

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

**WT/DS296**

**EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE  
UNITED STATES OF AMERICA  
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

**July 2, 2004**

### ***General Issue - Standard of Review***

1. 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 DOC and the ITC 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.

2. This case is, in fact, a perfect example of why *de novo* review is *not* the standard of review. The administrative records of the DOC and the ITC are enormous, totaling tens of thousands of pages. 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.

### ***Issues Concerning the Commerce Department's Subsidy Determination***

3. *Financial Contribution* – “Injecting money into a bottomless pit” – that is how a November 2002 report by the Korean Congress – entitled “Public Fund Mismanagement Investigation” – characterized the GOK's policy in 2000-2001 to bail out the Hyundai Group companies, including Hynix. 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. Hynix, which employed over 24,000 workers, was very important to the Korean economy, and singled it out for special treatment. The GOK established a policy to ensure that the debt-ridden Hynix did not fail. The Hynix bailout totaled **over 11 billion dollars**, in less than 12 months, a figure nearly **three times** total sales of *all* Hynix products in 2001. 11 billion dollars equaled **total sales** of DRAMS, by all DRAM producers **worldwide**, in 2001, as indicated by the record evidence.

4. Korea asks the Panel to substitute its judgment for that of the DOC and find, despite all the record evidence to the contrary, that this enormous financial assistance for a company that was “technically insolvent” 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 GOK is directing and entrusting Hynix's creditors to carry out the GOK's decision that the company not go under.

5. Korea insists that Hynix's creditors were motivated purely by commercial considerations. However, 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” 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.

6. There is no support in the SCM Agreement for Korea’s suggestion that 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.

7. 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 GOK operated behind closed doors. Nevertheless, due in part to intensive public interest in such an enormous bailout, there is ample compelling evidence that the GOK directed and entrusted Hynix’s creditors to rescue the failing company.

8. 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.

9. The evidence also demonstrates that the GOK did not merely extend a helping hand to Hynix – it used its strong arm to protect the company as well. For example, when KFB balked at participating in the bailout, government officials threatened the bank with the loss of deposits and the loss of customers. After the government arm-twisting, KFB got the message. Likewise, KorAm Bank balked initially, but subsequently succumbed to government threats and intimidation and went along with the program.

10. 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.

11. Even if we assume, for the purposes of argument, that the motivations of Hynix creditors are relevant to the question of a financial contribution, the record evidence also demonstrates that Hynix creditors were acting to fulfill the government’s objective. For example, the rationale given by KEB for participating in the May and October 2001 restructurings was to be aligned with the “social and economic policy concerns of the GOK.”

12. 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: “If Hynix says it needs an additional one 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.”

13. *Benefit* – Hynix’s financial picture was abysmal. Given this, 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.

14. Korea does not dispute the facts concerning Hynix’s poor financial condition. Nevertheless, Korea challenges the DOC’s finding that Hynix was not creditworthy or equityworthy during the period of investigation. Korea’s argument echoes its argument that the GOK did not direct or entrust private banks to rescue Hynix. The evidence supports the DOC’s determination that 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.

15. The facts on the record of the investigation support each of the DOC’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 DOC’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***

16. *The Many and Misleading Data Sources Cited by Korea* – 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. Korea relies on an ever-varying set of data sources and time periods depending on the point that it seeks to make. 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.

17. *No Basis for Korea’s Insistence that Only Market Share Increases Matter* – 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. The investigating authority has discretion to select the methodology to analyze the volume of subsidized subject imports. 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. Article 15.2 specifies that no one or several of these factors is determinative.

18. *Korea Disregards Important Conditions of Competition in this Industry* – 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.

19. 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. 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.

20. *Korea Seeks Alternate Methodologies without Demonstrating Any Shortcoming in the Methodologies Used by the ITC* – Korea merely asserts that the ITC’s weighted-average pricing analysis was “wrong for this industry” and that the ITC should have examined pricing and volume on a brand-name basis. 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. 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. 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.

21. 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.*”

22. *Korea Asks This Panel to Reweigh the Evidence and Factors Concerning the Impact of Subsidized Subject Imports, but the Result is the Same* – 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. 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.” Korea argues that the ITC should have weighed the evidence differently, and it asserts that in this industry there are only five key indicia.

23. 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 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.

24. *The ITC’s Causation Analysis was Proper* – In ascertaining whether there is a “causal relationship”, authorities 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. The ITC clearly demonstrated such a causal relationship, and also provided a satisfactory explanation of the nature and extent of the injurious effects of other factors. Even in the context of reviewing safeguards determinations, the Appellate Body has found 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.

25. *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. 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.

26. *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.