

***United States - Countervailing Duty Investigation on
Dynamic Random Access Memory Semiconductors (DRAMS) from Korea***

(AB-2005-4)

**Oral Statement of the United States of America at the
Meeting of the Appellate Body**

May 11, 2005

Introduction

1. Mr. Chairman and members of the Division, the United States appreciates this opportunity to present its views. We will focus on the major issues and correct some misunderstandings arising from Korea's submissions. We will address the issues in generally the same order as in our Appellant Submission, but it is first necessary to say a few words about the scope of appellate review.

The Scope of Appellate Review

2. Korea alleges that the U.S. arguments are really attacks on the Panel's objective assessment of the facts. This is incorrect.

3. Instead, our argument is that the Panel's legal conclusions were not justified due to multiple *legal* errors. For example:

- The Panel misinterpreted the legal standard of "entrusts or directs" under Article 1.1(a)(1)(iv) of the *SCM Agreement*.
- The Panel improperly imposed an evidentiary standard of "probative and compelling" evidence that has no basis in the *SCM Agreement* or the *DSU*.

- The Panel improperly excluded key evidence by erroneously finding that U.S. reliance on such evidence constituted *ex post* rationalizations.
- In contrast to the approach taken by the U.S. Department of Commerce (or, “DOC”), which had looked at the record evidence in its totality, the Panel examined each piece of evidence in isolation. This approach – which effectively marginalizes the importance of circumstantial and secondary evidence in cases involving government subsidization through private bodies – was inconsistent with the approach taken by prior panels and the Appellate Body. It also was inconsistent with the Panel’s role as a reviewer of the DOC determination, rather than as a *de novo* fact-finder.

Each of these errors presents *legal* questions.

4. Since the *EC – Hormones* case, the Appellate Body has recognized that these types of errors are appropriate for Appellate Body review. There, the Appellate Body stated: “The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.”¹ More recently, in *US – Cotton*, the Appellate Body stated: “Whether the Panel properly interpreted the requirements of Article 6.3(c) of the *SCM Agreement* and properly applied that interpretation to the facts in this case is a legal question.”² Significantly, nowhere in its submissions does Korea

¹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 132.

² Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 399.

explain why the interpretation of a treaty provision or the application of law to the facts are not legal issues.

5. Thus, this is not a case involving a disagreement as to the appropriate weight to be given to a certain piece of evidence. Instead, this is a case in which the Panel completely redefined the framework and parameters of the investigating authority's investigation, undertook an analysis at odds with Article 1.1(a)(1)(iv) of the *SCM Agreement*, and effectively shifted the burden of proof from the complaining Member to the investigating authority. In short, all of the issues raised by the United States qualify for review by the Appellate Body under Article 17.6 of the *DSU*.

The Panel's Erroneous Interpretation of "Entrusts or Directs"

6. This case is about *government* action. Specifically, it is about the action of the Government of Korea (or "GOK") in entrusting or directing the financial recovery of Hynix. These actions are the only actions in dispute. What is *not* in dispute is that the actions "that private bodies were allegedly entrusted or directed to undertake constitute 'financial contributions.'"³

7. The Panel's erroneous interpretation of "entrusts or directs" would limit the range of government actions that fall under this term to actions of "delegation or command." The Panel's interpretation is inconsistent with the ordinary meaning of "entrusts or directs" in its context and in light of the object and purpose of the *SCM Agreement*. Moreover, the Panel's interpretation

³ Panel Report, *United States – Countervailing Duty on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, circulated 21 December 2004 Panel Report, para. 7.27, n.42 (hereinafter "Panel Report"). See also *Appellant Submission of the United States of America*, April 5, 2005, para. 18, n.9 (hereinafter "U.S. Appellant Submission"); and *Appellee Submission of the United States of America*, April 25, 2005, para. 6 (hereinafter "U.S. Appellee Submission").

tainted the rest of its analysis, as the Panel repeatedly found that GOK actions were not “probative and compelling” evidence of GOK entrustment or direction because they were not affirmative actions of “delegation or command.”

8. The United States has explained that, if the Panel’s errors are not corrected, Article 1.1(a)(1)(iv) will be deprived of a substantial part of its meaning, because government actions falling within the ordinary meaning of this Article will not constitute entrustment or direction unless they are actions of delegation or command. Thus, contrary to Korea’s assertion, the United States does not seek to include “properly private action” within the scope of Article 1.1(a)(1)(iv).⁴ Rather, the United States asks the Appellate Body to correct the Panel’s misinterpretation of the legal standard so that the full range of *government* actions constituting entrustment or direction are subject to the disciplines of the *SCM Agreement*.

9. Korea argues that there must be an “affirmative link” between the government entrustment or direction and the private body’s action in providing a financial contribution.⁵ The United States does not dispute that there must be some link. However, Article 1.1(a)(1)(iv) does not require an investigating authority to demonstrate an explicit government action addressed to a particular entity, entrusting or directing a particular task or duty.⁶

10. In this case, it is clear that the GOK’s actions were directed at Hynix’s creditors. For example, a government official attended a meeting of Hynix creditors in order to ensure that the creditors did not back out of commitments they had made. The GOK threatened Hynix creditors

⁴ *Appellee’s Submission of the Republic of Korea*, April 25, 2005, para. 52 (hereinafter “Korea Appellee Submission”).

⁵ *See, e.g.*, Korea Appellee Submission, para. 22.

⁶ Panel Report, para. 7.42.

who were considering not participating in the bailout. The GOK also instructed creditors to request lending limit waivers and subsequently waived those limits to ensure that Hynix creditors could participate in the Hynix bailout. Contrary to Korea’s assertions, these and other types of actions by the GOK went beyond “mere policy pronouncements.”⁷ These actions were directed at Hynix’s creditors to effectuate the GOK’s policy to prevent the complete failure of Hynix. Moreover, it is undisputed that the private bodies actually carried out the tasks for which they were entrusted or directed.⁸ They did so despite the lack of any reasonable commercial basis for providing financial assistance to Hynix. Under such circumstances, the DOC properly concluded that the private action could be attributed to the GOK and that there were financial contributions under Article 1.1(a)(1)(iv).

11. The Panel erroneously interpreted the terms “entrusts or directs” by substituting different terms – “delegation or command” – in their place. If the drafters had intended the “entrusts or directs” standard to be limited to actions of delegation or command, the drafters would have used those words instead of “entrusts or directs.” The fact that the drafters chose the specific terms “entrusts or directs” must mean something. Simply substituting different terms, as the Panel did here, fails to recognize the nuances and range of meanings associated with the terms *actually in the Agreement* – “entrusts or directs.”

⁷ Korea Appellee Submission, para. 21.

⁸ Panel Report, para. 7.27, n.42. *See also* U.S. Appellant Submission, para. 18, n.9; U.S. Appellee Submission, para. 6.

12. The United States will not recite all the instances, detailed in its Appellant Submission, in which the Panel’s misinterpretation caused it to reach an erroneous conclusion. Rather, we will clear up some confusion created by Korea’s Appellee Submission.

13. First, with respect to the Panel’s disregard of evidence concerning GOK ownership of Hynix’s Group B creditors, Korea asserts that the Panel properly rejected a DOC presumption that such ownership constituted entrustment or direction.⁹ However, the DOC did not make any such presumption; it merely found that ownership of the banks gave the GOK the means by which to entrust the Hynix bailout to these banks and enabled the GOK to dominate the creditors’ councils and guide, give responsibility to, or regulate the conduct of the remaining banks.¹⁰ As such, it was relevant, albeit not dispositive, evidence of entrustment or direction. The Panel’s disregard of this evidence because it did not, in and of itself, demonstrate entrustment or direction was error.

14. Second, Korea misses the point with respect to the repeated GOK threats against various banks.¹¹ Korea First Bank capitulated after the GOK threatened that the bank would lose some of its clients if it did not participate in the Hynix bailout.¹² Thus, KFB did not “face down” the GOK, as Korea suggests. Quite the contrary – it acquiesced to the GOK’s demands and participated in the May 2001 restructuring and provided D/A and short-term insurance financing throughout 2001. Nor did KFB face down the GOK with respect to the October 2001

⁹ See Korea Appellee Submission, paras. 56-57, 71.

¹⁰ *First Written Submission of the United States of America*, May 21, 2004, para. 63 (hereinafter “U.S. First Submission”).

¹¹ Korea Appellee Submission, paras. 72-73.

¹² U.S. Appellee Submission, para. 5.

restructuring. Instead, it had to write off a substantial portion of its loans to Hynix on terms very favorable to Hynix. Moreover, KFB's capitulation would have sent a clear message to other private banks that the government's demands were not to be lightly regarded.

15. Finally, in light of Korea's assertions at paragraphs 74 to 75 of its appellee submission, it is necessary to clarify the circumstances surrounding the March 2001 creditors meeting. A GOK official attended this meeting to ensure that certain creditors would not back out of their commitments. It is irrelevant that the resolutions were already made by the creditors; the whole point of the GOK official's attendance was to ensure that the creditors did not renege. Moreover, the important point is that such government action constituted evidence of entrustment or direction under the ordinary meaning of those terms. The Panel's restricted interpretation tainted its entire analysis and caused it to erroneously conclude that the numerous GOK actions did not amount to entrustment or direction within the meaning of Article 1.1(a)(1)(iv).

The Panel's Erroneous "Probative and Compelling" Standard

16. Compounding its erroneous interpretation and consequent misapplication of the entrustment or direction standard, the Panel imposed an evidentiary standard that has no basis in the *SCM Agreement* or *DSU*. In so doing, the Panel impermissibly added to the obligations contained in the covered agreements.

17. Korea professes to be startled that the United States would maintain that evidence in indirect subsidy cases need not be compelling.¹³ Of course, there is nothing startling about the

¹³ Korea Appellee Submission, para. 82.

U.S. position. The phrase “probative and compelling” appears nowhere in the SCM Agreement or DSU and was never used by a panel prior to this case.

18. Where the *SCM Agreement* prescribes a particular evidentiary standard, the text so states. For example, certain articles require the use of “positive evidence.” Korea misunderstands the U.S. point here.¹⁴ The United States is not arguing that “positive evidence” is required under Article 1.1(a)(1)(iv). The point is that Article 1.1(a)(1)(iv) is *silent* as to any evidentiary standard, and the Panel erred by imposing one, particularly one that requires that evidence be “compelling.”

19. Nor does the *DSU* contain any “probative and compelling” standard. A panel’s duty under the *DSU* is to determine whether an investigating authority has provided a reasoned and adequate explanation as to why the evidence led to a particular conclusion. By creating a new evidentiary standard, the Panel read into the agreements words and obligations that are not there.

The Panel’s Erroneous Analytical Approach

20. Korea concedes that the Panel adopted a “piece by piece” analysis of the consistency of the record evidence with the requirements of Article 1.1(a)(1)(iv).¹⁵ There is no way to get around the Panel’s erroneous approach. Korea adopts the same erroneous approach in its attempted defense of the Panel’s findings.

¹⁴ See Korea Appellee Submission, paras. 100-107.

¹⁵ Korea Appellee Submission, para. 146.

21. The totality of the record evidence demonstrated that the GOK entrusted or directed the Hynix bailout. Korea, however, claims that each piece of evidence was not probative, and further claims that the Panel correctly analyzed the probative value of each piece of evidence.¹⁶

22. First, this is not what the Panel did. In fact, in its entire discussion of the massive evidence of entrustment or direction, from paragraphs 7.47 through 7.178 of its Report, the Panel used the word “probative” only twice.¹⁷ More importantly, the Panel assessed whether each piece of evidence *in and of itself* demonstrated entrustment or direction. The Panel’s language speaks for itself: it used phrases such as “in and of itself,” “alone,” “on the basis of,” “isolated incident,” and “*per se*.”¹⁸

23. Second, as both parties agree, evidence is probative if it *tends* to prove a certain conclusion.¹⁹ True, individual pieces of evidence, taken alone, may be inconclusive. However, contrary to the view held by the Panel and Korea, it does not follow that any individual piece of evidence that *tends* toward a conclusion must also *conclusively establish* that conclusion. Quite the reverse is true. In many fields of endeavor – whether science, economics or law – conclusions are very often properly reached as the result of the cumulative assessment of many pieces of evidence, no one alone of which alone can establish the conclusion.

¹⁶ See, e.g., Korea Appellee Submission, paras. 112, 118-120, 123, 124, 127-131, 134-136, and 144.

¹⁷ See Panel Report, para. 7.56 (discussing GOK and public bank loans to Hynix) and para. 7.130 (discussing the GOK’s coercion and threats against private creditors).

¹⁸ See U.S. Appellant Submission, paras. 61-69 and the portions of the Panel Report cited therein.

¹⁹ U.S. Appellant Submission, n.71; Korea Appellee Submission, para. 88.

24. The DOC considered all of the record evidence together, and its approach was reasoned and adequate. Unfortunately, the Panel, by examining pieces of evidence in isolation, redefined the framework of the DOC investigation and effectively shifted the burden of proof to the DOC. Put differently, the Panel failed to properly apply the law to the facts.

25. In this regard, Korea seeks to divert attention away from the Panel’s errors by focusing on the so-called “single program” approach of the DOC.²⁰ Korea calls it the “lynchpin or keystone” of the DOC’s analysis. As the United States has explained, however, the term “single program” was simply a convenient way of referring to the GOK policy and pattern of practices aimed at ensuring the survival of Hynix.²¹ The issue is not whether there was a single program (although there certainly was), but rather whether the totality of the record evidence, including circumstantial and secondary evidence, could lead an impartial and objective investigating authority to conclude that the GOK entrusted or directed the Hynix bailout.

26. In another effort to defend the Panel’s approach, Korea repeatedly asserts that the Panel found entrustment or direction of KFB on the basis of a “single” newspaper article.²² According to Korea, this proves that the Panel did, in fact, consider circumstantial and secondary evidence. Korea has misunderstood the Panel Report. The Panel cited to seven articles regarding the threats against KFB.²³ The United States referred to nine in its panel submissions. While the Panel erroneously disregarded one article based on its *ex post* rationalization finding, on the face

²⁰ Korea Appellee Submission, paras. 145-158.

²¹ U.S. Appellant Submission, para. 123, n.185.

²² *See, e.g.*, Korea Appellee Submission, paras. 10, 109, 162-164, 176, 217 and 220; Korea Appellant Submission, paras. 4, 14.

²³ *See* Panel Report, ns.119-132.

of its Report, the Panel did consider all, or at least some, of the remaining articles. Thus, there is no basis for Korea's allegation that the Panel based its finding on a single article.

27. More importantly, because of its focus on a "single" article, Korea ignores the most egregious Panel finding with respect to KFB: that the GOK's coercion of KFB was an "isolated incident."²⁴ No incident in the Hynix bailout was isolated. By examining each piece of evidence in isolation and disregarding the DOC's adequate and reasoned reliance on the totality of the record evidence, the Panel committed legal error.

The Panel's Erroneous Rejection of Record Evidence as Ex Post Rationalizations

28. With respect to the Panel's disregard of certain record evidence, panels have found that a party may not make arguments or advance reasoning that is different from that used by an investigating authority in the determination being challenged.²⁵ However, no panel (or the Appellate Body) has ever extended this principle to individual pieces of evidence that, as is the case in this dispute, support – rather than differ from – an authority's findings. The Panel's conclusion to the contrary, without citation to any authority, constitutes legal error.

29. Korea's defense of the Panel's actions is based entirely on Article 22.5 of the *SCM Agreement*, notwithstanding that it did not make any claims under – and the Panel did not even consider – that provision. Article 22.5 is relevant only to the extent that the Panel's findings, if allowed to stand, would effectively and drastically rewrite the requirements of that provision. An authority would have to include in a determination all evidence supporting that determination in

²⁴ Panel Report, para. 7.130.

²⁵ U.S. Appellant Submission, para. 89.

order to preserve its ability to rely on such evidence should the determination become the subject of a WTO dispute.

30. Article 22.5 refers to “all relevant *information*.” “Information” is defined as “Knowledge or facts communicated about a particular subject, event, etc.; intelligence, news.”²⁶ Thus, for example, knowledge or facts about a particular subject or event is something such as: “The GOK threatened KorAm Bank if it did not participate in the Hynix restructuring.” Assuming it is relevant, an investigating authority must include such information in its final determination. That is what the DOC did. However, this fact – the GOK threatened KorAm – must be distinguished from all of the evidence that demonstrates the fact. Article 22.5 does not require that all “evidence” be “contained” in a final determination.

31. The Panel’s findings and Korea’s arguments, if adopted, would lead to ludicrous results. If a final determination had to “contain” all record evidence relied upon, a determination would include the verbatim text of every questionnaire response, brief, and other documentation relied upon by an authority, and might reach the length of the record itself. This would be a daunting task for authorities of developed country Members, not to mention authorities of developing country Members.

32. Therefore, the Panel erred in disregarding the evidence noted in the U.S. Appellant Submission.²⁷ The DOC included all relevant information and reasoning in its determination. The articles cited by the United States in its submissions to the Panel consisted of record evidence that supported the DOC’s reasoning.

²⁶ *The New Shorter Oxford English Dictionary* (2003).

²⁷ U.S. Appellant Submission, para. 94, ns. 133-137.

33. Additionally, as the United States has already noted, the DOC did, in fact, cite to some of the articles in question in the *Direction Citations Memo*, which was incorporated into both the *Preliminary Determination* and the *Issues and Decision Memorandum*.²⁸ Contrary to Korea's claims, the United States did specifically identify in its appellant submission the articles cited in the *Direction Citations Memo*.²⁹ Of the seven articles in paragraph 93 of the U.S. Appellant Submission for which the United States is appealing the Panel's *ex post* findings, four were cited in the *Direction Citations Memo*: the article in the *Korea Economic Daily*, the article in *Euromoney*, and the two articles in the *Korea Times*.

34. There is simply no basis for Korea's accusations that the DOC never considered the articles in the *Direction Citations Memo*.³⁰ While the *Direction Citations Memo* and the *Preliminary Determination* have the same date, this date is simply the day on which the documents were signed. The date has nothing to do with when the articles were read.

The Panel Relied on Non-Record Evidence

35. As the United States has explained, the record evidence did not establish that Hynix creditors exercised mediation rights under the CRPA. Not until after the first substantive meeting with the Panel did Korea even allege that mediation actually occurred. Nonetheless, the Panel, by relying on Korea's non-record evidence, misinterpreted three sentences out of the voluminous DOC record to find that mediation had occurred.³¹ In so doing, the Panel acted inconsistently with Article 11 of the *DSU*.

²⁸ U.S. Appellant Submission, para. 94.

²⁹ See Korea Appellee Submission, para. 190; U.S. Appellant Submission, para. 98.

³⁰ See Korea Appellee Submission, paras. 193-194.

³¹ See Panel Report, para. 7.85.

36. If mediation had in fact occurred, Korea and Hynix had ample opportunity during the investigation to inform the DOC of this fact. Given Korea’s characterization of mediation as a “point of great importance,”³² one would assume that the GOK and Hynix would have filled the DOC record with evidence of mediation. They did not do so. Now, Korea alleges that the DOC had a duty to “follow up” on its record.³³ This begs the question: follow up on what? As the United States has demonstrated, the DOC asked repeated questions during the investigation concerning the October 2001 restructuring and the terms of the 3 options, including option 3, set by the Creditors’ Council.³⁴ Because mediation in connection with the October 2001 restructuring was *never* mentioned by the GOK or Hynix during the investigation – there was nothing more to “follow up.” As noted by the panel in *Egypt – Rebar*, “where opportunities have been provided by the authority for interested parties to submit into the record information and argument on [a] point, the decision by an interested party not to make such submission is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel.”³⁵

37. Despite the absence of record evidence of mediation actually occurring, both Korea and the Panel have stated that the mere “possibility” of mediation undercuts the DOC’s findings with respect to the October 2001 restructuring.³⁶ Obviously, there is a certain inconsistency between this argument and Korea’s arguments that evidence of what the GOK “could” do is not evidence

³² Korea Appellee Submission, para. 197.

³³ Korea Appellee Submission, para. 208.

³⁴ U.S. Appellant Submission, para. 108 n.156.

³⁵ Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.3.

³⁶ Panel Report, paras. 7.84 and 7.89; Korea Appellee Submission, para. 198.

of entrustment or direction unless the GOK actually did do it.³⁷ More importantly, however, even if the CRPA established a possibility of mediation, this does not mean that the government-owned and controlled creditors were not able to set the terms for the remaining creditors during the October 2001 restructuring. Each of the three options presented to Hynix’s creditors was highly favorable to Hynix.³⁸ Even under the third option, which Korea has mischaracterized as the option to “walk away,” creditors were forced to forgive a major portion of debt.

The Panel Failed to Properly Apply the Standard of Review

38. With respect to the standard of review applied by the Panel, Korea asserts that the U.S. allegations are “vague or ambiguous” or “subsidiary”.³⁹ To the contrary, the United States has shown that the Panel committed numerous legal errors, each of which independently warrants reversal. Taken together, however, they demonstrate that the Panel failed to make an objective assessment of the matter within the meaning of Article 11 of the *DSU*, and this error constitutes an additional reason for reversing the Panel’s findings.

Conclusion

39. In summary, Mr. Chairman and members of the Division, for the reasons we have just stated as well as those in our written submissions, the United States respectfully requests that the Appellate Body reverse the specific findings of the Panel as set forth in our Appellant Submission and affirm the specific findings of the Panel at issue in our Appellee Submission. We stand ready to address any questions the Appellate Body may have, including questions

³⁷ See Korea Appellee Submission, para. 63.

³⁸ U.S. First Submission, paras. 88-89.

³⁹ Korea Appellee Submission, para. 224 (quoting *US - Steel Safeguards (AB)*, para. 498).

regarding those issues that, given the time available, we have not been able to address in this statement. Thank you.