

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

WT/DS296

**EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE
UNITED STATES OF AMERICA
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

August 2, 2004

Standard of Review

1. We just heard our Korean colleague say that the Panel must decide whether import volume was significant. Of course, that is not the issue before the Panel. Instead, the issue is whether the ITC's conclusions regarding import volume were reasonable. Based on the discussion over the past few days, we believe the Panel fully understands this.

The Commerce Department's Subsidy Determination

2. At the last meeting the Panel asked, what must the government *do* for there to be an indirect subsidy? We have thought a great deal about this question and we have explored it with the Panel. In the end, we have concluded that the only answer is the one found in the SCM Agreement itself – the government must “entrust” a private entity or “direct” a private entity to make a financial contribution. That is, the government must set the task, the task must involve making a financial contribution, and the government must give responsibility for carrying out that task to a private entity. Thus, we know what the government must do. We also know based on the ordinary meanings of “entrust” and “direct” what the government need not do. That is, the government does not have to have a formal program or dictate precisely how that task is carried out. Moreover, nothing in the ordinary meaning of entrustment nor direction suggests that the party tasked must believe that what it is being tasked to do is totally irrational – that it is something no one would do absent government intervention. The issue is simply whether that party acts at the behest of the government to provide a financial contribution.

3. So, once again, let us step back from that impressionist painting and look at the whole picture rather than focusing on the dots. In this case, there is ample evidence that the government set the task; *i.e.*, to give Hynix the financial assistance needed to resolve the company's financial crisis. There is also ample evidence that the banks had not been relieved of that task prior to the October restructuring. Explicit statements by Ministers and by Hynix itself demonstrate that; just prior to the October restructuring the government had publicly stated that Hynix was going to get whatever it needed.

4. We also know that, for the most part, the government did not directly give Hynix the funds it needed. So, how did the government implement its decision? Of course, the government did not make the decision and then simply do nothing to implement it. The government turned to Hynix's creditors and gave them responsibility for completing the task. Korea argues that the banks acted solely for commercial reasons. But, the record supports a different conclusion. Record evidence for all elements of the Hynix bailout, such as the loan approval documents and the Kookmin prospectus, indicate that even the banks that were not controlled by the government were acting at the government's behest; *i.e.*, that the government had asked them to assist Hynix and they were doing so in accordance with that request. There is also the evidence of Hynix's dismal financial condition, evidence that the banks were classifying the chances of recovery on Hynix's debts as doubtful at the same time they were providing additional assistance, and evidence of government coercion of recalcitrant banks. Based on the totality of that evidence, it was certainly reasonable for Commerce to conclude that the banks were, in fact, acting at the behest of the government, and not purely for commercial reasons.

5. In addition, there is the fact that delegating the task of saving Hynix to the banks was a readily available option for the GOK because most of Hynix's debt was held by government banks, which the government knew it could trust to carry out its decision. There was also a system – the Creditors' Council – through which those government banks could dictate terms to other Hynix creditors as well, particularly if it was demonstrated to the banks that the government was willing to step in as the enforcer, doing a little arm-twisting where necessary. While the GOK denies these allegations by the banks, it cannot explain them under its theory of purely commercial behavior.

6. In sum, the government did not micro-manage the Hynix bailout; but there is ample evidence that the banks were acting at the government's behest in bailing out Hynix. Thus, as the EC noted, this is not a close case. The government's hand – as policy maker, facilitator and enforcer – is all over the Hynix bailout. Without question, based on the evidence as a whole, one can objectively and reasonably conclude that the Hynix bailout was a financial contribution. Frankly, if the evidentiary bar is set so high that the evidence in this case is not sufficient to establish a financial contribution, then the indirect subsidy provision in Article 1 is utterly useless.

The ITC's Injury Determination

7. Throughout these proceedings, Korea has insisted that the United States, through the ITC, "violated" U.S. obligations under the SCM Agreement, "ignored" record evidence, and considered other evidence in a "vacuum." Notwithstanding its repeated arguments, Korea has fallen far short of satisfying its burden of proving that the United States acted in a WTO-inconsistent manner. Indeed, several of Korea's factual and legal arguments contain no reference to the factual record, the ITC's determination, the SCM Agreement, or reports reviewing other investigating authorities' determinations.

8. Korea has repeatedly asserted that the volume of subject imports declined. The facts, however, showed that subject import volume and market share increased, as even Hynix's counsel admitted at the ITC's hearing. In fact, what Korea is really alluding to in its argument is the Hynix brand (composed of subsidized Hynix products made in Korea and products produced at Hynix's U.S. facility in Eugene, Oregon), not Hynix's subject imports. But, Korea cannot point to any provision in the SCM Agreement for the investigating authority to consider volume on a brand-name basis in circumstances such as in the DRAMs investigation, where brand names do not reflect country source and thus do not correspond to the relevant legal inquiry: namely the effect of subsidized subject imports on the domestic industry.

9. Korea never explained why the ITC's rejection of Hynix's proffered reason for the increase in subject import volume was inconsistent with the SCM Agreement. Hynix's Eugene facility was part of the domestic industry, so even if Hynix substituted subsidized imports for DRAM products made by its U.S. affiliate in Eugene, Oregon, those imports injured the domestic industry. The ITC provided a satisfactory explanation for its rejection of Hynix's factual

argument, but Korea simply disagrees with the reason. As for Korea's argument that Hynix has no obligation to supply the U.S. market first from its Oregon facility, and then supplement it with imports, Hynix can supply the U.S. market with imports, as Samsung did, but only if those imports are fairly traded. Hynix's imports benefitted from unfair subsidies, as my colleagues have explained at length.

10. The ITC found significant price undercutting by subsidized subject imports at high margins and increasing frequencies, no matter how the data were examined. Korea calls the ITC's pricing analysis "crude." In fact, the weighted average pricing comparisons that the ITC conducted were tailored to the conditions in the DRAMs industry and were painstaking and representative. The ITC calculated a weighted average for subject imports and offset instances of overselling with instances of underselling. It compared the weighted average price for subject imports with the weighted average price for domestic producers' U.S. shipments. Thus, the ITC's analysis was consistent with the relevant legal inquiry under the SCM Agreement, which is the price effects of subsidized subject imports on the domestic industry.

11. Although Korea has yet to demonstrate that a brand-name analysis was required, let alone permitted, under the SCM Agreement given the facts of the DRAMs investigation, the ITC also examined the pricing data on a disaggregated basis by brand name by source, and this analysis confirmed the results of its weighted-average pricing analysis. The disaggregated analysis revealed that Hynix was the lowest-price source more often than any other source.

12. Korea repeatedly accuses the ITC of conducting its examination of the volume and price effects of subsidized subject imports in a vacuum. But, it is Korea that wants the Panel to look at certain facts and findings in a vacuum. Korea wants the Panel to look at the absolute volume of subject imports and the increases in subject import volume both absolutely and relative to domestic consumption and production in the abstract. But, the SCM Agreement does not require such an approach, because it does not define any volume or increase as "by definition" significant or insignificant.

13. As evidenced by its lengthy discussion of the relevant conditions of competition and business cycle in a separate section of its determination, and by the integration of this discussion into its analysis of the volume, price effects, and impact of subsidized subject imports on the domestic industry, the ITC clearly examined the evidence and the relevant factors in context. Subsidized subject imports were highly substitutable for domestic DRAM products. In this commodity market, price was important, and purchasers reacted quickly to price undercutting through the rapid dissemination of pricing information to certain purchasers, including through such mechanisms as most-favored customer, best price clauses, and other informal arrangements. Demand was inelastic, so lower prices were unlikely to generate additional demand for the product, and demand continued to rise each year. Because DRAM producers must invest constantly in new capital equipment and research and development, they had to maximize capacity utilization.

14. Under these circumstances, a given volume can be more harmful than in other cases involving a highly differentiated product because it is more likely to have a direct impact on the market, particularly in terms of purchasers' willingness to switch to, or increase their purchasing of, subsidized subject imports, and/or use the low prices of subsidized subject imports as leverage to extract lower prices. Indeed, under these circumstances, it was not even necessary for subsidized subject imports to gain market share, if they forced the domestic industry to lower its prices in order to retain its share of the market.

15. The SCM Agreement, which employs disjunctive language, does not even require a finding of a significant increase in subsidized subject import volume, let alone a significant increase in market share. Here, however, not only were there significant adverse price effects in the form of significant underselling and significant price depression, but there was also a significant volume of subsidized subject imports and significant increases in subject import volume, no matter how measured. As the ITC explained, the commodity-like nature of the highly substitutable domestic and subsidized subject DRAM products magnified the ability of a given volume of imports to impact the domestic market and industry. In such a commodity market, which adjusts quickly to price changes, the ITC found that significant monthly price disparities between suppliers would not usually be expected.

16. Thus, it found a pattern of frequent, sustained underselling by subject imports, often at high margins, was especially significant in the context of the DRAM market, and could be expected to have particularly deleterious effects on domestic prices. Although certain other factors played a role in the price declines, 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. 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. In the absence of significant quantities of subject Korean product competing at relatively low prices, domestic prices would have been substantially higher. Korea never seriously challenged the ITC's analysis of the impact of subsidized subject imports on the domestic industry.

17. In the DRAMs investigation, there was a very high causal nexus between the material injury suffered by the domestic industry and the subsidized subject imports, no matter what standard the Panel applies, and no matter what lens the Panel uses to examine the evidence. Korea's contrary arguments are predicated on the assumption that the volume of subsidized subject imports was declining, an assumption that has no support in the record evidence.

18. Finally, Korea has failed to demonstrate why the ITC's evaluation of factors other than subsidized subject imports is inconsistent with U.S. obligations under the SCM Agreement. As Korea stated, there is no requirement in the SCM Agreement for an investigating authority to quantify injury, nor has the Appellate Body ever said there was any requirement to do sophisticated modeling or an econometric analysis of the data. The Appellate Body has explained that to "separate and distinguish" means that an investigating authority is to provide 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. The ITC's determination shows that the ITC not only examined all such factors, but provided a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the unfair imports. Korea has been unable to show why the ITC's explanation is inadequate.

19. Korea would have the Panel believe that the Government of Korea's intervention in the market to artificially sustain the existence of the number three producer of DRAMs in the world had no adverse consequences on Hynix's competitors. We respectfully disagree. While the consequences of Korea's subsidization of Hynix may have varied from market to market, the evidence before the ITC – and the ITC's analysis of that evidence – leave no doubt that subsidized subject imports from Hynix caused material injury to the U.S. DRAMs industry.