

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

WT/DS296

**OPENING STATEMENT OF THE
UNITED STATES OF AMERICA**

AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

June 23, 2004

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, it is our privilege to appear here today to present the views of the United States concerning the issues in this dispute. We do not intend to offer a lengthy statement; you have our written submission in which we fully explain the evidentiary basis for the investigating authorities' affirmative subsidy and injury determinations, and in which we address the legal and evidentiary arguments in Korea's first written submission.
2. Instead, we will focus on what we consider to be the major issues. First, we address the general issue of standard of review. We then turn to the central issues concerning the Commerce Department's subsidy determination. Finally, we address the main issues concerning the International Trade Commission's injury determination.
3. At the conclusion of our statement, we would be pleased to address any questions from the Panel.

General Issue - Standard of Review

4. On the surface, at least, there is no disagreement between the United States and Korea concerning the role of a panel under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). It is by now well settled that, in a dispute involving a determination made by a domestic authority based upon an administrative record, a panel does not conduct a *de novo* review. Rather, a panel must examine whether the domestic authority examined all the pertinent facts and provided an adequate explanation as to how the facts support the determination.

5. However, while Korea says that it does not advocate *de novo* review, in fact, it does. Korea does not allege errors in the evidence on which the Commerce Department and the International Trade Commission relied. Rather, Korea argues that the U.S. authorities should have discounted certain facts and relied on others, or analyzed the evidence in different ways. In other words, Korea wants this Panel to reweigh the evidence to reach a different outcome. That is *de novo* review, and the Panel should reject Korea's suggestions to the contrary.

6. This case is, in fact, a perfect example of why *de novo* review is *not* the standard of review. The administrative records of the Commerce Department and the International Trade Commission are enormous, totaling tens of thousands of pages of documentation and argument provided by the numerous interested parties. The authorities took many months to review and evaluate all of the record evidence, and explained in considerable detail the conclusions they drew from that record evidence. The depth and complexity of this investigation demonstrates the wisdom of a standard under which the Panel's task is not to step into the role of investigator and gather or reweigh evidence, but rather, in examining whether a Member met its agreement

obligations relating to fact-finding, to consider whether the investigating authority's decision-making is well reasoned and adequately supported by the evidence before it.

7. We are confident, therefore, that the Panel will reject Korea's efforts to expand the Panel's role and will instead undertake its assigned task, which is to evaluate whether a reasonable, objective person, looking at the evidentiary record of this case, could have reached the same conclusions as those drawn by the U.S. investigating authorities.

8. With that standard in mind, we will now turn to the Commerce Department's subsidy determination in this case.

Issues Concerning the Commerce Department's Subsidy Determination

Financial Contribution

9. "Injecting money into a bottomless pit" – that is how a November 2002 report by the Korean Congress – entitled "Public Fund Mismanagement Investigation" – characterized the Government of Korea's policy in 2000-2001 to bail out the Hyundai Group companies, including Hynix Semiconductor.¹

10. By the end of 2000, Hynix had incurred staggering losses, totaling 1.9 billion dollars, and the company's debt was 186% of its total equity. In short, the company was on the ropes financially. Hynix, which employed over 24,000 workers, was very important to the Korean economy. In fact, the government deemed it to be so important that it was singled out for special treatment. The government established a policy to ensure that the debt-ridden Hynix did not fail. That Hynix bailout totaled **over 11 billion dollars**, in less than 12 months. To put the enormity

¹ Public fund Mismanagement Investigation Report, Special Committee on Parliamentary Inspection of Public Fund Administration (November 2002) at 100-104 (translated version from DOC record) (copy attached as Exhibit US-115).

of this bailout in perspective, consider that 11 billion dollars is nearly **three times** total sales of *all* Hynix products in 2001. Consider also that 11 billion dollars equaled **total sales** of DRAMS, by all DRAM producers **worldwide**, in 2001, as indicated by the record evidence.²

11. Korea asks the Panel to substitute its judgment for that of the Commerce Department and find, despite all the record evidence to the contrary, that this enormous financial assistance for a company that was “technically insolvent”³ was simply the result of commercial banks doing as they saw fit. The facts, however, paint a very different picture – a picture in which the Government of Korea (GOK) is directing and entrusting Hynix’s creditors to carry out the government’s decision that the company must not go under.

12. Korea insists that Hynix’s creditors were motivated purely by commercial considerations. In the first instance, while commercial considerations are relevant to the issue of whether a company received a benefit, they are not germane to the issue of a financial contribution. “Financial contribution”, as that term is defined in Article 1.1(a)(1) of the SCM Agreement, focuses on **the action of the government** in making the financial contribution. In particular, subparagraph (iv) focuses on whether the government has given responsibility to, ordered, or regulated the activities of private bodies to make the financial contributions.

13. If the government enacted a decree that all Hynix creditors were to take steps to ensure that Hynix did not fail, there would, of course, be no question that a financial contribution exists, regardless of the views of Hynix’s creditors on the soundness of such a mandate. There is,

² Semiconductor Industry Blue Book 2001, WORLD SEMICONDUCTOR TRADE STATISTICS, at 18 (copy attached as Exhibit US-116).

³ Direct Intervention by the Government in Supporting Hynix, The Korea Economic Daily (August 28, 2001) (Exhibit US-29).

however, no support in the SCM Agreement for Korea's suggestion that such a formal mandate is required to find a financial contribution. While governments may act in such a formal manner, they frequently operate behind closed doors. There is no textual basis for the assertion that the SCM Agreement somehow ceases to apply when the doors close.

14. In this case, the GOK knew it would be heavily criticized, both domestically and internationally, for bailing out Hynix. Thus, it is not surprising that the government would operate behind closed doors. Nevertheless, due in part to intensive public interest in such an enormous bailout, there is ample compelling evidence that the government directed and entrusted Hynix's creditors to rescue the failing company.

15. For example, despite its much publicized reforms, the GOK announced that it had to alleviate Hynix's liquidity crisis. The government then waived the ceiling on the amount of debt banks could carry for a single debtor on three separate occasions specifically for the purpose of additional loans to Hynix. The government also ordered the KEIC to resume insuring Hynix's exports for the purpose of increasing Hynix's accounts receivable financing. The GOK also instituted a program to ensure that Hynix did not default on its maturing bonds.

16. The evidence also demonstrates that the Government did not merely extend a helping hand to Hynix – it used its strong arm to protect the company as well. For example, when Korea First Bank (KFB) balked at participating in the bailout, government officials threatened the bank with the loss of deposits and the loss of customers. Korea argues that, even if such threats took place, they were ineffective.⁴ That is not so. The threats against Korea First Bank followed the

⁴Korea First Submission, para. 123.

bank's refusal to participate in the KDB Fast Track Program for Hynix. After the government arm-twisting, KFB got the message. Although the exact amount is confidential, the bank subsequently purchased tens of million of dollars in Hynix convertible bonds, and later *forgave* over five times that amount in Hynix debt. Likewise, KorAm Bank balked initially, but subsequently succumbed to government threats and intimidation and went along with the program.

17. The evidence also demonstrates that government threats were not limited to creditors, but extended to anyone who might jeopardize the success of the Hynix bailout. In particular, the government reprimanded and threatened credit rating agencies that lowered (or attempted to lower) Hynix's rating to reflect the reality of the company's dismal financial situation.

18. Even if we assume, for the purposes of argument, that the motivations of Hynix creditors are relevant to the question of a financial contribution, as Korea suggests, the record evidence also demonstrates that Hynix creditors were acting to fulfill the government's objective. For example, the rationale given by Korea Exchange Bank for participating in the May and October 2001 restructurings was to be aligned with the "social and economic policy concerns of the GOK."⁵ Thus, the bank was following the government's policy, not commercial considerations.

19. Could an investigating authority reasonably conclude, based on this evidence, that the GOK directed and entrusted Hynix's creditors to ensure that the company did not fail? Absolutely. The government's message was crystal clear. As the Deputy Prime Minister and Minister of Finance and Economics stated, and I quote: "If Hynix says it needs an additional one

⁵ See *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea* at 56 (Exhibit GOK-5).

trillion won, and 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.”⁶

20. In sum, the decision of the Commerce Department that the bailout of Hynix was an indirect financial contribution by the Government of Korea is well reasoned, amply supported by the evidence and entirely consistent with the SCM Agreement.

Benefit

21. The government financial contributions were also extremely beneficial to Hynix. As I noted earlier, the evidence demonstrates that, during the period of investigation, Hynix was a bad credit risk and a bad investment. The company was technically insolvent. Moreover, it had recorded staggering losses, and conditions in the DRAMs industry were getting worse. In short, the company’s financial picture was abysmal.⁷ Given these facts, could an investigating authority reasonably conclude that in measuring the benefit to Hynix from loans, the benchmark should include a risk premium? Absolutely. Could an investigating authority also reasonably conclude that a reasonable investor would not have invested in Hynix? Absolutely.

22. Korea does not dispute the facts concerning Hynix’s poor financial condition. Nevertheless, Korea challenges the Commerce Department’s finding that Hynix was not creditworthy or equityworthy during the period of investigation. Korea’s argument, however, is based on the participation of private banks in the Hynix bailout and is an echo of its argument that the Korean government did not direct or entrust the private banks to rescue Hynix. As

⁶“Jin Vows to Eliminate Uncertainties Through Further Restructuring Efforts,” THE KOREA ECONOMIC DAILY, August 4, 2001 (copy attached as Exhibit US-117).

⁷ See, e.g., US First Submission, para. 221.

discussed in our submission, the evidence supports the Commerce Department’s determination that the private banks in Korea were directed or entrusted by the GOK, and, therefore, could not provide an appropriate market benchmark for loans and equity infusions. The sole exception was Citibank, and the United States explained in its first written submission why Citibank did not provide an appropriate benchmark.

23. The fact that Korea disagrees with the Commerce Department’s findings does not, of course, make those findings wrong. As the complaining party, Korea bears the burden of proving an inconsistency with the SCM Agreement. Korea has failed to do so.

24. The facts on the record of the investigation support each of the Commerce Department’s findings with respect to financial contribution, benefit, and specificity. There is also a “reasoned and adequate” explanation of how the facts support those findings. The Commerce Department’s determination that a countervailable subsidy exists is therefore consistent with the requirements of the SCM Agreement, and the Panel should reject Korea’s claims to the contrary.

Issues Concerning the International Trade Commission’s Injury Determination

25. With respect to the ITC’s injury determination, today, we will provide a few examples to illustrate how Korea seeks to have this Panel, in contravention of its role under Article 11 of the DSU, reweigh the evidence (or selective portions of the evidence) or apply a different methodology than did the ITC. We refer the Panel to our written submission for a more detailed refutation of Korea’s arguments.

The Many and Misleading Data Sources Cited by Korea

26. For its analysis, the ITC used a single, consistent data source: questionnaire responses covering the period 2000 to 2002 and the first three months of 2002 and 2003. In its first written

submission, Korea relies on an ever-varying set of data sources and time periods depending on the point that it seeks to make. To illustrate, for volume figures it refers to: Hynix Marketing Staff data based on WSTS data on global DRAM consumption in billions of bits; Gartner/Dataquest data on market share in “the Americas” on a revenue-basis; data from Hynix Semiconductor America’s importer questionnaire response on a shipment value-basis; public data in the ITC’s final determination; and in **figure 9** Korea uses “hybrid” data constructed from a mixture of these sources, as we explained in more detail in our written submission. Through its selective use of other data sources, Korea repeatedly makes statements in its submission that are completely inconsistent with the data used by the ITC in its injury determination. For example, Korea repeatedly mischaracterizes the volume trends as “declining.”

No Basis for Korea’s Insistence that Only Market Share Increases Matter

27. Korea places a great deal of emphasis on relative market share increases. There is no legal support for Korea’s assertion that increases in market share are the only indicator that matters for an affirmative material injury analysis. In fact, the investigating authority has discretion to select the methodology to analyze the volume of subsidized subject imports. Based on the facts in this investigation, the ITC found that the absolute volume of subsidized subject imports was significant. It also found that the increase in that volume was significant both absolutely and relative to both production and consumption. SCM Agreement Article 15.2 specifies that no one or several of these factors is determinative.

Korea Disregards Important Conditions of Competition in this Industry

28. Korea does not dispute that subsidized subject imports were highly substitutable for domestic DRAM products. They were used interchangeably, and there were no important

differences in product characteristics or sales conditions between them. Throughout the period of investigation, Hynix's subject Korean operations produced many of the same product densities as domestic producers. Moreover, subject imports and domestic DRAM products were sold largely to the same customers and through the same channels of distribution.

29. Korea ignores the significance of these conditions of competition. As the ITC emphasized, its findings about the volume of subject imports were reinforced by the substantial degree of substitutability between subject imports and domestic shipments. The commodity-like nature of domestic and subject imported DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry.

30. These conditions of competition, as well as the importance of price in this particular industry, were also important to the ITC's price effects findings. In a commodity-type market which adjusts quickly (even biweekly) to price changes, significant price disparities between suppliers would not usually be expected. Thus, the ITC found the patterns of frequent, sustained high-margin undercutting by subsidized subject imports (at margins often exceeding 20 percent and at increasing frequencies) was especially significant in this industry, and could be expected to have particularly deleterious effects on domestic prices. This undercutting was also probative because it was significant to each of the three main channels of distribution (PC OEMs (i.e., original computer equipment manufacturers), other OEMs, and non-OEMs). The undercutting was also consistent and substantial for particular high-revenue products to particular channels of distribution at specific points during the period of investigation. For modules, for example, the most significant sales channel was sales to PC OEMs, and here undercutting reached 100 percent of all price comparisons by the end of the period examined.

*Korea Seeks Alternate Methodologies without Demonstrating Any Shortcoming in the
Methodologies Used by the ITC*

31. Lacking any basis to dispute the ITC’s undercutting conclusions, Korea merely asserts that the ITC’s weighted-average pricing analysis was “wrong for this industry.” Instead of analyzing the data using a weighted-average pricing analysis that segregated pricing on a country-specific basis, Korea asserts that the ITC should have examined the pricing data on a brand-name basis. Korea also argues that the ITC should have analyzed volume on a brand-name basis.

32. These arguments ignore the fact that it is for the investigating authorities in the first instance to select methodologies for their analysis under Article 15.2 of the SCM Agreement. There is no requirement to conduct a brand-name analysis, and on the facts of this case, a brand-name analysis was not consistent with the relevant inquiry under the SCM Agreement. The domestic industry was comprised of multiple producers, each producing its own brand-name products. Moreover, shipments of Hynix-brand products were comprised of shipments of subsidized subject imports as well as domestic shipments. Thus, use of the brand-name analysis urged by Hynix would not reflect the source country of the DRAM products and would be utterly inconsistent with the requirement under the SCM Agreement to examine the effect “of the subsidized imports” on the “like product,” the product produced by the domestic industry.

33. On the other hand, by comparing the weighted-average price of subsidized subject imports with the weighted-average price of domestic shipments for each time period, the ITC’s methodology in this investigation addressed the inquiry posed by Article 15.2 – the assessment of the price effects of the subsidized imports on the domestic industry.

34. In any event, the ITC *also examined* the pricing data on a disaggregated basis (broken down by both brand-name and by source). Even a disaggregated analysis showed that subsidized subject imports were the lowest-priced product “*more often than DRAM products from any other source.*”⁸

Korea Asks This Panel to Reweigh the Evidence and Factors Concerning the Impact of Subsidized Subject Imports, but the Result is the Same

35. Based on an examination of trade, financial and other industry performance indicators, the ITC concluded that the domestic industry’s performance declined over the period of investigation with respect to many indicators, and its financial performance worsened precipitously. For example, due to a large decline in unit sales value, a \$2.7 billion operating income in 2000 was reversed in 2001 when the industry experienced more than \$2 billion in operating losses, and the domestic industry continued to experience substantial operating losses in the remainder of the period of investigation. The ITC determined that declining prices were the primary reason for the industry’s large operating losses, and that subject imports “contributed materially to the steep price declines that occurred over the period.”⁹ Korea argues that the ITC should have weighed the evidence differently, and it asserts that in this industry there are only five key indicia.

36. Korea ignores that it is the investigating authorities that are to evaluate the impact factors and weigh the evidence and that no one or several of the non-exhaustive list of enumerated SCM Agreement Article 15.4 factors is determinative. The ITC’s final determination reflects

⁸ USITC Pub. 3616 at 24 (Exhibit GOK-10) (emphasis added).

⁹ USITC Pub. 3616 at 26-27 (Exhibit GOK-10).

evaluation of positive evidence concerning each of the various Article 15.4 factors showing changes in the industry's condition, but even the select criteria that Korea asserts are important in this industry showed declines during at least part, if not the entire, period of investigation.

The ITC's Causation Analysis was Proper

37. In ascertaining whether there is a “causal relationship” between subsidized imports and injury to the domestic industry in countervailing duty investigations, authorities must examine several factors. They must demonstrate a causal relationship between the subsidized imports and the injury to the domestic industry based on an examination of all relevant evidence before the authorities. The authorities also must examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry to ensure that the injury caused by these other factors is not attributed to the subsidized imports. In this case, the ITC clearly demonstrated such a causal relationship, and it also provided a satisfactory explanation of the nature and extent of the injurious effects of other factors, as distinguished from the injurious effects of the unfair imports.

38. The ITC integrated the causation discussion and its discussion of how it ensured that it did not attribute material injury from other factors to the subject imports into its analysis of the volume, price effects and impact of subject imports. This approach is not required by, but it is certainly consistent with, the SCM Agreement. Korea fails to show otherwise.

39. Korea wrongly asserts that the ITC “failed to address” or “completely ignored” other factors. Korea also insinuates that in cases where there are several factors that may be injuring the domestic industry, the investigating authorities are precluded from making an affirmative material injury determination. Even in the context of reviewing safeguards determinations, the

Appellate Body stated in *United States – Wheat Gluten* and *United States – Lamb Meat*, that Article 4.2(b) of the Safeguards Agreement does not require that increased imports alone, in and of themselves, are causing serious injury. Nor is there any such requirement in Article 15 of the SCM Agreement.

40. *Non-subject imports*: The ITC found that subsidized imports, by themselves, were large enough and priced low enough to have a significant impact, regardless of the adverse effects caused by non-subject imports. The ITC determined that there were two principal factors that reduced the significance of the volume of non-subject imports. First, there was less competition between the domestic DRAM products and the non-subject imports than there was between the domestic DRAM products and the subject imports. The ITC determined after examining the composition of non-subject imports that a significant portion of non-subject imports were Rambus and specialty DRAM products for which domestic producers had no significant production during the period of investigation.

41. Second, even those non-subject imports consisting of “standard” products did not have the price effects that subsidized subject imports did during the period of investigation. Price effects were what the ITC concluded caused the “primary negative impact” on the domestic industry.

42. *Other possible reasons for price declines*: The ITC also evaluated other possible reasons why prices declined in the U.S. market (including product life cycles and business cycle changes in demand and supply that lead to “boom” and “bust” periods characteristic of this industry). While slowing demand played some role, together with the operation of the DRAMs business cycle and product life cycles, the ITC found that the unprecedented severity of the price declines

that occurred from 2000 to 2001 and persisted through 2002 indicated that supplier competition was an important factor. It concluded that the increasing frequency of underselling by subsidized subject imports from 2000 to 2002 corresponded with the substantial decline in U.S. prices over those same years and that in the absence of significant quantities of subsidized subject imports competing in the same product types at relatively low prices, domestic prices would have been substantially higher.

43. For all of these reasons and the additional reasons discussed in our written submission, the ITC determination that subsidized imports caused injury to the U.S. industry is consistent with the requirements of the SCM Agreement. The Panel should reject Korea's claims to the contrary.

Conclusion

44. Mr. Chairman, members of the Panel, this concludes our presentation today. We would be pleased to entertain questions from the Panel. Thank you very much.