

**UNITED STATES – COUNTERVAILING DUTY INVESTIGATION
ON DYNAMIC RANDOM ACCESS MEMORY
SEMICONDUCTORS (DRAMS) FROM KOREA**

WT/DS296

**COMMENTS OF THE UNITED STATES OF AMERICA
ON NEW FACTUAL INFORMATION
PROVIDED IN THE REPUBLIC OF KOREA’S ANSWERS TO
THE PANEL QUESTIONS FOLLOWING THE
SECOND SUBSTANTIVE MEETING**

August 13, 2004

Question 14

1. In its August 6 answers, Korea provides for the first time its estimates of the relative volumes of subject imports and non-subject imports that were undercutting domestic prices in 2000 and 2002.¹ These figures were computed in the same manner as the estimates of the relative volumes of subject imports and non-subject imports that were undercutting prices in 2001 that Korea previously submitted to the Panel,² and suffer from the same defects.³ Additionally, the new data are based upon selective portions of confidential import data that the United States has previously shown are not an appropriate proxy for the actual subject import data.⁴

2. The United States wishes to reiterate that there is no basis for substituting Korea’s own, less accurate data – including the new data provided in the Korea Second Answers – for that used by the ITC. Korea has not challenged the ITC’s treatment of the data in question as confidential. Indeed, at the second meeting with the Panel, Korea highlighted the sensitivity surrounding the treatment of confidential information when it justified its own failure to provide certain information to the DOC – even on a confidential basis under the terms of a protective order – by invoking Korean bank secrecy laws. Moreover, Korea has not challenged as inadequate the ITC’s summary of the confidential information in the public version of its report. Under the terms of Article 12 of the SCM Agreement, the United States is obligated to protect the confidentiality of data submitted during the ITC’s investigation. The United States has provided as much information as possible within the confines of its obligations. Moreover, all confidential information collected by, submitted to, and relied upon by the ITC was made available to counsel

¹ *The Republic of Korea’s Answers to the Panel Questions Following the Second Substantive Meeting*, 6 August 2004, para. 33 [hereinafter “Korea Second Answers”].

² *Second Substantive Meeting – Oral Statement of the Government of Korea*, 21 July 2004, para. 34.

³ *Answers of the United States of America to the Panel’s Questions to the Parties Following the Second Substantive Meeting of the Panel*, August 6, 2004, paras. 34-38 [hereinafter “US Second Answers”].

⁴ US Second Answers, para. 116.

for interested parties, including Hynix’s counsel, under the terms of an administrative protective order.

Question 16

3. In paragraph 39 of the Korea Second Answers, Korea makes the factual assertion that the DOC did not consider the GDS offering in the context of entrustment/direction. As indicated in paragraph 137 of the US Second Answers, however, the DOC did consider Hynix’s GDS arguments in the context of entrustment/direction.⁵ What Korea fails to explain is that Hynix’s sole reference to the GDS in the context of entrustment/direction was to cite it as evidence in support of its argument that the banks were acting based on the company’s financial condition.⁶ The DOC did not consider this GDS argument to be relevant to the issue of entrustment/direction. As the DOC stated, “[w]hether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element that is relevant to the measurement of ‘benefit,’ not ‘financial contribution.’”⁷ Accordingly, the DOC properly addressed the facts surrounding the GDS in the context of “benefit”, as Korea acknowledges.⁸ Neither Hynix, nor any other party, ever argued in the underlying investigation that the very existence of any contingency related to the May restructuring evinced a lack of government entrustment/direction.

4. Korea’s new argument that the very existence of any contingency in connection with the May restructuring evinces a lack of entrustment/direction is fundamentally flawed and, as discussed in our response to Question 16, is not supported by the record evidence.⁹ As the United States discussed with the Panel, it is entirely consistent with the concept of entrustment/direction – *i.e.*, giving someone responsibility for a task – to leave the details to the discretion of the entity entrusted/directed. The concern of the government is that the task be performed, not necessarily *how* it is performed. Those entrusted/directed to perform the task may have various options for fulfilling that objective, some of which may be contingent on other events or factors. The fact that the precise method the private entities ultimately used to perform the task may have been contingent on certain events does not in any way suggest that the government did not entrust/direct the entity to carry out the task in the first instance. Thus, the GDS contingency does not obviate the evidence that the GOK entrusted/directed Hynix’s creditors to solve the company’s financial crisis – one way or another. In this particular case, the irrelevance of the alleged “contingency” is underscored by the timing of, and the facts

⁵ In its response to Question 16, the United States mistakenly ascribed the argument to Korea, rather than Hynix.

⁶ *Issues and Decision Memorandum* at 39 (Comment 1) (Exhibit GOK-5) (summary of Hynix’s arguments).

⁷ *Issues and Decision Memorandum* at 47 (Exhibit GOK-5).

⁸ *See, e.g., Preliminary Determination*, 68 Fed. Reg. at 16777 (Exhibit GOK-4); *Issues and Decision Memorandum* at 87 and 90-91 (Comment 7) (Exhibit GOK-5).

⁹ US Second Answers, paras. 137-142.

surrounding, the GDS offering relative to the May restructuring, as evidenced by the Offering Memorandum itself, as discussed in our response to the Panel’s question.

Question 17

5. In paragraph 49 of the Korea Second Answers, Korea makes the factual assertion – without citation to record evidence – that Commerzbank was “the largest shareholder” and had “operational control” of the KEB. In fact, the GOK was the largest single shareholder of the KEB. The fact that the GOK’s 43.17% interest was held by two GOK entities is immaterial – KEB’s own ownership structure chart lists *total GOK ownership* (43.17%) as compared to Commerzbank (32.55%) and public shares (24.28%).¹⁰ KEB was properly included in Group B (private entities owned/controlled by the GOK) of Figure US-4.

6. In paragraph 51 of the Korea Second Answers, Korea makes the factual assertion – again without citation to record evidence – that the investment trusts and financing companies referenced in Figure US-4 “are not owned or controlled by the GOK”. In fact, record evidence substantiated that many of these financial entities were wholly owned subsidiaries of, or majority owned by, public entities and private entities owned/controlled by the GOK.¹¹

¹⁰ See *KEB Ownership Structure Chart* (2001) (copy attached as Exhibit US-158). The KEB ownership figures represent voting shares as of March 2001, as all preferred shares were accorded voting rights at that time. See Figure US-4 (“**”) notation and source document *GOK Supplemental Questionnaire Response* (March 11, 2003)) at 29 (Exhibit US-36).

¹¹ See *Chart of Hynix Creditors* (June 16, 2003) (Exhibit US-37).