*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 SECOND SUBSTANTIVE MEETING OF THE PANEL

**August 2, 2004**

***The Commerce Department's Subsidy Determination***

1. ***Korea's Submission of New Information*:** Korea's second written submission and answers to the Panel's questions are replete with information which was never provided to the DOC at any time during its investigation, notwithstanding the DOC's extensive requests for information. All of this new information – some of which is contradicted by evidence that was submitted during the investigation – should be disregarded by the Panel. Prior panels have recognized that in disputes involving the review of a determination by an investigating authority, the consideration of new evidence by a panel is incompatible with the principle that "a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities."

2. Korea's submission of new evidence illustrates its continuing efforts to have the Panel reweigh the facts. It is remarkable that Korea so blithely has ignored its own admonition that the focus must be on the "evidence before the agency" at the time of its determination. We are quite certain that if, for example, the United States had provided the Panel with information showing that prior to its privatization in December 2003, the GOK formally acknowledged to the WTO its legal and practical control over Kookmin Bank, Korea would object strenuously on the grounds that the information was not on the record.

3. It is equally distressing that Korea's second submission and responses to the Panel's questions are laced with many assertions of fact without citation to any support in the underlying record. An objective assessment of Commerce's explanation of how the record evidence supported its determination will lead the Panel to find that Commerce's determination was entirely consistent with the SCM Agreement.

4. ***Financial Contribution, Benefit, and Specificity*:** Korea, based on a novel and fundamentally flawed interpretive analysis, and some verbal sleight of hand, concludes that the facts of this case dictate the appropriate interpretation of the Agreement. Specifically, Korea argues that "in the context of the Hynix restructuring" only the term "directs" is relevant. Thus, Korea argues for purpose of this case the Panel should read the term "entrusts" out of the SCM Agreement. There is absolutely nothing in the text of subparagraph (iv) that even remotely suggests that the task delegated to a private body must involve the administration of a formal "government program."

5. Korea argues that the term "directs" can only mean "orders" because the French and Spanish verbs – "ordonner" and "ordenar" – *translate* into English as "to order". The drafters could easily have used the term "orders" in the English text for Article 1.1(a)(1)(iv), but they did not. The drafters used the term "directs." While "order" is certainly one meaning of "directs", it is not the only meaning.

6. The United States has consistently taken the position that whether there is government entrustment or direction within the meaning of subparagraph (iv), requires consideration of whether a government "gave responsibility to", "ordered", or "regulated the activities of" private bodies to "carry out" financial contribution functions.

7. The United States has explained in great detail – relying entirely on record evidence – the factual and legal bases for the Commerce Department's determination that the GOK pursued a policy to support Hynix and prevent its failure and that the GOK entrusted and directed Hynix's creditors to effectuate that policy. Korea does not deny the existence of GOK support for Hynix. Nor could it do so with any credibility given the explicit statements of government officials from the Blue House and the Financial Supervisory Commission (FSC), as well as from Economic Ministers, regarding government support of Hynix. Rather, Korea suggests that after the Economic Ministers meetings in late 2000, the evidence of the GOK's Hynix policy dries up. However, the extensive evidence of GOK actions over the course of the entire 10-month period of the Hynix bailout – as documented in our previous submissions – belies Korea's claim. It also bears mentioning that in the midst of the planning for Hynix's October 2001 restructuring and recapitalization, a high-level Hynix official acknowledged that "We won't be going bankrupt. The Korean government won't let us fail."

8. Korea's allegations of "gaps" in the evidence rests on its view that a bank- and transaction-specific analysis is required. We strongly disagree. The concept of government entrustment or direction of a task does not require that the government micro-manage those given responsibility for carrying out that task. Moreover, governments typically have a wide range of tools at their disposal to deliver a financial contribution indirectly. These tools may vary greatly in terms of their transparency. If subparagraph (iv) is to have any meaning, it is essential to recognize the importance of examining, on a case-by-case basis, all of the evidence surrounding possible government entrustment or direction, and to recognize reasonable inferences that may be drawn from that evidence. It is Korea's suggestion that such an analysis is impermissible that the Panel should find alarming. Given the nature of indirect subsidies, the type of rigid evidentiary standard advocated by Korea would render subparagraph (iv) virtually meaningless.

9. Finally, the United States will touch very briefly on the topics of "benefit" and "specificity." As a general matter, Korea offered nothing new on these issues in its second submission. In response to the Panel questions, however, Korea states that, although it does not challenge the conclusion that the KDB Fast Track Program constituted a financial contribution, it does challenge the existence of any benefit from, and the specificity of, the program. Given Korea's concession that the KDB Fast Track program constitutes a financial contribution, it is difficult to fathom how Korea can argue that financial contributions provided by banks under the Fast Track program could themselves serve as benchmarks for determining the benefits from those very same financial contributions. Korea offers no explanation for this dichotomy.

10. With respect to specificity, as discussed earlier, Korea's argument concerning the timing of Hynix's nomination for the KDB Fast Track program is contradicted by the record evidence submitted by Hynix. Moreover, Korea entirely ignores the fact that in the one-year existence of the Fast Track program, only six companies *in total* participated in the program, four of which were Hynix and its Hyundai affiliates.

***The ITC's Injury Determination***

11. ***Subject Import Volume was Increasing*:** Korea's arguments that volume did not increase are based entirely on the assumption that "volume" does not mean the volume of subsidized subject *imports*, but instead means the volume of all Hynix-brand products being sold in the U.S. market. A brand-name analysis was not appropriate under the circumstances and would contradict the SCM Agreement, because a brand-name analysis would not have corresponded to the relevant inquiry, which is to ascertain the effect of subsidized subject imports on the domestic industry.

12. ***Korea Cannot Explain Away the Increased Volume of Subject Imports*:** Even if, as Korea asserts, subsidized subject imports gained market share in the U.S. market only by replacing products produced by Hynix's Eugene facility, any such gain was at the expense of the domestic industry because the Eugene facility was part of the domestic industry. Moreover, Hynix was not principally using Eugene products to service the U.S. market.

13. ***Korea's Other Volume Arguments Also Fail*:** *Context Matters*. Consistent with the approach endorsed in *Thailand – H-Beams*, the ITC put the import figures and trends into the factual context of the DRAMs industry and the circumstances of the DRAMs investigation. As the ITC determined, 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. Korea concedes that Article 15.2 of the SCM Agreement does not impose any numerical threshold on what is a "significant" volume or a "significant" increase in volume.

14. *Data Arguments*. The Panel should disregard Korea's continuing efforts to assign values to the confidential volume data considered by the ITC. There is no basis to use data from Hynix's importer questionnaire response – however compiled – as a proxy. Moreover, there are a number of problems with GOK Exhibit 62, problems that do not exist with respect to Confidential US Figure 1. Whereas Confidential US Figure 1 rightly includes company transfers in the calculation of Hynix's U.S. shipments of subsidized subject imports, GOK Exhibit 62 does not include such transfers. GOK Exhibit 62, therefore, presents a distorted picture of Hynix's U.S. shipments of subsidized subject imports.

15. ***Korea Has Not Shown any Shortcomings in the ITC's Price Effects Analysis*:** Underselling by subject imports increased between 2000 and 2001 at a time when the volume of subsidized subject imports was increasing, domestic market share was declining, and underselling of standard products by non-subject imports was relatively stable. The underselling by subsidized subject imports ballooned to 69.8 percent of all observations in 2002, and underselling by subsidized subject imports was at a much higher frequency than underselling by non-subject imports at that time. While not required to do so, the ITC *did* conduct a disaggregated analysis, which showed that Hynix's subsidized subject imports were the lowest priced product more often than products from any other source.

16. Contrary to Korea's assertion, subject imports can have significant adverse price effects if they force domestic producers to lower their prices in order to retain market share. With respect to the ITC's conclusion that subsidized subject imports significantly depressed prices in the U.S. market, to the extent that Korea is implying that evidence of price leadership is required under the SCM Agreement, it is wrong. Second, the ITC found that factors other than subsidized subject imports could not explain the unprecedented price depression experienced during the period of investigation. Third, Korea's assertion that non-subject imports are completely fungible with the domestic like product is simply not supported by the evidence in this investigation.

17. ***The ITC's Impact Analysis Was Consistent with the SCM Agreement*:** Korea tries to rebut the ITC's impact analysis with snippets of information about individual producers. These snippets of information pertain only to individual producers, and are taken out of context and/or based on the company's global operations and/or operations on a broader array of products.

18. ***The ITC's Determination Was Also Consistent with Article 15.5 of the SCM Agreement*:** The ITC's determination more than satisfies the standard articulated by Korea of "some causal connection" between subject imports and the material injury to the domestic industry, whether or not the Panel examines the data under a correlation lens, a conditions of competition lens, or some other lens. A brief summary of the data is provided in Figure US-5, attached to this statement.

19. The ITC examined known factors other than the subsidized subject imports which at the same time were injuring the domestic industry to ensure that it did not attribute injury caused by such other factors to the subsidized subject imports. The ITC provided a thorough evaluation of known causes of injury other than the subsidized subject imports in its determination. The ITC explicitly agreed with Hynix that there were capacity increases both globally and in the United States during the period of investigation, but its analysis did not stop there. The ITC recognized that capacity increases lead to increased supply and that imbalances in supply lead to the characteristic boom and bust phases of the DRAM industry's business cycle. At the same time, the ITC found that the business cycle, as well as other factors affecting prices, simply did not explain the dramatic price declines experienced during the period of investigation. The other factors affecting prices that the ITC examined included the operation of the product life cycle and the slowing in the growth of demand at the end of the period of investigation. Korea continues to mischaracterize the evidence as showing a dramatic decline in demand. The evidence showed that demand continued to increase throughout the period of investigation, but the growth in demand was not as great at the end of the period of investigation. Korea simply fails to meet its burden of demonstrating how the United States failed to comply with the requirements of SCM Agreement Article 15.5.

***Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994***

20. Korea has failed to demonstrate that the United States has levied duties at all, let alone levied duties inconsistently with Article 19.4 and Article VI:3. Korea recognizes that the word "levy" is defined in footnote 51 of the SCM Agreement as "the definitive or final legal assessment or collection of a duty or tax", but Korea ignores the fact that what has to be "definitive" for purposes of Article 19.4 is not the "duty", but rather the "assessment or collection" of the duty. Korea concedes that the United States has not yet "collected" any countervailing duties, and offers no explanation as to how the United States has "assessed" countervailing duties.

21. Why Korea chose to invoke Article 19.4 and Article VI:3 is Korea's business. However, those provisions cannot be rewritten under the guise of interpretation in order to accommodate Korea's litigation choices.

***Korea's Consultation Request Failed to Comply with Article 4.4 of the DSU***

22. The Panel should reject Korea's claims regarding Commerce's countervailing duty order because Korea's consultation request failed to comply with Article 4.4 of the DSU. Korea refused to indicate any provision of a WTO agreement with which it considered the countervailing duty order to be inconsistent, even after the United States pointed out this failure to Korea. Korea claims that its second consultation request "specifically cited to Article VI:3 of GATT 1994," but the second consultation request does not mention Article VI:3.

23. Article 4.4, at a minimum, requires an indication of at least one provision with which a measure is considered to be inconsistent. While the requirements of Article 4.4 are minimal, they cannot be blithely ignored. Moreover, the United States promptly informed Korea of the defect in its second consultation request, and subsequently explained the defect to the DSB.

24. The United States does not believe that a failure to comply with Article 4.4 can be excused by an alleged absence of prejudice, and Korea cites nothing to support such a proposition. However, to the extent that the Panel considers a showing of prejudice necessary, the United States believes that it was prejudiced by Korea's *repeated* refusal to honor the U.S. right to receive an indication of the legal basis behind Korea's consultation request insofar as the countervailing duty order was concerned.