

**FINAL RESULTS OF REDETERMINATION  
PURSUANT TO REMAND**

Hynix Semiconductor Inc., Hynix Semiconductor of America Inc. v. United States  
Court No. 03-00651  
Slip Op. 05-106 (Ct. Int'l Trade August 26, 2005)

**SUMMARY**

The Department of Commerce (“the Department” or “Commerce”) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or “Court”) in Hynix Semiconductor Inc. v. United States, Slip Op. 05-106 (Ct. Int'l Trade August 26, 2005) (“Hynix Remand”).

In accordance with the Court’s instructions, the Department has addressed Hynix Semiconductor’s (“Hynix”) alternate theory: (1) that Hynix’s financial advisors, Citibank and Salomon Smith Barney<sup>1</sup> (“Citibank/SSB”), rather than the Government of Korea (“GOK”), orchestrated Hynix’s restructuring and (2) that Hynix’s restructuring featured commercially-based contingencies and options with no guaranteed outcome and, therefore, was the product of market forces. The Department affirms its original determination that the GOK entrusted or directed Republic of Korea (“Korea” or “ROK”) financial institutions to provide a financial contribution within the meaning of 19 U.S.C. § 1677(5)(B)(iii). Specifically, the Department finds that Citibank/SSB was hired to work out details of the restructuring, while the GOK, through its policy and pattern of practices, entrusted or directed Korean financial institutions to provide a financial contribution to Hynix. In addition, the Department continues to find that Hynix’s restructuring was, in fact, not based on commercial contingencies and options. Finally, the Department finds that even if there were commercial contingencies or options for Hynix’s

---

<sup>1</sup>Citibank and Salomon Smith Barney are both divisions of Citigroup.

creditors, they would not have altered the findings of GOK entrustment or direction, and they would not have transformed the financial restructuring of Hynix into a commercially-based endeavor.

## **BACKGROUND**

In the investigation covering the period of January 1, 2001, through June 30, 2002 (“POI”), the Department concluded that the GOK entrusted or directed financial institutions to carry out the GOK subsidy program to save Hynix. In so doing, the GOK entrusted or directed various ROK financial institutions. See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 Fed. Reg. 37122 (June 23, 2003) (“Final Determination”) and the accompanying Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea (June 16, 2003) (“Decision Memorandum”).

Hynix challenged Commerce’s Final Determination before the CIT. The Court ruled that the Department must address certain questions concerning Citibank/SSB’s involvement in the Hynix restructuring. See Hynix Remand.

Micron Technology, Inc. (“Micron”), the petitioner in the underlying investigation, filed comments on the Hynix Remand on October 6, 2005.

The Department released to the parties for comment the Draft Redetermination Pursuant to Remand (“Draft Remand”) on November 4, 2005. The Department received affirmative and rebuttal comments from the parties on November 9 and November 14, 2005, respectively. See “Comments” infra.

## DISCUSSION

The issues that the Court remanded pertain to Commerce's finding that the GOK provided a financial contribution to Hynix within the meaning of 19 U.S.C. § 1677(5)(B)(iii). The Court ruled that Commerce failed to address an alternative explanation proffered by Hynix in which Hynix claims that its restructuring was organized by Citibank/SSB and conditioned on uncertain market events. As such, Hynix asserts that its restructuring could not possibly be the result of indirect subsidies provided by the GOK. The Court ruled that Commerce did not adequately address this alternative theory in the underlying investigation. Therefore, the Court has ordered that, on remand, Commerce must address (1) why it disregarded or disbelieved the record evidence indicating that Citibank/SSB – not the GOK – orchestrated Hynix's restructuring and (2) why Hynix's restructuring featured commercially-based contingencies and options with no guaranteed outcome if Hynix's restructuring was indeed the product of GOK entrustment or direction and not market forces. See Hynix Remand at 35-36.

We first address the Court's question with regard to why we disregarded or disbelieved the record evidence indicating that Citibank/SSB – not the GOK – orchestrated Hynix's restructuring. Underlying the Department's findings that the GOK entrusted or directed Hynix's creditors to bailout Hynix was a general disbelief in Hynix's argument that its financial restructuring was orchestrated by Citibank/SSB. The Department disbelieved Hynix's theory because substantial record evidence demonstrated that the GOK was the impetus to, and the sustaining force behind, Hynix's restructuring. As such, the Department finds that the GOK was the orchestrator of Hynix's restructuring and that Citibank/SSB's role as the expert financial advisor to Hynix does not undermine the finding of entrustment or direction by the GOK.

In the Final Determination, the Department found that Hynix received a financial contribution from Korean banks that had been entrusted or directed by the GOK. We reached this determination on the basis of a two-part test. First, we determined that the GOK had in place a policy to support Hynix's financial restructuring to prevent the company's failure. Second, we found that the GOK acted upon that policy through a pattern of practices to entrust or direct Hynix's creditors to provide a financial contribution to Hynix. The subsidy was a four-step restructuring that was appropriately considered a single subsidy program. See Decision Memorandum at 47-61.

The record clearly establishes that Hynix's financial restructuring was carried out as a result of actions taken by the GOK, and because the GOK maintained the necessary leverage over the creditors to effectuate its policy to save Hynix. For example, in August 2001, a GOK official stated that “. . .if the creditor group cannot make a decision whether or not to provide additional support, the financial authorities should decide. We cannot simply leave it blindly to the creditor group.” Micron's March 14, 2003, Pre-Preliminary Determination Comments at Attachment B-18, “Deputy Prime Minister Chin, ‘Government Will Take Actions To Turn Around Hynix,’” Korea Economic Daily, August 4, 2001. That same month the Korean press reported that “{w}henever the creditor group attempts to shy away from providing support, the government has talked to them, or even twisted arms, to bring support for Hynix.” Micron's March 14, 2003, Pre-Preliminary Determination Comments at Attachment B-51, “Hynix, Will It Really Survive?” Newsmaker, No. 439, August 30, 2001. The record is replete with additional evidence showing that the GOK directed or entrusted Hynix's creditors to save Hynix from financial ruin, much of which the Department cited in its brief to the Court.

The Court found the Department’s policy and pattern of practices rationale “to be reasonable.” Hynix Remand at 26-28. Further, the Court upheld Commerce’s interpretation of the “entrusts or directs” language of the statute, ruling that “Congressional intent, Commerce’s past practice, and this Court’s jurisprudence clearly support Commerce’s decision to interpret the ‘entrusts or directs’ language broadly so as to include a single program of financial contributions involving multiple financial institutions directed by a foreign government.” Hynix Remand at 13. The Department’s analysis necessarily focuses on the government as the relevant actor in a case involving an indirect subsidy. In other words, it is the government’s actions with respect to the financial institutions lending to Hynix that are probative in a determination concerning entrustment or direction. Where substantial record evidence demonstrates that the government entrusted or directed private entities to provide financial contributions that conferred a benefit, an indirect subsidy exists. In this case, the Department found that the GOK’s role in Hynix’s financial restructuring was that of an orchestrator, or analogous to the role of the chief executive of a company. In that capacity, the GOK formulated a policy and an objective or overall strategy, and took the necessary actions to ensure that its policy and objectives for Hynix were carried out (i.e., the complete financial restructuring of Hynix to prevent its collapse). The GOK left it to the relevant specialist to flesh out the mechanics of that object or strategy. In this case, the specialist was Citibank/SSB.

Relevant to the question raised by the Court is Citibank/SSB’s role as a financial advisor and its involvement in three of the four constituent parts of Hynix’s financial restructuring: 1) the December 2000 syndicated loan; 2) the May 2001 restructuring; and 3) the October 2001 restructuring. Citibank/SSB did not participate in the fourth constituent part of Hynix’s financial

restructuring, the Korea Development Bank (“KDB”) Fast Track bond program (“Fast Track”). The Department found that the four constituent parts of Hynix’s financial restructuring comprise a single government program of entrustment or direction. While the Court has not yet conducted a “substantive review of the evidence supporting Commerce’s finding of government entrustment or direction,” the Court did rule that “it is reasonable for Commerce to view individual transactions. . .as one large program. . .” Hynix Remand at 37 & 20. As such, upon remand, the Department finds that Citibank/SSB’s involvement in Hynix’s restructuring must be examined as one piece of evidence among an abundance of record evidence regarding the single subsidy program. In other words, the Department finds that it can not consider Citibank/SSB’s involvement in isolation from the universe of record evidence regarding the GOK’s policy and pattern of practices relating to Hynix and its creditors.

For those portions of the restructuring in which Citibank/SSB was involved, the record demonstrates that its role was quite limited. The engagement letter between Hynix and Citibank/SSB narrowly defines and limits the role of Citibank/SSB in its dealings with Hynix. See Hynix’s January 27, 2003, questionnaire response at Exhibit 1 at 2 (viii). According to the engagement letter, Citibank/SSB was retained to advise Hynix on the following three areas: (1) cash for short-term liquidity needs; (2) debt restructuring to push off maturing debt obligations; and (3) new equity investment and cash infusions for longer term operational needs. Id. In addition, Citibank/SSB’s March 20, 2003, affidavit explains that Citibank/SSB’s role was “to assist Hynix’s restructuring and recapitalization efforts” and that it had provided such services “to a number of other companies in the Korean market suffering similar problems.” Citibank/SSB’s March 20, 2003, affidavit at 1-2. Serving Hynix within these confines,

Citibank/SSB analyzed Hynix's financial condition, and then constructed and proposed the mechanics of the financial restructuring. For example, Citibank/SSB recommended the December 2001 syndicated loan as a stop-gap loan to cover Hynix's immediate liquidity needs. See Hynix's January 27, 2003, questionnaire response at 14. For the May 2001 restructuring, the mechanics developed by Citibank/SSB included the issuance of convertible bonds ("CBs"), new loans, and the refinancing (at lower rates) and/or extension of maturities of existing loans. See Hynix's January 27, 2003, questionnaire response at Exhibit 10, pages 38-39 (Hynix's 2001 Audited Financial Report ). For the October 2001 restructuring, the mechanics developed by Citibank/SSB included equity infusions, new loans, debt forgiveness, and debt extensions and refinancing. See Hynix's January 27, 2003, questionnaire response at Exhibit 10, page 39.

The Department finds that these actions are not those of an orchestrator or chief executive but rather those of a consultant who is assigned to implement a specific task with little or no influence on defining, or ensuring the execution of, that task. In this case, the task was to save Hynix from financial ruin, the chief executive was the GOK and the consultant was Citibank/SSB. Given the enormity and complexity of the restructuring, it is not surprising that a financial advisor was hired to provide technical expertise for Hynix's financial restructuring. In the Final Determination, the Department stated, "in the case of an indirect subsidy, where the government is acting through a private party, it would make sense that the private party, and not the government itself, would fix the commercial terms." Decision Memorandum at 44. This is because a government generally does not have the expertise to plan the details of multiple financial transactions and because it does not have to micromanage the process to achieve its policy objectives. However, the government can, and in this case did, use its authority to ensure

that the transactions go forward so that its policies are carried out. Much like the chief executive of a company, the GOK formulated an objective and assigned various actors, including creditors and advisors, to attain that objective.

Although Citibank/SSB advised Hynix, it lacked the ability to ensure that Hynix's financial restructuring went forward. The GOK, on the other hand, did have the ability to ensure that Korean banks took the necessary steps to keep Hynix from going under. In addition, the GOK took the necessary actions to ensure that Hynix's restructuring was executed in a manner consistent with the GOK's policy objectives. In addition, Citibank/SSB was unable to operate independently from the GOK. For example, there are several statements in Hynix's questionnaire response that Citibank/SSB's proposals were indeed subject to GOK review and/or approval. See Business Proprietary Memorandum for Final Results of Redetermination upon Remand ("BPI Memorandum") at Comment 1. This evidence, when considered with evidence of the GOK's policy to save Hynix, its threats towards Hynix's creditors, its involvement in Creditors' Council meetings throughout the restructuring, and its control over a number of Hynix's creditors, among other things, demonstrates that the GOK, not Citibank/SSB, was the orchestrator of Hynix's restructuring. The GOK reviewed Citibank/SSB's proposals to ensure that Citibank/SSB was serving its client, Hynix, within the framework of the GOK's objective. See BPI Memorandum at Comment 1. Although, in the Final Determination, the Department did not find that Citibank/SSB was entrusted or directed per se, the Department did find that Citibank/SSB was not acting independently from the GOK. Thus, the role played by the financial advisors does not undermine the Department's finding of entrustment or direction by the GOK.

As part of addressing Hynix’s alternative theory, the Court asked the Department to explain why it “disregarded or disbelieved the record evidence indicating that Citibank/SSB – not the Korean government – *orchestrated* Hynix’s restructuring. . . {emphasis added}” Hynix Remand at 35. Imbedded in Hynix’s alternative theory is the idea that the Department found that the GOK had a “master plan” to save Hynix. See e.g., Hynix’s Brief in Support of Motion for Judgment Upon Agency Record at 5 (“The Department alleges a single, ten-month Master Plan by the GOK to bail out Hynix, but has trouble finding any creditable evidence of such a Master Plan.”). Commerce made no such finding. Rather, Commerce found that the GOK had a policy to save Hynix and engaged in a pattern of practices to ensure that the creditors carried out this policy. Citibank/SSB certainly did much of the technical work behind the mechanics of Hynix’s financial restructuring. However, it was the actions taken by the GOK, pursuant to its policy to save Hynix, to entrust or direct the ROK financial institutions that effectuated the restructuring and brought about the financial contributions. Citibank/SSB’s actions do not erase the GOK’s actions to initiate and sustain the efforts to restructure Hynix’s debt.

The statute states, in pertinent part, that “the term ‘authority’ means a government of a country or public entity. . .” 19 U.S.C. § 1677(5)(B). An indirect subsidy is a subsidy “in which an authority makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.” 19 U.S.C. § 1677(5)(B)(iii). The Department interprets this statutory language to speak to the actions a government takes toward private entities to provide a financial contribution. Indeed, under the statutory language, the actions of

the financial advisors may not be relevant at all. The Department has found that all of the details of the restructuring must be examined in total. The one constant throughout the entire restructuring program, whether Citibank/SSB was involved in any one step or not, was the GOK and the actions it took to ensure that its policy objectives were achieved.

Hynix's alternative theory hinges on the notion that the creditors were acting in their own interest and that Citibank/SSB, as the financial advisor, was simply helping them achieve that goal. Commerce, of course, determined that the creditors' actions were not consistent with normal market considerations. By all indications, both the financial condition of Hynix and its future prospects were extremely poor and getting worse throughout the investigation period, and would clearly have dissuaded commercial lenders from lending to, or otherwise investing in, the company. The record showed that several well-respected private investment firms with no ties to Hynix, such as UBS Warburg and Morgan Stanley Dean Witter, had repeatedly and consistently viewed Hynix as a company on the brink of bankruptcy that was being kept alive by the GOK-led debt restructurings. See, e.g., Micron's March 14, 2003, Pre-Preliminary Determination Comments at Attachment L-16, "Hynix Semiconductor," Morgan Stanley Dean Witter, September 25, 2002, at 1. Clearly, as Commerce demonstrated, given the considerable evidence on the record, the creditors' decision to participate in the restructuring was not commercially motivated.

However, upon being entrusted or directed by the GOK to participate, it would make sense that the creditors would need Citibank/SSB to structure certain transactions in a manner that would not also undermine their own viability. The Department's Preamble anticipates that creditors who are entrusted or directed might nonetheless seek to maximize their self-interest:

“Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government requiring an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party.” Countervailing Duties; Final Rule, 63 Fed. Reg. 65,348, 65,350 (Nov. 25, 1998). Thus, even if Citibank/SSB were working to assist the creditors make the best out of a bad situation, this would not in any way undermine Commerce’s finding of entrustment or direction nor would it indicate that Hynix’s creditors’ motivation to lend to Hynix was based solely on their own commercial considerations.

We now address the Court’s question with regard to why Hynix’s restructuring featured commercially-based contingencies and options with no guaranteed outcome if Hynix’s restructuring was indeed the product of GOK entrustment or direction and not of market forces. See Hynix Remand at 35-36. The Department finds that the restructuring did not feature commercially-based contingencies and options with no guaranteed outcome.

The Department assumes that, when the Court stated that there were “commercially-based contingencies,” it was referring to the Global Depository Shares (“GDS”) offering. The GDS offering was a USD 1.25 billion equity offering on international capital markets. See Citibank/SSB’s March 20, 2003, affidavit at 3. The Department does not believe that the May restructuring was truly “contingent” upon the GDS offering nor does the Department believe that Hynix’s financial restructuring would not have occurred if the GDS offering had failed, as suggested by Hynix.

As a practical matter, the massive May 2001 portion of the restructuring came *before* the GDS offering. Hynix’s creditors met and voted to provide the package in early May. See Hynix Verification Report at Exhibit 7.<sup>2</sup> The GDS offering happened in June. See Hynix’s January 27, 2003, questionnaire response at Exhibit 5. The new loans and debt restructuring included in the May portion of the restructuring package were a focal point of the GDS Offering Memorandum, which was provided to potential share purchasers. Id. at 4-5. In the Offering Memorandum, the May restructuring was labeled “Concurrent Financing Transactions,” and was characterized as a central portion of the overall capitalization plan for Hynix. Along with the Fast Track program, it was presented as the cornerstone for restoring Hynix’s liquidity. Id. at 4 & 19. The Offering Memorandum also noted that the May restructuring would close “substantially concurrently,” with the closing of the GDS, thus highlighting the automaticity of the assistance agreed to in May. Id. at 4. Thus, the language in the GDS Offering Memorandum demonstrates that the May restructuring was not truly contingent upon the GDS Offering.

Further, the GDS Offering Memorandum speaks to the GOK’s support for Hynix and calls into question whether the May restructuring package was truly contingent upon the success of the GDS offering. In fact, the Offering Memorandum expressly specified in numerous places how the GOK stood behind Hynix. In order to demonstrate the GOK’s continuing support for Hynix, the Offering Memorandum specifically stated that, “as a supplement to the May restructuring package, approximately 2.0 trillion won in additional financing was expected to continue to be available to Hynix from May 31, 2001, through the remainder of 2001 under the

---

<sup>2</sup>All verification reports cited in this remand are dated May 15, 2003, and are on the official record.

debenture rollover program sponsored by KDB.”<sup>3</sup> Hynix’s January 27, 2003, questionnaire response at Exhibit 5 at 4. Thus, the Department found that Hynix was clearly relying on the support of the GOK in selling its GDS shares. In other words, the appeal of the GDS Offering to potential buyers depended at least in part on the expectation of new financial infusions (e.g., convertible bonds) into Hynix through the May restructuring, among other GOK-directed events. Hynix’s January 27, 2003, questionnaire response confirms this conclusion: “Specifically, the {convertible} bonds were intended. . . to promote the participation of foreign investors for the success of the issue of the GD{S}s and high yield bonds.” Hynix’s January 27, 2003, questionnaire response at 39-40.

On June 12, 2001, even after the May announcement was made, but before the GDS offering closed, Hynix’s creditor banks entered into an agreement, setting the terms of part of the May restructuring – specifically, the underwriting agreement of the 1,000 billion won of convertible bonds. See Hynix’s January 27, 2003, questionnaire response at Exhibit 5 at 5. Since the creditor banks met again to work out the details before the GDS even closed and then signed an agreement with respect to the terms of the underwriting, the Department finds it unlikely that the banks were truly waiting until the successful conclusion of the GDS to decide whether to proceed with the May restructuring. Thus, as evidenced in the discussion above, the evidence on the record suggests that the May restructuring was not conditioned upon the GDS offering. If anything, record evidence suggests that the reverse is true.

As discussed above, the Department’s Preamble anticipates creditors who are entrusted or

---

<sup>3</sup>Commerce found the KDB to be a “government authority.” See Decision Memorandum at 13-17.

directed might nonetheless seek to maximize their self-interest: “Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government requiring an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party.” Countervailing Duties; Final Rule, 63 Fed. Reg. 65,348, 65,350 (Nov. 25, 1998). Thus, it comes as no surprise to the Department that, when entrusted or directed to save Hynix financially, Hynix’s creditors would seek to share at least some of the financial burden of saving Hynix with international GDS buyers. In April 2001, upon analyzing Hynix’s financial situation, Citibank/SSB proposed a collection of financial mechanisms designed to meet the GOK’s objective of rescuing Hynix. See Hynix’s January 27, 2003, questionnaire response at pages 40-41 and Exhibit 21. In considering Citibank/SSB’s proposals, each of Hynix’s creditors had to consider its own financial situation to determine the extent to which it could individually contribute to what Hynix needed. It is certainly possible that Hynix’s creditors, collectively, could not come up with all the money called for in Citibank/SSB’s proposal to meet the GOK’s demands. The additional plan to seek capital through a GDS offering suggests that this was the case. Moreover, the Department finds that this scenario does not in any way erase or undermine record evidence demonstrating the GOK’s actions to entrust or direct Hynix’s creditors to save Hynix.

The Department assumes that, when the Court stated that there were commercially-based “options,” it refers to the options presented in the Creditors’ Council resolution (“CRPA

resolution”). Under the Corporate Restructuring Promotion Act (“CRPA”), banks holding 75 percent of a company’s debt may set the financial restructuring terms for all of a company’s creditors. Hynix’s GOK-owned or controlled creditors accounted for a substantial majority of the company’s outstanding debt at that time, an amount sufficient to set the terms for all banks and ensure compliance with GOK policy objectives. See Decision Memorandum at 55 and Hynix’s January 27, 2003, questionnaire response at Exhibit 10, page 39. Thus, those banks that were given “options” had to exercise them on terms that were established for them by the GOK-owned or controlled banks. Id. The true nature of the “options” was to benefit Hynix at the creditors’ expense.

The Creditors’ Council developed three options for Hynix’ creditors: (1) creditors extended new loans, converted D/A loans to long-term loans, swapped CBs and unsecured loans to new CBs (which would be subsequently converted into equity), and refinanced and extended the remaining loans; (2) creditors did not extend new loans, but converted all of their secured loans and 28 percent of their unsecured loans into the CBs that would subsequently be swapped for equity, and forgave the remaining unsecured loans; (3) creditors did not extend new loans or convert debt-to-equity, exercised their appraisal rights for all of their secured debt and 25 percent of their unsecured debt based on Hynix’s liquidation value (as established by an external consultant), and forgave the remainder of the debt. It is noteworthy that option 3 did not provide an immediate refund of liquidated loans to creditors. Instead, these funds were converted into five-year, interest-free debentures (i.e., interest-free loans). See Hynix’s January 27, 2003, questionnaire response at 54 and Exhibit 10 (financial statements at 39-40), and Decision Memorandum at Comment 9. If all of the creditors had selected options two or three, all of the

banks' loans would have been wiped from Hynix's books. Alternatively, if all of the creditors had selected option one, a portion of the loans would have remained but Hynix would have received sufficient new loans to service those debts. Thus, under any scenario, Hynix would be saved to the detriment of its creditors.

Press reports on the record support the notion that the creditors that were not GOK-owned or controlled were unhappy with the options. The Dong A-Daily reported:

The executives of the main creditor banks, Korea Exchange Bank and other banks such as Hanvit, Korea Development Bank, and Chohung Bank, have smiles on their faces. In contrast, the executives of Shinhan, KorAm, Hana, Korea First, and Kookmin Bank stepped glumly into the meeting room. They were supposed to cast "aye" votes that would bring themselves losses on the order of several tens of billions of won, up to 100 billion won. It is no wonder they could not be light-hearted.

On that day, the "ayes" carried the day on the Hynix support proposal. However, practically no one thought that the proposal passed due to merit, or that the proposal was convincing and reasonable. Micron's March 14, 2003, Pre-Preliminary Comments at Attachment B-35, "Gangster-Style Solution for Hynix," Dong A-Daily, November 1, 2001.

Further, the article states that when the Korea Exchange Bank, a GOK-owned or controlled bank, the lead bank, proposed option three, "Banks initially went ballistic: 'It doesn't make any sense, it's just plain ridiculous.' However, they ended up giving their consent, 'swallowing the mustard while crying in tears,' as the old Korean saying goes. There simply wasn't any room for any other choice. The result in support was all set in advance." Id. These are not the statements of creditors happy with a market-oriented solution. Rather, these actions are indicative of the GOK entrustment or direction that was teaming through the Creditors' Council.

In May 2001, having been entrusted or directed by the GOK to save Hynix, Hynix's

creditors faced a daunting challenge and they turned to international capital markets to share a portion of the burden imposed upon them. However, by October 2001, Hynix's financial status had deteriorated and the possibility of seeking additional help from outside investors was completely eliminated. As such, the creditors were again forced to ante up for Hynix. Citibank/SSB devised another restructuring package and the creditors were compelled by the GOK to contribute to the Hynix restructuring. As a result, the creditors had three options that reflected varying levels of participation. As mentioned above, Hynix's creditors had to operate within the confines of their individual financial circumstances. Surely, the GOK would not force every creditor to choose option 1, particularly if certain creditors' balance sheets dictated that they could not. However, the mere presence of options 1, 2, and 3 does not in any way negate the GOK's actions to entrust or direct Hynix's creditors to prevent its financial collapse.

As is evidenced above and in the underlying investigation, the Hynix restructuring was not the product of market forces, as Hynix contends. The Hynix restructuring was the product of the GOK's policy to save Hynix and the pattern of practices the GOK engaged in, with respect to the creditors, to effectuate this policy. The evidence regarding Hynix's financial condition certainly suggests that, if not for the GOK, Hynix would not have survived as a going concern. The GOK repeatedly intervened to ensure that the creditors would carry out the restructuring. Moreover, Commerce has never suggested that the government could control every minute aspect of the Hynix restructuring. The law does not require that a government have a "master plan" or "orchestrate" every aspect of an indirect subsidy program. Requiring such would be an impossible standard to meet. The GOK did what it deemed necessary to save Hynix.

## COMMENTS

### **Citibank/SSB's Involvement in the Hynix Restructuring**

#### *Hynix's Arguments*

According to Hynix, the Court's remand is intended to ascertain whether and how the Department considered counter-evidence of entrustment or direction in its Final Determination. However, Hynix argues, the Department instead chose to reiterate its Final Determination findings and limited its analysis of counter-evidence to whether Citibank/SSB could have controlled Hynix's creditors. In doing so, Hynix contends, the Department ignored the Court's directions to consider evidence regarding the transactions comprising Hynix's restructuring and the actors driving those transactions. Hynix also argues that the issue of whether Citibank/SSB controlled Hynix's creditors is irrelevant to the questions posed by the Court. Moreover, Hynix argues, the Department continues to rely on dubious evidence to support its finding that the GOK entrusted or directed Hynix's creditors.

According to Hynix, the Department has conceded that Citibank/SSB played the role of advisor to Hynix and its creditors. In addition, the Department found that Citibank was not entrusted or directed by the GOK and, therefore, Hynix argues, SSB and Citibank are independent commercial actors. For these reasons, and because Citibank/SSB participated in several of the transactions comprising Hynix's restructuring, Hynix argues that its restructuring must have been commercially motivated and, therefore, was not motivated by GOK entrustment or direction. Hynix contends that such commercial motivation belies the Department's conclusion that Hynix's creditors were entrusted or directed to participate in Hynix's financial bailout.

Hynix contends that the Department relies on the relationship between Hynix (the client) and Citibank/SSB (the advisor) to undermine the actual commercial nature of Citibank/SSB's role in the Hynix restructuring. However, Hynix contends, the Department's logic is nonsensical. Hynix argues that SSB and Citibank were not "hired guns" but rather SSB was a paid, expert financial advisor and Citibank was a significant lender to Hynix, and both acted with their commercial interests in mind and independently from the GOK. Hynix also argues that the Department's suggestion that Citibank/SSB's proposals were subject to GOK approval was based on weak evidence and is contradicted by Citibank's statements to the Department. See Hynix Verification Report at 18. Citing the Citibank engagement letter, which predates Ministerial meetings cited by the Department, Hynix also argues that Citibank/SSB devised the mechanics and controlled the financial restructuring of Hynix. Hynix contends actions such as waiving lending limits or the alleged use of the KDB Fast Track program to promote the GDS offering and the May restructuring fail to undermine the commercial nature of Citibank/SSB's restructuring plans for Hynix.

#### *Micron's Arguments*

Micron contends that Citibank/SSB's involvement in Hynix's restructuring does not prove that Hynix's creditors were motivated by commercial considerations. Specifically, Micron contends that SSB's role as the technical advisor on the complexities of a massive financial restructuring fails to demonstrate that Hynix's creditors were motivated by their own commercial considerations, particularly given Hynix's financial situation. In addition, Micron contends, record evidence demonstrates that Hynix's creditors participated in Hynix's restructuring because they were controlled and/or pressured to do so by the GOK. According to Micron, there would

be no need for such GOK control and intervention if lending to Hynix were a commercially motivated endeavor. Micron further argues that any counter-evidence cited by Hynix to support its alternative theory is simply overwhelmed by an abundance of record evidence demonstrating that Hynix's creditors were motivated by GOK entrustment or direction, rather than commercial motivations.

Micron also contends that Citibank's role as a minority lender to Hynix fails to demonstrate that Hynix's other creditors were motivated by commercial considerations. In support of its argument, Micron points to the Department's final determination that "Citibank participated in the debt arrangements in an extraordinary manner not comparable to those of the average lender." See Decision Memorandum at 9. Given the Department's findings with respect to Citibank, Micron argues that Citibank is not situated similarly to Hynix's other creditors and, therefore, it cannot serve as a representation of the other creditors, particularly with respect to their motivations to support Hynix's restructuring. In addition, Micron contends that record evidence demonstrates that Citibank and SSB's actions were indeed subject to GOK approval and, therefore, Citibank/SSB could not have led the Hynix restructuring. See BPI Memorandum at Comment 1. Micron further argues that Citibank acknowledged the GOK's control over Hynix's restructuring in statements to the Department during verification. See Hynix Verification Report at 20.

#### *Department's Position*

For the reasons stated in the "Discussion" section above, the Department finds that Citibank/SSB's role as a financial advisor to Hynix does not prove that Hynix's financial restructuring was commercially motivated. Citibank/SSB planned the mechanics of portions of

the restructuring, but it was the GOK's policy and pattern of practices that guaranteed the survival of Hynix. Further, the parties' arguments regarding Citibank as a lender are not relevant because the CIT directed us to consider Citibank/SSB's role as financial advisor during the bailout.

As discussed above, the evidence, or so-called "counter-evidence," of Citibank/SSB's role demonstrates that it was hired to work out the mechanics of the restructuring because a government normally does not have expertise to do so. Citibank itself explained that "the Hynix restructuring efforts were designed and led by Citibank and Salomon Smith Barney. It was Citibank and SSB that had put together a comprehensive restructuring package for Hynix." Citibank May 22, 2003, affidavit at 4. It was the GOK, however, that stepped in to ensure that the creditors carried out the restructuring and effectuated the GOK's policy of saving Hynix. The Department found that the GOK was the true orchestrator in the restructuring.

Hynix sums up the issue as "whether the transactions organized by SSB and Citibank were motivated by commercial considerations." Hynix's November 9, 2005, Comments on the Department's Draft Redetermination Pursuant to Remand at 6. However, there is no requirement in the statute that a financial restructuring not be motivated by commercial considerations in order for there to be government entrustment or direction. Even if the restructuring were motivated by commercial considerations, this would not undermine the Department's finding of entrustment or direction. Indeed, the Preamble stands for this very proposition, stating that "indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party." Countervailing Duties; Final Rule, 63 Fed. Reg. at

65,350. In any event, as described above, the financial condition of Hynix was so poor that, if not for the government entrustment or direction, Hynix's creditors would likely have discontinued to lend to or invest in the company.

### **Commercial Contingencies - May Restructuring**

#### *Hynix's arguments*

According to Hynix, its creditors agreed to the May 2001 restructuring before the GDS issuance closed in June 2001. However, Hynix argues, this fact does not prove that the GDS offering was contingent upon the May restructuring, as the Department stated in its Draft Remand. Rather, Hynix argues, the GDS Offering Memorandum clearly indicates that the May restructuring was contingent upon a successful GDS offering. To support this argument, Hynix points to the GDS Offering Memorandum which states that the "principal condition to these banks' obligations as set forth in the agreement is our completion of sales of equity and/or debt securities generating gross proceeds exceeding W1,300 billion." Hynix's November 9, 2005, Comments on the Department's Draft Redetermination Pursuant to Remand at 14, citing the GDS Offering Memorandum. In addition, Hynix contends that the GDS Offering Memorandum does not indicate that the May restructuring was automatic, as the Department argues, but rather shows that the GDS Offering and the May restructuring were concurrent events and that each carried some element of uncertainty. In fact, Hynix argues, if the GDS had failed, the May 2001 restructuring would not have happened. Moreover, Hynix argues that Citibank, in its March 20, 2003, affidavit, confirmed that the May restructuring was "a market-based approach reflecting the commercial self-interest of all participants." Hynix further contends that these commercial contingencies undermine the Department's allegations of entrustment or direction and that such

uncertainties do not conform to the Department's findings that there was a policy and pattern of practices demonstrating the GOK's goal of saving Hynix.

According to Hynix, the Department concluded that Hynix was relying on the GOK, through the Fast Track program, to help sell its global depository shares, which Hynix argues is not supported by the GDS Offering Memorandum. Hynix further argues that the GDS Offering Memorandum does not indicate certainty about Hynix's participation in the Fast Track program. Hynix notes that the GDS Offering Memorandum states, "the KDB Fast Track program is not a committed line of credit, and our participation in the program is subject to the broad discretion of the creditor bank committee..." Given this uncertainty, Hynix argues that the Fast Track program was a risk factor and likely discouraged investors rather than something that encouraged investors because of implied GOK support for Hynix.

#### *Micron's Comments*

In its November 9, 2005, comments, Micron expressed its general agreement with the positions that the Department took in the Draft Remand and offered suggestions to bolster those positions.

Micron contends that the GDS Offering Memorandum and other record evidence contain several indications that the May 2001 restructuring was not contingent upon the success of the GDS issuance. See e.g., Hynix's January 27, 2003, questionnaire response at Exhibit 5 and Hynix Verification Report at Exhibit 7, which the Department cited in its Draft Remand. Micron further contends that in its January 27, 2003, questionnaire response, Hynix neglected to raise the alleged contingency aspect of the May restructuring, despite the Department's specific request for such details. Micron notes that Hynix instead responded to the Department's request by

stating that the convertible bonds were “intended. . .to promote the participation of the foreign investors for the success of the issue of the GDRs {i.e., GDSs} and high yield bonds.” Hynix’s January 27, 2003, questionnaire response at 39-40. Micron argues that if the May restructuring were indeed contingent upon the GDS offering, Hynix would have raised that point to the Department during the investigation. Lastly, Micron argues that statements in the GDS Offering Memorandum that allegedly suggest commercial contingencies do not change the fact that Hynix’s financial restructuring depended on the GOK’s policy to save Hynix and the GOK’s actions to entrust or direct Hynix’s creditors to bailout Hynix.

#### *Department’s Position*

For the reasons stated in the “Discussion” section above, the Department finds that record evidence, at the very least, calls into doubt Hynix’s contingency argument regarding the May restructuring. However, the Department finds that the May restructuring was not contingent upon the success of the GDS offering because the record shows that the creditors agreed to the restructuring package before the GDS offering closed. Given the GOK’s involvement in formulating and entrusting or directing creditors to participate in the May restructuring, the Department finds that the May restructuring would have occurred even if the GDS issuance failed. In addition, the Department finds that even if the May restructuring did feature true contingencies, it would not erase the substantial record evidence demonstrating the GOK’s actions to entrust or direct Hynix’s creditors to participate in the restructuring.

#### **Commercial Contingencies - October Restructuring**

##### *Hynix’s arguments*

Hynix contends that the October restructuring has several characteristics that undermine

the Department's finding that the GOK entrusted or directed Hynix's creditors to participate. First, according to Hynix, the GOK could not control the Creditors' Council or dictate the terms of the October restructuring because the GOK did not have 75 percent of the voting rights, the majority required by the CRPA to pass a resolution. Hynix contends that a "blocking majority" (less than 75 percent of the votes) can only achieve deadlock and is incapable of setting the terms for all banks, as the Department has concluded. Similarly, Hynix notes that those investors holding more than 25 percent of the votes could have stalemated the restructuring and forced Hynix to liquidate. Hynix argues that liquidation was not forced upon Hynix and, therefore, the October restructuring contained commercial contingencies. According to Hynix, the Department has simply failed to address these realities in its analysis.

Hynix also argues that the ability of each creditor to challenge any resolution by the Creditors' Council in mediation and the Korean courts further undermines the Department's theory of GOK entrustment or direction. Again, Hynix contends, the Department neglected to consider this fact in its analysis of whether the GOK entrusted or directed Hynix's creditors. In addition, Hynix argues that creditors' ability to choose one of three options, in addition to seeking mediation or court resolution, indicates that each creditor could act in accordance with its own commercial considerations and without regard to GOK entrustment or direction.

According to Hynix, Micron's arguments relating to the October 2001 restructuring do nothing to discredit the commercial contingencies associated with the restructuring. Hynix contends that Micron's suggestion that the Department emphasize that creditors' claims against Hynix were suspended only established that the CRPA prohibited independent creditor action against a debtor until all creditor claims were sorted and identified. Hynix argues that this is

similar to what happens in a traditional bankruptcy. Hynix also argues that contrary to Micron's assertion that the October 2001 restructuring was designed to eliminate creditors' choices, the CRPA preserved the creditors' right to liquidate their interest in Hynix. Hynix contends that the options available to creditors were designed to balance the interests of all creditors and prevent "free riders" who were unwilling to support Hynix but wanted to convert 100 percent of their unsecured debt to Hynix equity. Hynix also refutes Micron's claim that the swap price under the October 2001 debt-to-equity conversion was artificially high, benefitting Hynix. Hynix contends that the swap price was a market-derived price designed to protect the interests of creditors and existing shareholders.

#### *Micron's Comments*

Micron contends that Hynix did not argue during the investigation that creditors who did not like the terms of the October restructuring had access to mediation. According to Micron, the Department asked Hynix several questions regarding option 3 in the October restructuring and, in response to those questions, Hynix never once made a reference to mediation. Thus, this information was not presented to the Department for consideration during the investigation.

Micron also argues that the failure of private banks to block the restructuring with a minority vote does not indicate that the October restructuring was commercially reasonable. Instead, this fact and record evidence demonstrating that the GOK threatened and coerced Hynix's creditors to participate in the restructuring together prove that Hynix's creditors did not voluntarily participate in the October restructuring for their own commercial purposes; they participated in the restructuring because they were entrusted or directed to do so. According to Micron, the GOK would not have had to coerce or threaten creditors if restructuring Hynix's debt

were a commercially reasonable endeavor from the creditors' perspective.

Micron acknowledges that the three options in the October restructuring provided limited flexibility to Hynix's creditors. However, Micron argues, none of the options represents what a commercially motivated creditor would have pursued absent GOK direction or entrustment.

*Department's Position*

As described above, the presence of options and the possibility of mediation in the October 2001 restructuring do not undermine the Department's finding of entrustment or direction. Further, we disagree with Hynix's contention that because the GOK-owned or controlled banks did not have 75 percent of the voting rights on the Creditors' Council, the GOK could not dictate the terms of the October 2001 restructuring.

The October 2001 restructuring occurred against the legislative backdrop of the CRPA. Despite the presence of options, the structure of the CRPA enabled a handful of the largest creditors to dominate the restructuring process and to dictate the results to every other creditor.

The CRPA mandated that all Hynix creditors participate in the Creditors' Council. The GOK enacted the CRPA in August 2001, precisely at the time when Hynix and other Hyundai Group companies were on the brink of bankruptcy and required significant financial assistance to avoid financial failure. As GOK officials noted at verification, "the National Assembly passed the Corporate Restructuring Promotion Act ('CRPA') to make sure that the banks *could not avoid* participating in workouts." Decision Memorandum at 54, citing Government of Korea Verification Report, May 15, 2003, at 8. A Ministry of Finance official stated that: "{w}e've decided to force all creditor financial institutions to take part in the meetings in order to prevent some of them from refusing to attend and pursuing their own interests by taking advantage of

bailout programs.” Decision Memorandum at 60, citing Micron’s November 1, 2002, Countervailing Duty Petition at Exhibit 61, “Foreign Banks Required to Attend Creditor Meetings for Ailing Firms,” Korea Times, July 22, 2001.

Further, the CRPA provided the GOK with a very valuable tool to prevent creditors from seeking to liquidate a troubled company. Pursuant to Article 14, at the request of the lead creditor bank, the FSS could prevent creditors from placing a company in liquidation. This is precisely what the FSS did in the Hynix bailout. Government of Korea Verification Report, May 15, 2003, at 19. This provision effectively forecloses any and all creditors from seeking liquidation unless and until the GOK’s objectives are achieved through the CRPA procedures.

The Creditors’ Council was dominated by creditors that were owned and controlled by the GOK. In turn, the GOK had a stated, public policy that it would not allow Hynix to fail, and had taken, and continued to take, actions aimed at ensuring that Hynix did not fail. No one step in the restructuring can be isolated from the other steps. As stated in the Decision Memorandum, the GOK engaged in threatening and coercive behavior towards Hynix creditors who were reluctant to participate in the restructuring. See Decision Memorandum at 60-61 and Micron’s March 14, 2003, Pre-Preliminary Determination Comments at Attachment B-1, “American Boss Dispenses With Protocol at South Korean Bank,” Wall Street Journal, January 29, 2001. Under these circumstances, and considering the totality of the evidence, the Department continues to find that the GOK was able to use the CRPA as a mechanism to ensure that all of Hynix’s creditors participated in the restructuring and recapitalization measures benefitting Hynix.

In short, the GOK knew that it could entrust or direct the banks to carry out the task of saving Hynix. The presence of options is not inconsistent with the Department’s finding of

entrustment or direction. Nor is the fact that the GOK-owned or controlled creditors did not have 75 percent of the voting rights on the Creditors Council. The choices available to the creditors at the October 2001 restructuring were clearly designed to ensure the continued survival of Hynix.

## **RESULTS OF REDETERMINATION**

The Department affirms its original determination that the GOK entrusted or directed ROK financial institutions to provide a financial contribution within the meaning of 19 U.S.C. § 1677(5)(B)(iii). Specifically, the Department finds that the financial advisors were merely hired to work out details of the restructuring, while the GOK, through its policy and pattern of practices, entrusted or directed Korean financial institutions to provide a financial contribution to Hynix. In addition, the Department finds that Hynix's restructuring was, in fact, not based on commercial contingencies and options. Even if the restructuring did feature true contingencies, substantial evidence demonstrates the GOK's actions to entrust or direct Hynix's creditors to participate in the restructuring.

---

Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

---

(Date)