entrust or direct Hynix's creditors to provide financial contributions to Hynix.

46 See Dynamic Random Access Memory Semiconductors From the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 72 FR 7015 (February 14, 2007), and accompanying Issues and Decision Memorandum at 4 and 5 (Second Review Final).

47 1) Hynix was no longer at risk for failure in 2004, and, as such, the principal motivation for the GOK's past policy was no longer present, and 2) the GOK did not maintain its dominance of the creditor's council in 2004, so

investigation and first review was over.⁴⁸ Specifically, Hynix and the GOK note that the Department concluded that both prongs of the test could no longer be met.⁴⁹

Hynix and the GOK assert that the law allows the Department to recognize circumstances arising over the duration of a CVD order that warrant an adjustment in the estimated CVD cash deposit. Hynix and the GOK argue that these regulations and the related practice serve the specific purpose of meeting statutory requirements and U.S. international obligations to impose a deposit rate that reflects a reasonably accurate estimate of expected CVD liability. According to Hynix and the GOK, the Department is required to determine the amount of any net countervailable subsidies for entries of subject merchandise during the POR, as well as the estimated duties for future entries.⁵⁰ Hynix and the GOK assert that although the statute does not specify how the deposits should be calculated, the deposits should reasonably reflect the estimated CVD liability and should not be uninformed proxies or outdated speculation. Hynix and the GOK argue that the Court of Appeals for the Federal Circuit (“CAFC”) held in Torrington v. United States⁵¹ that deposit rates should be reasonably correct in terms of what is expected to be levied in subsequent anniversary periods under the order. Hynix and the GOK point out that for these reasons, the Department has express regulations involving program-wide changes that allow it to adjust the deposit rate,⁵² as well the discretion to effect changes in the deposit rate where the circumstances do not fit the more formal program-wide change criteria.⁵³

Hynix and the GOK assert that the need for deposit rates to reasonably reflect expected CVD liability is also confirmed by U.S. obligations under the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). Specifically, according to Hynix and the GOK, Article 19.2 of the SCM Agreement specifies that imposed duties shall not exceed the full of amount of the subsidy or less, where imposed duties include duty deposits as distinguished from levied duties, which are defined as encompassing final legal assessment or collection of a duty or tax.⁵⁴ Hynix and the GOK assert that WTO dispute settlement decisions examined the same transactions that led the Department to impose the current CVD order since 2003, and they concluded that continued imposition of CVD duties is not consistent with the SCM Agreement. See Japan-DRAMS.⁵⁵ Hynix and the GOK assert that with respect to the October 2001 and

the principal mechanism for entrustment or direction was gone. Hynix asserts that in the Preliminary Results of the present case, the Department confirmed that the single program terminated in 2003. See Preliminary Results at 51614. Hynix also asserts that record evidence in the current review supports this conclusion. Specifically, Hynix notes that in 2005, it was very profitable and easily accessed foreign-sourced capital, and that it graduated from the Creditor’s Council in July 2005.

48 See Second Review Final at 6.

49 See Second Review Final at 5.

50 See 19 USC 1675(a)(1) and 19 CFR 351.221.

51 See Torrington Co. v. United States, 44 F.3d 1572, 1579 (Fed. Cir. 1995)

52 See 19 CFR 351.526.

53 See Stainless Steel Sheet and Strip in Coils From France: Final Results of Countervailing Duty Administrative Review, 68 FR 53963 (September 15, 2003), and accompanying Issues and Decision Memorandum at Comment 3 (SSSSC from France); and Final Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium From Germany, the Netherlands, and the United Kingdom, 69 FR 40869 (July 7, 2004), and accompanying Issues and Decision Memorandum at Comment 3 (Uranium).

54 See SCM Agreement, Art. 19.4, n. 51.

55 See Japan – Countervailing Duties on Dynamic Random Access Memories From Korea, Report of Panel,

December 2002 restructuring, the WTO panel and Appellate Body decisions held that the benefit from the transaction expired as of the end of 2005 and 2006, respectively, and that continued imposition of duties beyond that period is in violation of Article 19 of the SCM Agreement. Hynix and the GOK note that in Japan CVD on Korean DRAMS Panel, the panel emphasized that imposed duties are intended to address present subsidization, not past subsidization.

According to Hynix and the GOK, the panel relied on the present tense used in Article 19.1 of the SCM Agreement to provide the relevant context⁵⁶ and found support for the present subsidization proposition from Article VI of the GATT 1994 and related WTO jurisprudence.⁵⁷ In addition, Hynix and the GOK assert that the analysis is consistent with Article 21.1 of the SCM Agreement which imposes disciplines on the continued imposition of duties only to the extent necessary, *i.e.*, no more than to offset the subsidy presently found to exist.⁵⁸ Hynix and the GOK argue that the WTO Appellate Body confirmed the Panel's understanding of Article 19 obligations.⁵⁹ Hynix and the GOK acknowledge that both the Panel and Appellate Body were addressing Japan's prospective duty system, but they argue that the fundamental principles are the same between prospective and retrospective systems, given the language of Article 19.2 and the legal distinction drawn by the SCM Agreement between imposed and levied duties. In addition, according to Hynix and the GOK, the decisions also confirmed that the December 2002 restructuring never constituted a subsidy in the first place due to the absence of benefit. Hynix and the GOK point out that the present review covers 2005 entries and the ongoing next review covers 2006 entries. Pursuant to these principles and the undeniable termination of the non-recurring subsidy benefit stream, Hynix and the GOK urge the Department to exercise its discretion and adjust Hynix's cash deposit rate and terminate the CVD order as soon as possible under U.S. law.

Hynix and the GOK note that under 19 CFR 351.526, the Department may make an adjustment to the deposit rate in response to a program-wide change. Specifically, Hynix and the GOK assert that when the Department determines a program-wide change has occurred by official act not limited to an individual firm or firms and when the Department is able to measure the change in the amount of the subsidies provided under the program, the Department may adjust a CVD deposit rate. In addition, Hynix and the GOK note that the Department will only refrain from such adjustments where residual benefits may continue under the terminated program or where a substitute program has been introduced. Hynix and the GOK assert that the Department has departed from this narrower rule to adjust a deposit rate where no official act has taken place and the only change has been termination of a known benefit stream during the POR that would have made the expected rate *de minimis*.⁶⁰ Hynix and the GOK assert that there is no statutory bar to

WT/DS336/R (July 13, 2007) (Japan CVD on Korean DRAMS Panel) and Japan – Countervailing Duties on Dynamic Random Access Memories From Korea, Report of Appellate Body, WT/DS336/AB/R (November 28, 2007) (Japan CVD on Korean DRAMS Appellate Body) (collectively, Japan-DRAMS).

56 See Japan CVD on Korean DRAMS Panel at para. 7.352.

57 *Id.* at para. 7.354.

58 *Id.* at n. 544.

59 See Japan CVD on Korean DRAMS Appellate Body at para. 210.

60 See Pure Magnesium and Alloy Magnesium From Canada: Final Results of Countervailing Duty Administrative Review, 70 FR 54367 (September 14, 2005), and accompanying Issues and Decision Memorandum at Comment 2 (Magnesium from Canada).

further development of the exception above as the Department has discretion to draw distinctions on a case-specific basis. Hynix and the GOK assert that the case-specific facts in instant case, as described above, require a deposit rate change, even if they do not technically fit all aspects of 19 CFR 351.526.

Hynix and the GOK note that Department can be confident that it has collected sufficient deposits to cover projected CVD liability for 2006 forward. Specifically, Hynix and the GOK note that: 1) the benefit associated with the October 2001 restructuring was fully allocated at the end of 2005, so deposits have been made for more than two years beyond its full amortization; 2) deposits have been made for more than one year beyond the end of the allocation period for the December 2002 restructuring; 3) termination of the single program in 2003 with no evidence that such a program will return, makes the likelihood of a new benefit stream small; and 4) information provided in the present review shows that Hynix's sales in 2006 exceeded those in 2005, so the Department can adjust the deposit rate knowing that it will not underestimate the margin as the result of a declining denominator.

Hynix and the GOK argue that, at a minimum, the Department must explain why its choice of deposit rate is reasonably correct or otherwise defer to the adjustments proposed by Hynix, consistent with the CAFC's holding in Torrington v. United States. Hynix and the GOK point out that there is an important distinction between the instant case and Torrington v. United States. According to Hynix and the GOK, in Torrington v. United States, a key issue was whether using the U.S. price as divisor to calculate antidumping cash deposit rates, instead of entered value, under the old statute resulted in consistent underpayment of estimated duties. Hynix and the GOK explain that the CAFC acknowledged that U.S. price is subject to upward and downward adjustment, and thus, the Department could not predict whether the use of entered value for any given review period would produce a more accurate cash deposit rate. Thus, Hynix and the GOK assert that there was no evidence in that case that the use of one divisor over another produced a more reasonably accurate deposit rate,⁶¹ but the Department in the instant case is in possession of more certain information from which it can easily compute a more accurate deposit rate.

Micron's Rebuttal: Micron argues that the Department should not adjust the cash deposit rate, and that Hynix has not demonstrated it will be harmed by continuing to pay the current cash deposit rate. Micron notes that the Department's regulations are permissive concerning when a change in the cash deposit rate can occur. Micron argues that the existence of program-wide change is necessary to change the cash deposit rate, but such a determination will not automatically result in a change in the cash deposit rate.

Micron argues that Hynix and the GOK have failed to satisfy any of the elements in 19 CFR 351.526(b) and that the Department has determined that no program-wide changes occurred in this situation.⁶² Micron asserts that there has been no change that is not limited to an individual firm or firms. Micron argues that all the programs which Hynix and the GOK argue are the

⁶¹ The CAFC in Torrington v. United States, as a result, upheld the Department's choice.

⁶² See Preliminary Results at 22.

underlying basis for the alleged program-wide changes are all specific to Hynix alone, and thus fail to satisfy the first regulatory criteria for a program-wide change. In addition, Micron notes that there has been no change effectuated by an official act and that Hynix's and the GOK's argument centers on the assertion that benefits from certain programs ended in 2006. Micron asserts that the Department previously found the expiration of benefits from a non-recurring subsidy does not qualify as a program-wide change under the regulations.⁶³ Micron notes that the benefit stream from non-recurring subsidies in the instant case has continued well beyond the POR and that Micron has filed new subsidy allegations in each administrative review. Micron asserts that Hynix's assertion that the benefit streams of certain subsidies will be fully amortized by the end of the next POR is not an appropriate basis for a cash deposit rate adjustment. Micron explains that in Stainless Steel Plate in Coils from Belgium,⁶⁴ the Department rejected a respondent's claim that a cash deposit rate should be decreased because a particular subsidy would be fully allocated before the beginning of the next review period. Micron argues that while Hynix may assert that there is no evidence of additional subsidies on the record of the present review, the same cannot be said for the next review until it is completed. Micron asserts that the Department previously found in Magnesium from Canada⁶⁵ that no adjustment to the cash deposit rate was appropriate in situations where the benefit is set to expire after the end of the POR. Micron asserts that in the instant case, the benefit stream will continue on beyond the POR. While Micron does not contest the Department's discretion to draw distinctions on a case-specific basis and adjust the deposit rate where necessary as demonstrated by past practice, Micron asserts that past practice rejects Hynix and the GOK's arguments in this case.

Micron argues that Hynix will suffer no harm as result of paying the current cash deposit rate, even if no new countervailable subsidies are found in the next administrative review. Micron notes that importers are entitled to receive a refund of cash deposits with interest at the time of liquidation and asserts that Hynix has failed to demonstrate that the refund provisions of the statute are insufficient to protect its interests in this case.

Micron asserts that Hynix's and the GOK's arguments that the Department is in violation of its obligation under U.S. law to provide a reasonably correct cash deposit rate, as well as its obligation under the SCM Agreement not to impose higher duties than necessary, are incorrect and misinterpret WTO law and precedent. Micron argues that, as Section 102 of the Uruguay Round Agreements Act recognizes, U.S. law controls over WTO law. Micron asserts that Article 19 of the SCM Agreement deals with the imposition of countervailing duties as a result of an original investigation, while Article 21 applies to the duration of the case and review of countervailing duties.⁶⁶ In addition, according to Micron, WTO panels and the Appellate Body

63 See Final Affirmative Countervailing Duty Determination: Carbon and Alloy Steel Wire Rod From Canada, 67 FR 55813 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 11.

64 See Stainless Steel Plate in Coils From Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007 (August 27, 2001) and accompanying Issues and Decision Memorandum at Comment 4.

65 See Magnesium from Canada at Comment 2.

66 See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Product Originating in the United Kingdom, WT/DS138/AB/R (June 7, 2000) at para. 53 (U.S. – Lead and Bismuth II).

have explicitly rejected attempts to apply Article 19 to reviews.⁶⁷ Micron argues that none of the WTO provisions or case law cited by Hynix and the GOK address the setting of cash deposit rates in assessment reviews and that Hynix's and the GOK's equation of the term imposition with the establishment of cash deposit rates is an error in interpretation of the treaty text. Micron asserts that the imposition of duties is limited to the initial entry into force of countervailing duties following an original investigation final, as specified in Article 19.1 of the SCM Agreement and confirmed by the Appellate Body,⁶⁸ and it does not apply in the context of interim or administrative review under Article 21 of the SCM Agreement. Micron notes that Article 21.3 provides support for this interpretation by requiring sunset reviews not later than five years from the imposition or initial entry into force of countervailing duties, meaning the adjustment of cash deposit rates does not constitute a new imposition which restarts the five year clock for sunset reviews.

Micron also asserts Hynix's and the GOK's reliance on Japan CVD on Korean DRAMS Appellate Body to support its argument that cash deposits must match the level of present subsidization is incorrect because the Appellate Body's finding related exclusively to the imposition of duties following an original investigation final not a subsequent review. Micron argues that the Appellate Body's requirement for present subsidization at the time of imposition can only apply to investigations, because Article 21.3 of the SCM Agreement expressly contemplates the possibility that duties may be continued in the absence of current subsidization based on the likelihood of recurrence of subsidization.

Finally, Micron argues that Hynix and the GOK have failed to show that the Department is required to explain the current cash deposit, and it notes that the Department did explain in the Preliminary Results that the current cash deposit rate was accurate and that arguments for adjustment failed to meet the Department's regulatory standards. Micron asserts that Hynix's and the GOK's reference to Torrington v. United States is inapposite as that case dealt with the setting of cash deposits in antidumping cases based on total United States price instead of entered value as a divisor, which is not the issue in this case. Micron concludes that nothing in Torrington v. United States supports the assertion that the Department is required to provide an explanation of the cash deposit rate in the instant review, beyond its explanation that there is no basis under the regulatory criteria for adjustment of the rate in this instance.

Qimonda asserts that Hynix and the GOK's reliance on a WTO decision involving a dispute between Korea and Japan is neither relevant to nor binding on the United States in applying the U.S. CVD law. Qimonda further argues that to discontinue offsetting these benefits as respondents request would essentially ignore the nonrecurring nature of the benefits and the average useful life over which those benefits were allocated, in contravention to longstanding U.S. practice. Qimonda asserts that the Department should reject Hynix and the GOK's request for a downward adjustment to or elimination of the deposit rate for Hynix.

⁶⁷ See Japan CVD on Korean DRAMS Panel at 7.350.

⁶⁸ See U.S. – Lead and Bismuth II at para. 53.

Department's Position: We disagree with Hynix that the cash deposit rate should be revised for expiry of the benefit arising from GOK entrustment or direction prior to 2004. The Department's regulations at 19 CFR 351.526(a) state that "the Secretary may take a program-wide change into account in establishing the estimated CVD cash deposit rate if: (1) The Secretary determines that subsequent to the period of investigation or review, but before ... a preliminary result of an administrative review ... , a program-wide change has occurred; and (2) The Secretary is able to measure the change in the amount of countervailable subsidies provided under the program in question." A program-wide change is defined in 19 CFR 351.526(b) as "a change that: (1) Is not limited to an individual firm or firms; and (2) Is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree." Therefore, it is the Department's general practice to adjust cash deposit rates to reflect the expected discontinuation of future subsidy benefits only where it has been demonstrated that a program-wide change has occurred, pursuant to 19 CFR 351.526.

With regard to the expiry of the program related to GOK entrustment or direction, the facts of this case do not fit the regulatory criteria for a program-wide change and deposit rate change under 19 CFR 351.526, as even Hynix and the GOK acknowledge. The program in question related specifically to Hynix, and there is no information on the record that the GOK is prohibited from providing additional financial contributions through entrustment or direction in the future.

The Department has departed from its general practice in only very limited instances. As explained in Pure Magnesium from Canada at Comment 2, in SSSSC from France and in Uranium, the Department provided for a narrowly-circumscribed exception to this general practice in light of certain, specific conditions; namely, the information needed to make the adjustment was derived entirely from the POR and the expiry of the subsidy meant the expected CVD rate for entries subject to the deposit rate set in that review was de minimis. These circumstances do not apply in this review. In the instant case, as in Pure Magnesium from Canada, the allocation period for the subsidy in question does not end until the subsequent review period, while in SSSSC from France and Uranium, the allocation periods for the subsidies in question ended during the POR. Therefore, in the instant case, we cannot rely exclusively on POR data to calculate the future rate because the allocation period related to the December 2002 restructuring does not end until the end of the next review period (i.e., end of 2006). In addition, while the allocation period related to the October 2001 restructuring does expire at the end of the current review period, given the presence of other subsidies, the expiration of the program would lead to a lower but not a de minimis rate. Therefore, the rationale for the limited exception in prior cases is not met in this review. Accordingly, we are not revising the cash deposit rate for expiry of the program related to GOK entrustment or direction prior to 2004.

While Hynix and the GOK cite to WTO decisions in Japan-DRAMS, we note that the cases cited do not involve the United States but a trade case involving Japan and Korea. In any case, the Department's position regarding WTO reports is well established. See, e.g., Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 25;

Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from Mexico, 71 FR 54614 (September 18, 2006), and accompanying Issues and Decisions Memorandum, at Comment 1; Ball Bearings and Parts Thereof from Japan and Singapore; Five-year Sunset Reviews of Antidumping Duty Orders; Final Results, 71 FR 26321 (May 4, 2006), and accompanying Issues and Decisions Memorandum, at Comment 1; Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005), and accompanying Issues and Decisions Memorandum, at Comment 8. Congress made clear that reports issued by WTO panels or the Appellate Body “will not have any power to change U.S. law or order such a change.” See Statement of Administrative Action (SAA) at 659. The SAA emphasizes that “panel reports do not provide legal authority for federal agencies to change their regulations or procedures....” *Id.* To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See section 129 of the Uruguay Round Agreements Act. The courts have confirmed that WTO dispute settlement reports are not binding. See Corus Staal BV v. Dep’t of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (“WTO decisions are not binding on the United States, much less this court.” (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004))). This is especially true of reports stemming from disputes in which the United States was not a party.

Moreover, the reports in Japan-DRAMS addressed a completely different situation than the situation in this review. In that case, Japan imposed a CVD order covering, in part, subsidies that had been fully allocated by the time of the issuance of the order. Under Japan’s prospective system, duties were levied upon imposition of the order, meaning that Japan was levying duties in excess of the amount of the subsidy, contrary to Article 19.4 of the SCM Agreement. That dispute had nothing to do with cash deposits during administrative reviews in a retrospective system.

Similarly, while Hynix and the GOK cite the SCM Agreement, we note the Department is bound by U.S. law and precedent.⁶⁹ After agreeing to the SCM Agreement, the United States revised its related trade laws to be in accordance with the agreement. The Department then revised its regulations to be in accordance with U.S. law. Therefore, our obligation in administering antidumping and CVD cases is to follow U.S. trade law, as well as the Department’s regulations which are consistent with the WTO agreement. As discussed above, our calculation of the deposit rate is in accordance with U.S. law and precedent. In any event, Hynix and the GOK’s reliance on Article 19.2 of the SCM Agreement is misplaced because that article deals only with imposition of a countervailing duty, which means the issuance of a CVD order after an investigation. Moreover, contrary to Hynix and the GOK’s argument, Article 19.2 is written in discretionary, not mandatory, language.

We agree with petitioner that Torrington v. United States is inapposite. As petitioner noted, that case dealt with the setting of cash deposits in antidumping cases based on total United States price instead of entered value as a divisor, which is not the issue in this case, and there is nothing

⁶⁹ The WTO decisions in Japan-DRAMS involve a trade case between Japan and Korea and do not concern the U.S. or its law.

in Torrington v. United States to support the assertion that the Department is required to adjust the deposit rate in the current review. The rate calculated in the instant review is in accordance with U.S. law, as well as the Department's regulations and practice. It is, therefore, reasonably correct. See section 751(a) of the Act (requiring an "estimated duty to be deposited").

Comment 5: Whether There Are Errors that Lead to Double and Triple Counting of Benefits of Principalized Interest Loans

Hynix's Argument: Hynix and the GOK note that under the Department's regulations, the difference between interest paid on loans and the Department's interest cost benchmark equals the subsidy benefit for the loan, and the benefit is expensed in the year interest was due. Hynix and the GOK argue that in the Preliminary Results, the Department applied this methodology to the loans and bonds under investigation as reported by Hynix; however, certain principalized interest debt reported by Hynix should be exempt from the calculation. Hynix and the GOK explain that in December 2002, Hynix restructured certain debt such that future restructured interest on that debt would be paid in part through cash payment (at an interest rate of 3.5 percent) and in part by principalizing the remaining interest due (that part of the interest over 3.5 percent) and charging an additional amount of interest on the principalized portion (with a separate interest of 6 percent applied). Hynix and the GOK assert that in reporting loans and bonds to the Department in this review, Hynix identified and labeled the principalized interest debt as a separate debt entry, and at the same time, reported interest payments on the original underlying debt, including separate entries for both the cash payment and the principalized interest payment portions. Hynix and the GOK argue that in the Preliminary Results, the Department applied its interest rate benchmark to all interest payment entries reported by Hynix that were related to the December 2002 restructured debt, including: 1) the separate cash payments of 3.5 percent; 2) the related payment entries for interest over the 3.5 percent rate converted to principal, and 3) the principalized interest debt entries at the 6 percent rate.

Hynix and the GOK allege that the Department's calculation results in double and triple counting of the benefit. Hynix and the GOK allege that this is because the Department did the following: 1) applied the interest rate benchmark to the 3.5 percent cash payment entries, thereby capturing and expensing the entire differential as the alleged benefit in the margin calculation; 2) double counted the benefit when applying the same benchmark to interest over the 3.5 percent cash payment rate recorded as principalized interest payment entries (which had already been captured and expensed as unpaid interest in the first calculation) and added the recorded difference to the total calculated subsidy resulting in double counting the benefit; and 3) applied the same interest rate benchmark to subsequent interest payment on the principalized interest debt (debt that had already been captured and expensed as unpaid interest in the first calculation), resulting in triple counting the benefit, and also recorded the difference to the total calculated subsidy.

Hynix and the GOK argue that to remedy this error the Department should not countervail any principalized interest debt. Hynix and the GOK assert that the Department should do this by 1) excluding all interest payment entries reported by Hynix where the interest rate was not 3.5 percent and where there was a contemporaneous interest payment of 3.5 percent reported for the

same loan number and 2) excluding all subsequent interest payments on December 2002 principalization debt entries.

Micron's Rebuttal: Micron argues that the Department should not adjust its preliminary loan calculations as suggested by Hynix and the GOK because the record does not support their contentions. Micron asserts that Hynix and the GOK are making this argument for the first time in their case brief. Micron notes that even if this contention were true, Hynix failed to report this purported fact in a timely fashion so that it could have been confirmed at the Department's recently completed verification. Micron asserts that the database for the loans in question does not unambiguously support Hynix's and the GOK's argument. Micron asserts that since Hynix failed to explain how it had structured its loan database in its questionnaire responses and the underlying data disprove Hynix's claims, the Department should not eliminate the loan transactions that Hynix claims were double or triple counted. Micron asserts that the mere fact that certain of the loans identified by Hynix arose from interest that was principalized in December 2002 does not lead to a benefit being double or triple counted. Micron notes that these principalized loans were created in December 2002 when Hynix took out additional loans in order to repay interest owed on old loans. Micron notes that to the extent that these principalized loans bear an interest rate lower than the benchmark interest rate at the time the new loans were made, the Department correctly continues to calculate benefits on such loans as the difference between interest paid and what it should have paid for the entire duration these loans are outstanding. Micron argues that under the Department's regulations, the origin of the loans have no bearing on countervailability. Micron concludes that even if the Department accepts Micron's argument that certain loans were double counted, there is no basis for the Department to fail to countervail the benefit from the other loans that were alleged to be triple counted.

Department's Position: We agree with Hynix's first argument regarding the excess interest over the 3.5 percent rate that Hynix converted to principal. During verification, we reviewed one of these loans in detail.⁷⁰ The information we reviewed for this loan was consistent with Hynix's explanation of the loans in its case brief.⁷¹ By calculating the difference between the benchmark rate and the 3.5 percent cash payment rate, we capture the full benefit of the loan. Therefore, we have adjusted the calculations by removing the loans noted in Attachment 1 of Hynix's case brief.

We disagree, however, with Hynix's argument regarding the alleged triple-counting of loans in Attachment 2 of Hynix's case brief. On page 21 of the brief, Hynix stated, "The excess interest at the original rate over the 3.5 percentage points paid in cash was treated as an addition to the principal with a separate interest rate of 6% applied."⁷² Even though the source of the principal of this loan is the interest of another loan, the principal is now part of another countervailable loan. In addition, the interest on this new loan is for a different time period than the original

70 See Hynix Verification Report at 13-14 and Exhibit 20.

71 See BPI Memorandum at Comment 5.A.

72 See Hynix and the GOK's case brief at 21.

interest that was principalized. Therefore, we do not find that we have over-calculated the benefit on Hynix's reported loans, and we have not made this change to the Preliminary Results.

Comment 6: Whether the Import Duty Reduction Program Is Specific to Hynix

Hynix's Argument: Hynix and the GOK argue that the import duty reduction program is not specific to Hynix and, thus, does not confer a countervailable subsidy. According to Hynix and the GOK, in the Preliminary Results, the Department determined that the import duty reductions under the program are available to any company importing factory automation equipment, thus finding the program is not de jure specific to any specific enterprise or industry, but de facto specific for Hynix because it received a disproportionately large amount of the subsidy from the program. Hynix and the GOK disagree with the Department's approach of grouping companies from disparate sectors of the economy among hundreds of companies receiving benefits to determine disproportionate use by Hynix. Hynix and the GOK assert that Congress' intention with respect to the specificity test is to differentiate between government assistance that is broadly available and widely used, and subsidies provided to discrete segments of the economy. Hynix and the GOK argue that the approach is to be tempered by a rule of reason,⁷³ and it should not be applied a purely results-oriented basis but must be grounded in a logical examination of availability and use. Hynix and the GOK insist that the Department's approach in this case is inconsistent with past practice where the Department refrained from grouping enterprises or industries with no logical connection to one another. Hynix and the GOK point to AFBs from Singapore,⁷⁴ where the Department declined to group just three industry sectors (electronics, fabricated metal products and non-electrical machinery) for purposes of determining disproportionate use of a program by the AFB industry. According to Hynix and the GOK, in AFBs from Singapore, the Department found that while it is possible for a group of industries to be a disproportionately large recipient of benefits based on the facts of a given case, in AFBs from Singapore there were three industry categories with a wide variety of distinct and diverse products and not variations of the same product or the same product at different stages of production. Hynix and the GOK also note that similar logic was applied by the Department in Live Swine from Canada.⁷⁵ Hynix and the GOK argue that in the present case, the Department has reversed course in allowing a far more diverse and illogical grouping.

Hynix and the GOK conclude that when all the information regarding usage of the program is analyzed, the Department's analysis and percentages are not sufficient to find Hynix a disproportionate user of the program and the program is generally available to all Korean companies encompassing all types of industries. Hynix and the GOK assert that if the Department intends to find specificity with regard to Hynix, it should examine Hynix as a company among numerous diverse companies receiving duty reductions under the program. Hynix and the GOK argue that Hynix's share of the total import duty reduction in 2005, as

73 See Statement of Administrative Action, H. Doc. 103-316, 103d Cong., 2d Sess. 929-30 (1994).

74 See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof (AFBs) From Singapore; Final Results of Countervailing Duty Administrative Reviews, 60 FR 52377 (October 6, 1995) (AFBs from Singapore).

75 See Final Negative Countervailing Duty Determination: Live Swine From Canada, 70 FR 12186 (March 11, 2005), and accompanying Issues and Decision Memorandum at 29.

calculated by Hynix, cannot support the assertion that Hynix is a disproportionate recipient of the program for purposes of specificity.

Micron's Rebuttal: Micron argues that the Department's specificity approach is in accordance with the Department's regulations. Micron argues that Hynix's and the GOK's reliance on AFBs from Singapore is misplaced and that the assertion that similar logic was used in Live Swine from Canada is not correct. Micron asserts that the facts at issue in the specificity discussion in Live Swine from Canada deal with the agricultural specificity rule, which requires that the specificity analysis be conducted within the agricultural sector.⁷⁶

Micron notes that the Department's practice has been affirmed by the CAFC in Magnola Metallurgy v. United States,⁷⁷ where the CAFC upheld the Department's de facto specificity finding in which the Department concluded that Magnola, the respondent, received a disproportionately large share of the subsidy, as compared to other recipients. According to Micron, the fact pattern in that case is similar to the instant case. Micron notes that in that case, Magnola was the second largest recipient overall and received benefits greater than the benefits received by 99 percent of all the other beneficiaries.⁷⁸

Micron disagrees with Hynix's and the GOK's faulty reasoning in calculating Hynix's share of the total import duty reduction in 2005. Micron notes that Hynix did not take into account the plethora of additional information on the record that clearly shows that Hynix was a disproportionate recipient of the program in comparison to other companies participating in the program. As a result, Micron argues that the Department should continue to find the program to be de facto specific and, therefore, a countervailable subsidy for purposes of the final results.

Department's Position: We disagree with Hynix and the GOK, and continue to find that Hynix is part of a group of enterprises that receives a disproportionately large amount of the subsidy. Therefore, we find that the program is specific under section 771(5A)(D)(iii)(III) of the Act. In conducting our de facto analysis under section 771(5A)(D), we note that the statute is silent with regard to any restriction placed on the Department in terms of grouping enterprises or industries by similar characteristics. Rather, the statute simply says that the term "enterprise or industry" includes "a group of such enterprises or industries," without specifying what can constitute a "group." See section 771(5A)(D) of the Act. Moreover, the Preamble addresses this very point when it states:

There is no basis in PPG II or in the language of section 771(5A)(D) of the Act for concluding that there is a requirement that the limited users also share similar characteristics. Moreover, such a requirement would undermine the purpose of the specificity test as articulated in the SAA. Several commenters have urged the Department to codify our position with respect to this issue. Because this issue is not addressed in the

⁷⁶ See Live Swine from Canada at Comment 1.

⁷⁷ See Magonola Metallurgy, Inc. v. United States, 508 F.3d 1349 (Fed. Cir. 2007).

⁷⁸ Id. at 1352.

statute or the SAA, we have adopted this suggestion. Accordingly, Sec. 351.502(b) provides that the Secretary is not required to determine whether there are shared characteristics among enterprises or industries that are eligible for, or actually receive, a subsidy in determining whether that subsidy is specific.⁷⁹

Therefore, the Department has discretion in evaluating the shared characteristics among enterprises or industries in determining whether they constitute a “group” for purposes of specificity analysis.

In regard to AFBs from Singapore and Live Swine from Canada, we find Hynix and the GOK’s reliance on both cases is misplaced. We note that AFBs from Singapore predated 19 CFR 351.502(b) and the Preamble. Moreover, in both instances, the Department determined that examining the characteristics of the industries receiving the benefits was necessary and had an impact on the subsidy in question and how it was distributed within the economy. However, as stated above, according to 19 CFR 351.502(b), the Department is not required to determine whether or not there are shared characteristics among enterprises for purposes of its specificity analysis. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum at “Specificity” (“the Department is not required to determine whether there are shared characteristics among the industries that are eligible for, or actually receive, a subsidy.”).

As cited by Hynix and the GOK, the SAA does require the Department to use a rule of reason with respect to the specificity test. See SAA at 930. However, the SAA also states that “{c}onversely, the specificity test was not intended to function as a loophole through which narrowly focused subsidies provided to or used by discrete segments of an economy could escape the purview of the CVD law.”⁸⁰ In the instant case, as explained in the Preliminary Results, the GOK provides an import duty reduction on specific automated equipment. Although there is no limitation on the types of enterprises that may receive the import reduction, the program is limited by the types of imported equipment that may receive the reduction. As outlined in the Preliminary Results, we received data from the GOK on the names of companies that received a benefit under this program, the type of equipment imported, the amount of the benefit received, and a business classification of the enterprise.⁸¹

In conducting our analysis of usage under this program, we examined the enterprises by receipt of the benefit, which in this case was the reduction of the duty on the imported value of the automated equipment. From this analysis, we determined that Hynix was within a limited group of enterprises which received a disproportionately large amount of the subsidy.⁸² Our analysis

⁷⁹ See Preamble, 63 FR at 65357.

⁸⁰ Id.

⁸¹ See Preliminary Results, 72 FR at 51613.

⁸² See Third Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea: Analysis Memorandum for Business Proprietary Information on Korean Import Duty Reduction Program (August 31, 2007) (Analysis Memo).

and preliminary finding were based on the actual benefit received (import duty reduction) by this group and the distribution of the subsidy among the enterprises that used the program.⁸³

Therefore, the Department's grouping of enterprises in examining specificity was in line with our statutory and regulatory obligations, as noted above, and provided a reasonable method by which to assess Hynix's use of the program and its countervailability.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. 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)

83 We note that Micron's cite to Magnola is misplaced, as our analysis in this case involves an examination of the amount of benefit received by a group of enterprises of which Hynix is a part, not an examination of the amount of the benefit received by Hynix alone.