Korean Legislations and Related Legal Instruments in the WTO Anti-Subsidy Jurisprudence

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Abstract

The purpose of this note is to survey certain Korean legislations the WTO compatibility of which were tested in the recent WTO anti-subsidy cases involving Korea and Hynix. The Hynix proceedings originated from the imposition by the U.S. Department of Commerce of countervailing duties on Hynix DRAMS on the basis that the Government of Korea had subsidized the chipmaker in contravention of Korea's international obligations. In its final published determination, the DOC considered various Korean legislations pursuant to which it determined the Korean government could entrust or direct Hynix's lenders and the banking sector of Korea more in general to provide preferential financing aimed at Hynix. The note critically appraises the DOC findings on each of the legislations and the Panel and, where appropriate, Appellate Body treatment of them in the subsequent WTO dispute settlement context. In addition to the legislations involved, the note probes certain legal instruments considered by the DOC as proof of GOK direction or entrustment involving Hynix's creditors. The note ends with certain policy suggestions in connection with the legal instruments.

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I. Introduction

The purpose of this note is to survey certain Korean legislations the World Trade Organization ("WTO") compatibility of which were addressed in the recent WTO anti-subsidy cases involving Korea and Hynix Semiconductor Ltd. ("Hynix"), one of the world's largest semiconductor producers based in Korea. These legislations were introduced and enacted in the aftermath of Korea's financial crisis in 1997. For the ensuing survey, the factual background and chronology of the Hynix WTO proceedings, coupled with an analysis of the relevant WTO treaty provisions and case law, will be first looked at. This will be followed by a discussion of the Panel and, where appropriate, Appellate Body treatment of the legislations involved and then by a probe into related legal instruments.

1. Background

The countervailing duties ("CVD") disputes between Korea and the U.S. in respect of Hynix arose from a CVD investigation by the U.S. Department of Commerce ("DOC") on imports of Dynamic Random Access Memory Semiconductors ("DRAMS") from Korea. The DOC imposed countervailing duties after it determined that Hynix had received massive subsidies from the Government of Korea ("GOK") in the form of financial contributions by its creditors.[1] Specifically, the DOC determined that the financial contributions for Hynix were provided by a number of banks with GOK ownership or control, as well as by a host of private financial institutions that were "entrusted or directed" by the GOK to do so.

Korea subsequently contested before a WTO Panel the consistency of the *Decision Memorandum* with, among others, the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). It thus argued in *US DRAMS* that the participation of private lenders in the financial restructuring of Hynix was solely based on commercial considerations and therefore fell outside the disciplines of the

1) U.S. Department of Commerce, *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003), available at wais.access.gpo.gov (hereinafter "Decision Memorandum").

SCM Agreement.[2] The *US DRAMS* Panel was overall receptive to the claims of Korea and consequently ruled that the USDOC had failed to establish a sufficient evidentiary basis to impose countervailing duties on imports of Hynix DRAMS.[3] Korea's triumph at the Panel level, however, was dealt a blow when, as will be seen shortly, the WTO Appellate Body reversed the Panel in June, 2005 by ruling that the US Panel had erred with respect to several legal issues including, *inter alia*, its interpretation of the terms "direction" and "entrustment" as envisaged under the SCM Agreement.[4]

2. The Concept of Direction and Entrustment in WTO Jurisprudence

1) Treaty Provision — Article 1.1(a)(1) of the SCM Agreement

In the WTO context, the law of subsidies is codified and regulated under the SCM Agreement. SCM Agreement Article 1.1 provides that a subsidy shall be deemed to exist where there is a "financial contribution" that confers a "benefit." Article 1.1(a)(1) further provides that there is a "financial contribution" by "a government or any public body within the territory of a Member" (collectively referred to as "government" in the SCM Agreement) where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g.

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2) Panel Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea* (WT/DS296/R), 21 December, 2004, *available at* http://docsonline.wto.org (hereinafter "US DRAMS").

3) In a parallel proceeding involving the European Communities (Panel Report, *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (WT/DS299/R), 21 January, 2005, *available at* http://docsonline.wto.org [hereinafter "*EC DRAMS*"]), a separate WTO Panel decided that the EC had not erred in finding at least some of the restructuring programs of Hynix, which were undertaken subsequent to the Korean financial crisis in 1997-98, as violative of the SCM Agreement.

4) Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea* (WT/DS296/AB/R), 27 June, 2005, *available at* http://docsonline.wto.org (hereinafter "*DRAMS AB Report*").

fiscal incentives such as tax credits) [footnote omitted];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

Article 1.1(a)(1) subparagraphs (i) to (iii) thus contemplate three specific instances that may be considered to constitute a *direct* financial contribution by a government. Subparagraph (iv) adds that such financial contribution may also exist *indirectly* where the government has entrusted or directed a private body to carry out a type of the financial contributions listed in subparagraphs (i) to (iii). In other words, in the framework of the SCM Agreement, a financial contribution will be deemed to be present where the government or a public body itself provides a financial contribution, or where the government entrusts or directs a private body to do the same.

2) Appellate Body Analysis of Article 1.1(a)(1)

In the *DRAMS AB Report*, the Appellate Body attempted to distil the meaning of the terms “directs and entrusts.” At the outset of its analysis, the Appellate Body noted that under Article 1.1(a)(1) of the SCM Agreement, no product may be countervailed in the absence of a financial contribution, since a “financial contribution” by a government or public body is an essential component of a “subsidy” in the sense envisaged by Article 1.1(a)(1). Furthermore, the Appellate Body made it clear that situations involving purely private conduct — that is, conduct that is in no way attributable to a government or any emanation thereof — cannot constitute a “financial contribution” under the SCM Agreement.[5)]

In constructing the concept of “entrusts” and “directs,” the Appellate Body noted that the term “entrusts” connoted the action of assigning responsibility to a person for

5) *DRAMS AB Report*, paras 106-107.

a task or an object.[6] In the Appellate Body's view, "delegation" (the word used by the *US DRAMS* Panel to allude to entrustment) may well be a formal or informal means by which a government imparts responsibility to a private body to carry out a governmental function. Yet the Appellate Body went on to find that, in addition to acts of delegation, there may be other formal or informal means by which a government could entrust a private body. Accordingly, the Appellate Body found the Panel holding limiting the scope of "entrusts" to acts of "delegation" to be overly narrow.

As for the term "directs," the Appellate Body noted that the requirement under paragraph (iv) that the private body be directed "*to carry out*" a government function meant that an act of directing implied the existence of authority on the part of the person or entity that "directs" vis-à-vis the person or entity so directed.[7] In the context of paragraph (iv), the Appellate Body stated that a "command" (the term used by the Panel below interchangeably with direction) would undoubtedly be one form or method by which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv). Aside from issuing formal commands, however, governments are likely to employ other subtle and less coercive means to exercise authority over a private body. Thus, as with "entrusts," the Panel's interpretation of the term "directs" that was limited to acts of "command" was found to be restrictive in scope. From the preceding analysis, the Appellate Body concluded that not all government acts would necessarily amount to entrustment or direction. As agreed upon by the United States and Korea alike, the Appellate Body took the view that a "mere policy pronouncement" by a government or any legitimate or inadvertent act of market regulation by public authorities would not, by itself, be equated with entrustment or direction for purposes of Article 1.1(a)(1)(iv).[8]

II. Legislations Surveyed

In its *Decision Memorandum*, the DOC considered various Korean legislations pursuant to which it determined the Korean government could entrust or direct

6) *Id*, para 110.

7) *Id*, para 111.

8) *Id*, para 114.

Hynix's lenders and the banking sector of Korea more in general to provide preferential financing aimed at the troubled chipmaker. These legislations included Prime Minister's Decree No. 408 on the Responsible Management of Financial Institutions and the Guarantee of Transparency in Financial Administration ("Prime Minister's Decree No. 408"), the Public Funds Oversight Act, and the Corporate Restructuring Promotion Act. According to the DOC, each of these legislative measures was ambiguous enough in wording and contents to enable the GOK to seize control of the Korean banking system in support of Hynix. In what follows, each of the legislations and the Panel treatment of them in the abovementioned WTO disputes, among others, will be considered in turn. Critical commentary will be attempted as appropriate in the process.

1. Prime Minister's Decree No. 408

With respect to the Prime Minister's Decree No. 408, the DOC determined in its *Preliminary Determination* that:

> For instance, the *Prime Minister's Decree* at Article 5 states that the financial supervisory agencies can request cooperation from financial institutions for the purpose of the stability of the financial market, or to attain the goals of financial policies. As noted above, the financial system in the ROK has been going through a crisis that could be the type of situation in which this exception would be applied. A further exception that would allow GOK influence over the banks is included in Article 6 of the *Prime Minister's Decree*. Article 6 states that the Minister of MOFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial institution, which was invested by the {GOK} or KDIC, can be operated independently under the direction of the Board of Directors thereof" (emphasis added). As noted above, because the GOK is part-owner in many commercial banks, an exercise of its shareholder rights could allow the GOK an opportunity to become involved in the operations of the banks.[9]

9) US DOC, *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 16766 (April 7, 2003), *available at* wais.access.gpo.gov

The DOC thus focused on Articles 5 and 6 of Prime Minister Decree No. 408 as proof of GOK direction or entrustment of Hynix's creditors. Yet the Panel was not persuaded by the agency's analysis of the decree.

In the DOC's view, Article 5 could be a potent tool for the financial supervisory authorities in requesting cooperation from financial institutions. From the Panel's perspective, however, such a request for co-operation could not objectively be adjudged to be evidence of affirmative acts of delegation or command.[10] This is because, in principle, requesting co-operation in a certain matter would be distinct from affirmatively directing or entrusting a private body for the purpose of providing a countervailable subsidy. In terms of evidence, moreover, the Panel noted that the DOC failed to adduce any evidence that Article 5 had been invoked or actually exercised in a way that enabled the GOK to entrust or direct non-public intermediaries. Instead, the DOC merely asserted that a financial crisis "could be the type of situation in which [Article 5] would be applied." As such, the Panel found the DOC analysis to be a mere hypothesis and hence insufficient in terms of probative value to establish positive acts of delegation or command by the GOK under Article 5.[11]

As for Article 6 of Prime Minister Decree No. 408, the Panel noted that the DOC's analysis primarily pertained to the legal authority of the GOK to intervene in the activities of government-owned banks through its shareholding clouts. Yet, as such analysis did not necessarily entail affirmative acts of delegation or command, the Panel rejected it as objective proof of GOK direction or entrustment in relation to Hynix.[12]

In the end, the Panel made it clear that evidence regarding simple exercise of shareholder rights by a government may not underpin a finding of entrustment or direction under Article 1.1(a)(1) of the SCM Agreement.

(hereinafter "*Preliminary Determination*"), at 16774.

10) According to the *US DRAMS* Panel, "[i]t follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction)". *US DRAMS,* para. 7.31.

11) *US DRAMS*, para 7.76.

12) *Id.* para 7.77.

1) Comments

Prime Minister Decree No. 408 was promulgated on November 13, 2000 in the midst of, as will be seen below, a sea change in the financial regulatory regime and milieu of Korea in the aftermath of the liquidity crisis in 1997. The chief purpose of the Decree was to prohibit undue involvement of government officials in the management operations of Korean banks.[13] The decree specifically bars government officials working in MOFE and FSC, among others, from meddling with the fiscal operations of all banks whether they are commercial or specialized.[14]

In the context of WTO dispute settlement, the Decree was also considered in *Korea-Measures Affecting Trade in Commercial Vessels*.[15] In that case, the EC claimed that while Article 6 of the Decree purports to guarantee the independence of banks in which the Government of Korea has ownership, Article 5 specifically requires these banks to co-operate with the GOK "for the purpose of stability of the financial market" and "to attain the goals of financial policies." Under the decree, governmental instructions to these ends can be given orally or by telephonic means.

As maintained by Korea, on the other hand, a government is obliged to enforce financial policies related to ensuring stability of the fiscal markets. Financial institutions, in return, are expected and, on occasion, statutorily required to comply with legitimate public policies aimed at normalizing the markets. Seen in this context, Article 5 of the Prime Minister's Decree was but a legislative provision authorizing the Government of Korea to adopt and implement financial policies. Unlike the EC claim, moreover, the Decree was enacted to ensure independence of the banks in which the GOK came to acquire an ownership stake. In this regard, Korea pointed out that the Prime Minister's Decree embodied the commitment of the Government of Korea to the IMF that:

> In the interim [i.e., pending re-privatization of government-owned commercial

13) The decree was published in the Korean official gazette (Instruction No. 408, November 2000, to be effective immediately).

14) Violations of this order are sanctioned under the Government Officials Act that penalizes disregarding orders from superiors. *See* Hynix, *Initial Arguments on the Directed Credit Issue in DRAMs from Korean — CVD Investigation* (March 2003), at 27-28.

15) Panel Report, *Korea-Measures Affecting Trade in Commercial Vessels* (WT/DS273/R), 7 March, 2005, *available at* http://docsonline.wto.org (hereinafter "*Korea Shipbuilding*"), paras 7.389-7.393.

> banks], banks will be operated on a fully commercial basis and the government will not be involved in the day-to-day management of the banks.[16)]

The decree, accordingly, was never meant to be an apparatus for governmental control of the banking and financial sector in Korea.

From the Shipbuilding Panel's standpoint, there was no hint or suggestion in the Decree itself that it was intended to confer on the government any power to compel reluctant banks to participate in corporate restructuring. Rather, the primary aim of the Decree was ensuring the stability of the financial markets as envisaged in Article 1.[17)] Article 1 provides that the basic rationale for the Decree is to "procure that the Government shall go through objective and transparent formalities in *establishing financial policies or conducting supervision over financial institutions*, and to exclude unfair outside intervention in management of financial institutions, etc. so that financial institutions, etc. can operate their businesses more independently, taking more responsibility."[18)] The Panel further noted that pursuant to Article 5.1 of the Decree, "[i]f the Financial Supervisory Agencies request cooperation or assistance of Financial Institutions, etc. *for the purpose of stability of the financial market*, etc. (excluding the request for data in relation to routine management activities), such request shall be made in writing or through a meeting."[19)] Even though Article 5.2 provides that in cases of urgency such request may be made orally or by phone, it further provides that "[i]n this case, the Financial Supervisory Agencies shall notify such request to the relevant Financial Institutions, etc. in writing without delay."[20)] Upon review of the legislative texts, the Panel concluded that pursuant to the Decree, the GOK could, at least in certain circumstances, induce private banks to carry out actions related to securing and maintaining stability in the financial markets. In the view of the shipbuilding Panel, however, the EC failed to establish that such "stability" was linked to the corporate restructuring of shipyards,

16) Annex to Korea's 13 November 1998 Letter of Intent to the IMF as quoted in *Id.*

17) In this respect, the *Korea-Shipbuilding* Panel found it "difficult to conceive of any country that does not have a legislative or regulatory framework enabling the government to intervene in the market for the purpose of maintaining financial stability". *Id.* footnote 225.

18) *Korea-Shipbuilding*, para 7.39 (emphasis original).

19) *Id.* (emphasis original).

20) *Id.*

if at all.

In the final analysis, the Panel opined that "the issue of entrustment or direction does not have to do with a government's power, in the abstract, to order economic actors to perform certain tasks or functions. It has instead to do with whether the government in question has *exercised* such power in a given situation subject to a dispute."[21] In this regard, not unlike the DRAMS Panel, the Panel noted that EC failed to proffer any evidence that the Prime Ministerial Decree No. 408 was in fact relied on, invoked or used by the GOK for the purpose of directing or entrusting private bodies in a restructuring context. Accordingly, in and of itself, the Prime Ministerial Decree No. 408 could not amount to evidence of GOK entrustment or direction with respect to any private intermediary. To sum up, with respect to the Prime Ministerial Decree, both the *DRAMS* and *Shipbuilding* Panels did not consider it as concrete proof of GOK direction or entrustment of any private entity in contravention to the SCM Agreement.

2. Public Funds Oversight Act

Another piece of Korean legislation probed by the USDOC in their CVD investigation of Hynix was the Public Funds Oversight Act ("PFOA"). With respect to the PFOA, the US determined that:

> The DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the government (Memoranda of Understanding or MOUs) in exchange for the massive recapitalizations they received from the government. These MOUs provided the government with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks. The MOUs specify financial soundness, profitability, and asset quality targets, and include a detailed plan for implementation …
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> In particular, MOUs allowed the GOK to require that the bank management be changed or the bank be restructured such that employees can be fired, the bank

21) *Id.* para 7.392 (emphasis original).

can be restructured, or the KDIC can order that the bank be merged with another healthier bank. Many of Hynix s creditors, suffering from capital shortages and seriously over-exposed with respect to Hynix, had no choice but to accept the strict requirements of the MOUs. These legislatively-mandated contractual agreements provided the GOK with substantial control in directing credit to Hynix.[22]

The DOC thus found that the use of MOUs allowed the GOK to set various financial targets, and review their implementation. The Panel, however, found that the DOC gave undue weight to these MOUs. From the Panel's standpoint, even assuming *arguendo*[23] that the DOC was correct in determining that the GOK had relied on the MOUs to become "directly involved in the fiscal operations of the bank," the DOC failed to adduce any evidence that such involvement in fact exceeded ensuring compliance with the applicable targets, or otherwise resulted in government entrustment or direction of a private proxy. Accordingly, the DOC treatment of the PFOA could not be considered as establishing an affirmative act of delegation or command by the Korean government with respect to any Hynix creditor.[24]

1) Commentary

In the wake of the liquidity crisis in 1997 that left the whole country paralyzed, the Government of Korea came to acquire temporary equity ownership in several banks with no previous affiliation or ties to it.[25] In the process, the GOK entered into MOUs with certain banks in which the injection of public funds bestowed on the GOK a majority ownership.[26] In a written submission to the EC, the GOK went through the rationale for the MOUs in the following vein:

In the aftermath of a serious financial crisis, the GOK needed to inject public

22) *The First Written Submission of the U.S. in US DRAMS* (May 2004) (hereinafter "*U.S. First Written Submission*), paras 82-83.

23) Meaning "for the sake of argument".

24) *US DRAMS*, para 7.78.

25) See Statement by Korea in *US DRAMS*.

26) The injection was mostly done through Korea Depository Insurance Company ("KDIC").

> funds into certain commercial banks. This need for the GOK to become a substantial shareholder in various banks, however, has not changed the day-to-day management of those banks. The GOK enacted laws and regulations to guarantee the independence of the banks. In doing so, the GOK has been working to strengthen bank independence and to build firewalls to prevent any improper government interference in the day-to-day decisions of the banks. That is why there are explicit rules prohibiting government officials from interfering with banks' lending decisions. That is also why there are explicit rules holding bank officials responsible for loan decisions that do not have a commercial basis.
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> […] These MOUs do not allow the GOK to control the day-to-day decisions of the banks. Rather, the MOUs provide a framework for evaluating broader performance measures at the banks. Once the MOU is executed, as long as the banks maintain their operational goal, the GOK is prohibited from getting involved in the day-to-day operation, and in November 2000, such decision was formally instituted by the Prime Minster's Decree.[27)]

As the above demonstrates, the aim of the MOUs was not to confer on the GOK any decision-making power concerning individual credit decisions, but to ensure non-interference by the government in the decision making process of the bank involved. In addition, at the core of the post-1997 reform was the recognition that independent supervision, not government direction, was in order for all financial sectors.[28)] To this end, an independent FSC was created to consolidate and improve supervision of financial institutions. Prior to the 1997 crisis, supervision of these institutions was mainly in the hands of the Minister of Finance and Economies ("MOFE"). Starting in 1998, regulatory control sifted away from MOFE to FSC and to other independent regulatory agencies including the Final Supervisory Services ("FSS"), the supervisory arm of FSC.[29)]

27) Government of Korea, *Additional rebuttal comments of the Government of Korea on the Commission's provisional determination in the anti-subsidy investigation concerning imports of DRAMs from Korea* (May 2003), at 9.

28) Hynix, *Initial Arguments on the Directed Credit Issue in DRAMs from Korean — CVD Investigation* (March 2003), at 28-29.

29) FSC took the lead in evaluating banks, and ordering failed banks to close. The FSC also acted to begin the

3. The Corporate Restructuring Promotion Act

The last legislation considered by the U.S. in their CVD proceeding was the Corporate Restructuring Promotion Act (CRPA). With respect to the CRPA, the USDOC found that:

> [d]ecisions made by the October Creditors' Council were subject to the newly enacted CRPA. Under this Act, banks holding 75 per cent of a company's debt may set the financial restructuring terms for all of a company's creditors. Hynix' government-owned and controlled creditors accounted for a substantial majority of [Hynix's] outstanding debt at that time, an amount sufficient to set the terms for all banks ....[30)]

In the DOC's view, within the framework of the CRPA, the GOK could coerce Group C creditors (that is, private creditors) into taking part in the October 2001 restructuring of Hynix because this particular group was at the whim of the Creditors' Council which in turn was dominated by Group A and B creditors (owned or controlled by the GOK).[31)]

According to the Panel, there were two main issues to be considered in respect of the CRPA. The first issue was whether the DOC could properly have found that the Creditors' Council was in fact controlled by Group A and B creditors by virtue of holding at least 75 percent of the voting rights. The second issue was whether there was a proper evidentiary ground to sustain the DOC finding that Group C creditors were constrained by decisions of the Creditors' Council lacking, as a result, any meaningful ability to make volitional commercial decisions.[32)]

As for the first issue, the Panel found a disparity between the pertinent record evidence and the DOC finding that groups A and B held at least 75 per cent of the

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process of developing and implementing stricter prudential regulations, and creating a new watchdog agency (i.e. FSS) to implement these new regulations and policies.

30) *Decision Memorandum*, page 54.

31) The DOC found that the financial contributions for Hynix were provided by public bodies (Group A creditors including Korea Development Bank ("KDB")), by a number of private, yet GOK owned or controlled banks (Group B Creditors including Korea Exchange Bank), and by private entities (Group C creditors including Kookmin). *See US DRAMS*, para 7.8.

32) *US DRAMS*, paras 7.80-7.89.

votes.[33] Accordingly, the DOC finding was found devoid of substantial evidentiary grounds.[34]

As for the second issue, the gist of the USDOC's contention was that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors."[35] In respect of this particular finding, the Panel paid close heed to the fact that creditors were given three options[36] to choose from, and that four creditors[37] from Group B and C had exercised their appraisal rights pursuant to the third option crafted by the Creditors Council. In addition, the Panel criticized the DOC for overlooking the record evidence that, under the terms of the CRPA, the dissenting creditors were entitled to decline the terms of payment and "buy out" price put forward by the Creditors' Council if they were unreasonable or otherwise deemed unacceptable.

On the basis of these considerations, the Panel rejected the US determination that the government-owned and controlled creditors could dictate the terms of the October 2001 restructuring of Hynix.

1) CRPA (EC)

In *EC DRAMS*, the Panel noted the EC finding that the CRPA had been enacted in August 2001 with a view to streamlining corporate restructuring through a majority voting procedure. Before the enactment of the CRPA, corporate restructuring in Korea was based on private agreements entered into between the

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33) According to a document prepared by the US Embassy in Seoul at the request of the DOC, those "institutions where [GOK] is the first shareholder" held 63.3 per cent of the voting rights. Furthermore, during the US DRAMS proceeding, the US reported that the share of the Creditors Council vote held by Group A and B creditors at the time of the October 2001 restructuring was "above 65 [per cent]." *US DRAMS*, para 7.81.

34) *Id.*

35) *Id.* para 7.82.

36) Each creditor could choose from the following three options: (1) extend new loans, convert a majority of their debt to equity, and extend maturities on the remainder; (2) refuse to extend new loans, convert a smaller portion of their debt to equity, and forgive the remainder; or (3) exercise appraisal rights against their outstanding debt based on the liquidation value of the company, as determined by an independent auditor, and walk away. *See Decision Memorandum*, at 20.

37) They are Korea First Bank, Kwangju Bank, Kyungnam Bank, and HSBC.

distressed company and their creditor banks. At the time of the October 2001 Restructuring Programme, on the contrary, the Panel found that a government-driven policy entrenched in the framework of the CRPA had "considerably circumscribed the options of dissenting creditors."[38)]

2) Appellate Body Findings

As noted above, the USDOC found in the case below that, under the CRPA, creditors holding three-fourths of a firm's outstanding debt could set and foist the terms of restructuring on all of that firm's creditors. During the Panel proceeding, Korea disputed this DOC finding by adducing evidence that, under Article 29 of the CRPA, three creditors of Hynix had actually exercised their mediation rights for the purpose of being "bought out by other creditors at a price determined through mediation."[39)] The Panel was receptive to the claims of Korea under the CRPA based on said evidence. The Appellate Body, however, reversed the Panel finding by noting that the evidence at issue was not part of the universe of evidence before the USDOC (that is, it was non-record evidence). As a result, the Appellate Body found the Panel to have failed in undertaking "an objective assessment of the matter before it" as required under the pertinent provisions of the Dispute Settlement Understanding.[40)]

3) Comments

Enacted in August 2001,[41)] the CRPA is a Korean law providing a statutory framework for corporate restructurings and out-of-court workouts under a creditor financial institutions' council.[42)] Under the CRPA, the main creditor bank, "which is chosen *by the creditors themselves* without direction or control by the GOK" runs the

38) *EC DRAMS*, para 7.12.

39) *DRAMS AB Report*, para 171.

40) *Id.*, para 179.

41) The CRPA was initially enacted as a temporary, stop-gap measure and expired at the end of 2005. On 3 August, 2007, the CRPA was re-enacted with validity period until 31 December, 2010.

42) *See* Clearly and Gottlieb, *Restructuring News Letter* (December, 2004), *available at* http://www.cgsh.com/files/tbl_s47Details%5CFileUpload265%5C302%5CCGSH_Restructuring_Newsletter_Dec_2004.pdf.

creditors' council and spearheads the corporate restructuring efforts.[43] In the event of discord among the creditors, a Creditor Financial Institutions Mediating Committee ("Committee") consisting of private experts in corporate restructuring, can be set up to serve as a mediator.[44]

Any role for government under the CRPA?

Under the CRPA, no statutory authority is conferred on any government agency. In addition, mediating or observing functions under the Act exclusively belong to the Committee, not to any public authority. Article 31 of the CRPA provides that a Committee, which is made up of seven professionals, may be formed for the purpose of implementing the effective reorganization of the distressed company and for ironing out or mediating differences in opinion within the creditors group.

Furthermore, the government has no role to play in enforcing the CRPA or any decisions made thereunder by the Creditor's Council. In terms of minority protection, any creditor financial institution that takes issue with the Committee's decision can subsequently seek mediation or judicial review.[45]

4. Further Note on Legislation in the Context of Financial Reform

In their respective final determinations, the U.S. and E.C. both determined that technically insolvent, yet viable companies such as Hynix should have been allowed to go bankrupt.[46] At least the Panel in *US-DRAMS* questioned the wisdom of this common finding by taking the view that, unlike what the DOC had found, certain of

43) Hynix, *Case Brief in DRAMs from Korea — CVD Investigation* (May 2003), at 14 (emphasis original).

44) *See generally* GOK, *Supplemental Questionnaire Response in the DOC CVD investigation of Hynix* (2003), at 59-66.

45) In respect of mediation rights, Article 29(5) of the CRPA provides:

"[w]here the consultation under paragraph (4) is not attained, the mediation committee under Article shall make a decision on the price of purchase or redemption of claims and conditions thereof. In such case, the mediation committee shall take into consideration the price computed by an accounting specialist selected under a consultation between the council and opposing creditors by evaluating the value of the relevant enterprise with insolvency signs and the possibility for implementing the agreement, as well as the situation of funds of purchase institutions".

46) For instance, the EC stated that: "(t)he European Communities does not consider that what happened to Hynix happened according to the normal application of generally applicable bankruptcy laws" *See* para. 556 of the *First Written Submission* of the EC in *EC DRAMS*.

Hynix's creditors were not directed or entrusted by the Korean government to financially prop up Hynix. Yet the Appellate Body subsequently reversed this Panel ruling reinstating thereby the initial U.S. view on the issue. In so doing, the Appellate Body seems to have implicitly acknowledged and endorsed the notion that the proper antidote for ailing companies even with reasonable prospects of viability such as Hynix,[47)] was the U.S.-style liquidation, rather than any form of corporate restructuring. However, it is suggested that such proposition is troubling for the following reasons.

First, the problem with such view is that it does not accurately reflect or accord with what happened in Korea in terms of corporate restructuring subsequent to the financial crisis in 1997.[48)] Especially in respect of restructuring *chaebol*,[49)] Korea has heavily relied on corporate reorganization and out-of-court workout procedures, rather than liquidation. More specifically, among the firms that went insolvent in 1997, the vast majority of the top thirty *chaebol* entered into the corporate reorganization procedure. With the introduction of a government-initiated out-of-court workout procedure in 1998, the workout program gained extra momentum and became the most prevalent form of restructuring for large *chaebol*. By 1999, most of the new bankruptcies (in terms of assets) were now handled through out-of-court procedures.

In this connection, it is also noted that Korean bankruptcy law generally favours corporate reorganization over liquidation. As Mikyung Yun alludes to: "Between corporate reorganization and composition, the former is favored to the latter. This is apparent from the priority the court gives to corporate reorganization. Once a corporate reorganization is approved, application for composition or bankruptcy cannot be filed. Further, application for corporate reorganization overrides

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47) In this regard, Citibank, Hynix's financial consultant during 2001, stated that "it decided to stay involved with Hynix because it *could get a better recovery value if they stayed involved with Hynix for the long haul*. Moreover, Citibank still thought Hynix could be a viable going concern, which is why Citibank decided to invest more funds as part of the October restructuring …. According to Citibank officials, although its investment decisions in Hynix did not work out, Citibank made its decisions to invest following Citibank's standard investment procedures and based completely on commercial considerations". Korea, *First Written Submission* in *US DRAMS* (April, 2004) (hereinafter "*GOK First Written Submission*"), para. 534 (emphasis original).

48) *See* Haggard, Lim and Kim, et al. *Economic Crisis and Corporate Restructuring in Korea* (2003), at 211-16.

49) A "chaebol" is a Korean term for a conglomerate of several companies clustered around a single holding company.

composition, even if the latter has already been applied for or is in process."[50] The same point is reinforced by James L. Garrity and Karen P. Ramdhanie when they state that: "… in Korea the perception continues that bankruptcy and, to a lesser extent, reorganization are socially unacceptable."[51]

Second, the US view that "technically insolvent" companies should be liquidated, rather than restructured or reorganized as in the case of Hynix is problematic in that it accords undue supremacy to one form of corporate reorganization over another.[52] Also, in the absence of any definitive determination or pronouncement at an international level that Korea's choice of corporate restructuring or out-of-court workout as the prime vehicle for revamping large conglomerates was incompatible *per se* with established international norms or legal obligations, such view lacks legal coherence and force. In this regard, it is noted that corporate reorganization in Korea in general and the CRPA in particular were modelled after the "London Approach" to corporate work out procedures. This particular approach to management normalization was recommended to Korea by the IMF as a way of trailblazing reform in the wake of Korea's liquidity crisis.[53] As Korea pointed out in the *US DRAMS* proceeding:

> Partly because of the cumbersome nature of Korea's bankruptcy laws, the Korean government has often employed a restructuring process that is outside the judicial system known as the London Approach. Developed in the United Kingdom over the last 25 years as a non-statutory market-led system for corporate workouts, the London Approach has been widely used in the United Kingdom since the early 1990s to rejuvenate distressed companies. The London Approach has been useful for solvent companies facing a cash flow

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50) Mikyung Yun, *A Primer on Korean Bankruptcy Law*, Am. Bankruptcy Inst. J. (June 1999).

51) James L. Garrity and Karen P. Ramdhanie, *Korean Bankruptcy Law: the Heavy Duty Hypothetical Applied*, New York L. J. of Int. & Comp. L. (1997), at 281.

52) In addition, what is problematic with such US-EC view is that "under such theory, a reasonable investor only looks at narrow financial indicators. This view thus precludes a reasonable investor from considering broader economic factors. The US view also precludes a reasonable investor from having a different perspective as an "inside investor." For example, under their view, a bank that has a large amount of outstanding debt is not allowed to consider the effect of a new loan on the probability of recovering the existing loan. Given the rather narrow focus of the U.S.-style "reasonable investor," that investor is almost applying a *per se* rule." *See* Korea, *Answers to the Panel Questions* (July 2004) in *US DRAMS*, at 5.

53) The "London Approach" has been implemented in several countries with less developed bankruptcy systems

> crisis and is voluntary. As described by Michael Smith of the Bank of England, "The London Approach … is flexible framework which enables banks and other interested parties to reach well-based decisions about whether and on what terms a company in financial difficulty might be allowed to survive." The London Approach has been used in corporate restructuring in Korea because of its advantageous features, such as flexibility, and because it avoids an actual bankruptcy for the distressed firms. An additional advantage is that the approach leads to fewer workers being laid off and hence a lower rate of unemployment than would otherwise be the case.[54]

Hence, just because Korea chose a particular restructuring model provides no ground or reason to "condemn this approach to corporate workouts, which was deemed a more efficient and less costly alternative to traditional bankruptcy proceedings."[55]

III. Related Legal Instruments - Securities Prospectuses

In addition to the legislations considered above, in support of its finding that Korea could and indeed did influence the lending behavior of privately held banks, the USDOC considered the conduct of Kookmin Bank. According to the US, this particular bank, which had less than 10 percent government ownership,[56] admitted in sworn disclosure documents to the U.S. Securities and Exchange Commission ("SEC") that its lending decisions could be subject to government influence. More specifically:

> (I)n September 2001, Kookmin Bank and Housing and Commercial Bank (two Hynix creditors that were merging to form the New Kookmin during the period of investigation) filed a prospectus with the SEC. Kookmin

where "voluntary workouts organized by creditors often preserve more value for the creditors than forced bankruptcies and liquidation of the debtor's assets". *See* para. 336 of *GOK First Written Submission*.

54) Robert F. Emery, *Korean Economic Reform* 140 (2001), quoted in *Id.*, at 567.

55) *Id.*

56) During the period of DOC investigation, Kookmin was 65% foreign owned.

acknowledged in the Risks Relating to Government Regulation and Policy Section of this prospectus:

> *The Korean government promotes lending to certain types of borrowers as a matter of policy, which New Kookmin may feel compelled to follow ….* In addition, the Korean Government has, and will continue to, as a matter of policy, attempt to promote lending to certain types of borrowers. It generally has done this by identifying qualifying borrowers and making low interest loans available to banks and financial institutions who lend to those qualifying borrowers. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with New Kookmin's credit review policies. *However, we cannot assure you that government policy will not influence New Kookmin to lend to certain sectors or in a manner in which New Kookmin otherwise would not in the absence of the government policy.*

In June 2002, Kookmin made another submission to the SEC in anticipation of the issuance of American depository shares (ADS s) coordinated by Goldman Sachs. This submission contained language virtually identical to the first prospectus:

> *The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow.* The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. *It generally has done this by requesting banks to participate in remedial programs for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors.* The government has in this manner promoted low-income mortgage lending and lending to *high technology companies.* We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. *However, government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy.*[57)]

According to the US submission, all companies entering the U.S. securities

markets are required to file a prospectus regardless of nationality. The purpose of such prospectus is to warn prospective investors of all material risks associated with their contemplated investment. According to the US, the SEC mandates the use of "plain English" in the issuance of prospectuses. Namely, prospectuses are to be drafted in such a way that all risk factors are articulated in a "clear, concise and understandable" manner.[58] In deference to this SEC approach, the DOC undertook its review of the Kookmin prospectuses on a "plain reading" of the language used therein.[59]

The Panel, however, was not persuaded that a plain reading of the two Kookmin prospectuses somehow bore out GOK entrustment or direction in respect of any Hynix creditor. Rather, a plain reading of those documents indicated that "the GOK has sought to promote lending to certain types of borrowers, and that it had done so by requesting banks to participate in remedial programmes, and making low interest loans available to them" as appropriate.[60]

According to the Panel, what was plain in the prospectuses was that the GOK pursued certain fiscal policies by means of requests to banks to provide low interest loans. In the Panel's opinion, such conduct entailed a legitimate form of government prudential policy, as opposed to an affirmative act of delegation or command within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Accordingly, an objective and impartial investigating authority could not have found that the language of the two Kookmin prospectuses reasonably evidenced GOK entrustment or direction for the benefit of Hynix.[61]

In addition to the Kookmin prospectuses, USDOC considered Form 20-F submitted to the SEC by Woori Finance Holdings Co. ("WFHC") in September 2003 in their first CVD administrative review on Hynix DRAMS.[62] Woori Bank, which is a subsidiary of WFHC, participated in the May 2001 restructuring measure (by purchasing convertible bonds) and in the October 2001 restructuring program (in the

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57) *U.S. First Written Submission*, paras 70-71 (emphasis original).

58) *US DRAMS*, para 7.163.

59) *Id.*

60) *Id.*, at 7.164.

61) *Id.*

62) U.S. Department of Commerce, *Issues and Decision Memorandum for the Final Results in the First Administrative Review of the Countervailing Duty Order on DRAMS from Korea*, 71 FR 14174 (March 21, 2006), *available at* wais.access.gpo.gov (hereinafter "*First CVD Review*").

form of new loans and debt swapped for equity) of Hynix.[63)]

In respect of GOK pressure to lend to certain strategic industries, WFHC's Form 20-F included a statement to the effect that:

> The KDIC, which is our controlling shareholder, is controlled by the Korean government and could cause us to take actions or pursue policy objectives that may be against your interests. The Korean government, through the KDIC, currently owns 86.8% of our outstanding common stock. So long as the Korean government remains our controlling stockholder, it will have the ability to cause us to take actions or pursue policy objectives that may conflict with the interests of our other stockholders. For example, in order to further its public policy goals, the Korean government could request that we participate with respect to a takeover of a troubled financial institution or encourage us to provide financial support to particular entities or sectors. Such actions or others that are not consistent with maximizing our profits or the value of our common stock may have an adverse impact on our results of operations and financial condition and may cause the price of our common stock and ADSs to decline ….[64)]

WFHC's 20-F further states in terms of risks relating to government regulation:

> The Korean government promotes lending and financial support by the Korean financial industry to certain types of borrowers as a matter of policy, which financial institutions, including us, may decide to follow. Through its policy guidelines and recommendations, the Korean government has promoted and, as a matter of policy, may continue to attempt to promote lending by the Korean financial industry to particular types of borrowers. For example, the Korean government has in the past announced policy guidelines requesting financial institutions to participate in remedial programs for troubled corporate borrowers, as well as policies identifying sectors of the

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63) Hanvit Bank, the predecessor of Woori Bank, received a capital injection of 2.7644 trillion KRW from the KDIC, a government-affiliated organization, in the form of stock holding. Later, all of the KDIC shares were transferred to WFHC in April 2001, and the bank became a subsidiary of WFHC. As of 2001, WFHC was 100 percent owned by the KDIC, and the KDIC indirectly held full ownership of the bank through the holding company. Hanvit Bank changed its name to Woori Bank in May 2002.

64) *First CVD Review*, at 54531.

> economy it wishes to promote and making low interest funding available to financial institutions that lend to these sectors. The government has in this manner encouraged low-income mortgage lending and lending to small- and medium-sized enterprises and technology companies. We expect that all loans or credits made pursuant to these government policies will be reviewed in accordance with our credit approval procedures. However, these or any future government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of that policy.[65)]

According to the USDOC, WFHC's SEC disclosure was a smoking-gun proof of GOK control of GOK-owned or controlled banks with respect to their lending decisions involving Hynix in that such filing is "subject to stringent transparency rules designed to protect investors, and the veracity of the accompanying statements entails serious litigation and liability risk for the company."[66)]

Interestingly, WFHC's 20-F was also considered in Japan's recent CVD investigation involving Hynix.[67)] In that case,[68)] in light of this disclosure document and others, the Japanese Minister of Finance ("MOF") found it probable that the policy of GOK could influence the credit decisions of commercial banks. Especially where the GOK is the controlling shareholder, the MOF determined, the GOK could cause the bank to pursue certain policy objectives that might collide with the interests of non-government stakeholders. Based on these facts on the record, the MOF found a legal framework in Korea under which the government could lord it over individual banks and their lending activities.[69)]

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65) *Id.*

66) *Id.*, at 54531.

67) The Final Determination with respect to the Investigation under Article 7, Paragraph 6 of the Customs Tariff Law (Law No. 54 of 1910) (Ministry of Finance Notification No. 352 of August 4, 2004) on DRAMS from the Republic of Korea (hereinafter "*MOF Final Determination*") announced in Cabinet Order No. 13 and Ministry of Finance Notice No. 35, published respectively in Issue No. 4264 and Special Issue No. 17 of the Official Gazette dated 27 January 2006.

68) Japan launched an anti-subsidy investigation against the GOK and Hynix in August 2004 and issued a final affirmative determination in early January, 2006 making it Japan's first countervailing duties.

69) *Id.* paras 85-87.

1. Appellate Body finding on the Kookmin Prospectuses

During the Appellate Body proceeding, the U.S. contended that the Panel had employed a "piecemeal approach" to analyzing the DOC finding on direction and entrustment as exemplified by the Panel treatment of the Kookmin prospectus.[70)] In the Appellate Body's view, on the basis of the admission by Kookmin Bank that "government policy" might lead it to extend loans that it otherwise might not offer, and also given the existence of an ongoing GOK policy to save Hynix,[71)] the Panel should have considered, as did the USDOC, whether the Kookmin Bank prospectuses could be considered relevant in the context of the totality of all evidence,[72)] rather than in isolation or by itself.[73)]

2. Comments on the Kookmin Prospectus

As has been noted, the US DRAMS Panel refused to consider the Kookmin Prospectus as tangible proof of GOK direction or entrustment of Hynix creditors. The Appellate Body, on the other hand, castigated the Panel for not strictly following the holistic approach of the DOC to record evidence whereby the prospectus was to be evaluated as but an element of the universe of evidence before the agency. Yet what the Appellate Body failed to observe in this regard is that despite Kookmin's issuance of the prospectus in September 2001, Kookmin, in fact, did not participate in the October 2001 restructuring of Hynix by refusing to extend any additional new loans. As such, in so far as the October restructuring is concerned, Kookmin's actual

70) *DRAMS AB Report*, para 20.

71) For instance, in its published determination, the DOC stated:

[t]he GOK had a policy to prevent Hynix' failure. The GOK attached such great importance to Hynix' survival because it feared that the company's collapse would have serious repercussions for the ROK's corporate, labour and financial markets, and because Hynix was part of an industry sector considered to be of 'strategic' importance to the GOK. *Decision Memorandum,* at 37.

72) In this respect, the Appellate Body noted that:

(R)equiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence. *DRAMS AB Report,* para 150.

73) *Id.*, para 155.

actions belie the DOC determination that the prospectus constituted "direct evidence of an explicit and affirmative command by the GOK to Hynix creditors."[74)]

In the WTO dispute settlement context, the Kookmin prospectus was also considered in *Korea-Shipbuilding*. In that case, Korea contended that Kookmin's statement in the prospectus pertained to GOK promotion of low-income mortgages and lending to technology companies, not to the shipbuilding sector. In support of this claim, Korea submitted a letter from Kookmin's lawyers[75)] explaining that the prospectus "does not state, nor was it intended to imply, that the Korean government exercises control over the banking sector generally or over bank lending decisions either generally or with respect to particular borrowers such as Hynix."[76)]

In reviewing the prospectus language itself, the shipbuilding Panel accepted Korea's claim that it was actually made in respect of GOK promotion of low-interest mortgages and loans to technology firms. In the view of the Panel, therefore, the prospectuses did not prove that Kookmin was led or coerced by the government into the restructuring of shipyards. In addition, the Panel pointed out that the prospectus referred to GOK "requesting" banks to take part in remedial measures for distressed corporations. In the absence of any other probative material, the Panel opined, a mere government "request" will not amount to entrustment or direction, since such request lacks the requisite elements of delegation or command.[77)]

IV. Conclusion — Implications

According to the FSS, a total of eight Korean corporations are listed on the New York Stock Exchange ("NYSE") as of March, 2007.[78)] They are: POSCO, SK Telecom, Korea Telecom, Kookmin Bank, WFHC, LG Philips LCD, Shinhan Financial Holding Group ("SFHG"), and Korea Electric Power Corporation. The number of financial institutions among these NYSE traded Korean entities is three consisting of Kookmin, arguably the largest commercial lender in Korea,[79)] WFHC

74) *First Written Submission of the GOK in US DRAMS*, para 439.

75) The law firm of Cleary Gottlieb.

76) *Korea-Shipbuilding*, para 7.396.

77) *Id.* para 7.397.

78) FSS, *Press Release* (March 2007), *available at* http:// www.fss.or.kr.

and SFHG the respective subsidiary banks of which form the Big Four together with Kookmin and Hana Bank.[80)]

As has bee noted above, Kookmin and WFHC stated in their respective SEC disclosures that government influence can shape the contours of their lending decisions. As for Shinhan Bank, which forms part of SFHG, the EC has recently determined in the context of Hynix's October 2001 restructuring programme that the GOK was capable of wielding "considerable influence" over the bank as its largest shareholder holding more than 18% equity stakes.[81)] Given the status and size of these financial institutions, it should come as no surprise that the banking and financial sector of Korea can be considered susceptible to governmental pressure and control in the eyes of international investors, particularly in the area of lending policy related to technology firms.[82)]

Aside from the commercial banks, the U.S. has expressed concerns about the role played by policy lending banks in government support of selected Korean industries. In the view of the U.S., the participation of these banks, among which the KDB in particular, in the Hynix restructuring signaled GOK support for the ailing chipmaker.[83)] Determined to be a public body by the US and EC trade remedy authorities alike,[84)] the KDB has been active in its support to "foster technology-

79) Bloomberg News, *South Korea's Biggest Lender Gets Bigger*, available at http://www.dbs.com/newsroom/2002/press020326.html.

80) See Moon Ihlwan, *South Korea — A Great place to be a Bank*, *available at* http://www.businessweek.com/magazine/content/05_45/b3958131.htm.

81) European Council, *COUNCIL REGULATION (EC) No 584/2006 of 10 April 2006 amending Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, available at* europa.eu.int/eur-lex/en/oj, recital 20.

82) In connection with possible GOK direction of credit for Korean financial institutions, the DOC recently took the view that, in 2004, "GOK influence may have been directed at LG Card", a credit card company operating in Korea. This view was based upon Kookmin's SEC filing that "in light of the financial market instability in Korea resulting from the liquidity problems faced by credit card companies during the first quarter of 2003, the Korean government announced temporary measures intended to provide liquidity support to credit card companies". *See* DOC, Issues and Decision Memorandum for the Final Results in the Second Administrative Review of the *Countervailing Duty Order on Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 72 FR 7015 (February 14, 2007), available at wais.access.gpo.gov, at 25.

83) *First CVD Review*, at 54532.

84) For example, KDB was determined by the USDOC to be a public body because: 1) its shares are wholly owned by the GOK, 2) the bank's purpose is to supply and manage major industrial funds with a view to promoting

intensive industries including semiconductors."[85] In respect of Hynix, the KDB participated in both the May and October 2001 remedial measures while implementing a bond-purchase program which was found *de facto* specific to Hynix and Hyundai Group in general.[86] With respect to the KDB, the US Trade Representative ("USTR") noted in their recent annual report that:

> More specifically, the U.S. Government has expressed concerns about the role played by the government-owned Korea Development Bank (KDB) in supporting certain Korean industries. Historically, the KDB, which as a government-owned entity is not necessarily bound by the same constraints as commercial institutions, has been one of the government's main sources for policy-directed lending to favored industries. U.S. industries have reported that lending and equity investments by the KDB have contributed to overcapacity in certain Korean industries. The U.S. Government will continue to monitor the lending policies of the KDB and other government-owned or affiliated financial institutions.[87]

Lessons for Korea here would be, first of all, minimizing "government intervention that impedes commercialization."[88] In this respect, the Korean government might find it necessary to completely privatize the commercial banks in which it had acquired an ownership stake to varying degrees in the aftermath of the 1997 crisis, since such privatization will signal an affirmative step towards

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the overall well-being of the Korean economy; 3) the government is heavily involved with its day-to-day management. *See Decision Memorandum*, p. 16.

85) Available at http://www.kdb.co.kr. In this respect, Article 18.2 of the KDB Act provides in pertinent part that the KDB may "lend funds which are to be employed in the development of high-technology for major industries …."

86) Referring the KDB Fast Track/Debenture Program. The EC determined the program to be *de facto* specific to Hynix in the meaning of Article 3(2)(c) of the basic Regulation because: i) the program was predominantly used by Hyundai Group companies including Hynix; ii) Hynix had used more than 40 percent of the funds available under the program. *See* European Council., *COUNCIL REGULATION (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, available at* europa.eu.int/eur-lex/en/oj/, recital 65.

87) USTR, *The National Trade Estimate Report on Foreign Trade Barriers* (2007), at 362.

88) Thomas Byrne, *The Korean Banking System Six Years after the Crisis, available at* http://www.keia.org/2-Publications/2-2-Economy/Economy2004/Byrne.pdf.

remedying the unfortunate perception that the GOK is still tinkering with the lending decisions of privately held commercial lenders.[89] In respect to the policy lending banks, there have been recent press reports that talks are under way to turn the KDB into a holding company and then have it privatized eventually in due course.[90] If implemented, these steps will certainly go a long way towards transforming the image of the KDB as an executor *par excellence* of GOK financial policies and economic mandates.

KEY WORD: Hynix, Corporate Restructuring, Korean Liquidity Crisis, World Trade Organization

89) A prime example here would be Korea Exchange Bank, the lead bank on Hynix's Creditors Council. During the period of DOC investigation, the KEB was majority owned by the GOK. In 2004, however, Lone Star, a private equity fund in Texas, U.S., became the bank's majority shareholder by purchasing 51 percent of KEB shares.

90) *Available at* http://news.mk.co.kr/newsRead.php?year=2007&no=117642.