

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2005-4)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

April 25, 2005

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Penghu, Kinmen and Matsu

Table of Reports Cited in this Submission

Short Form	Full Citation
Panel Report	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, circulated 21 December 2004, appeal filed with the Appellate Body 29 March 2005

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Korea has appealed one finding of the Panel in this dispute concerning the entrustment or direction by the Government of Korea (“GOK”) of Korea First Bank (“KFB”). Specifically, the Panel found that, based on press accounts of GOK threats directed at KFB, Commerce had a sufficient factual basis from which to reasonably draw the conclusion that there was GOK entrustment or direction in respect of KFB. While the United States disagrees with many aspects of the Panel’s analysis concerning the GOK’s entrustment or direction of Hynix’s creditors, the Panel’s finding with respect to the GOK’s entrustment or direction of KFB was correct.

Therefore, the Appellate Body should affirm the Panel’s findings.

II. THE PANEL CORRECTLY FOUND THAT THE DOC HAD A SUFFICIENT FACTUAL BASIS TO CONCLUDE THAT THERE WAS GOK ENTRUSTMENT OR DIRECTION IN RESPECT OF KFB

2. In its final determination, the U.S. Department of Commerce (“DOC”) observed that numerous press reports from the time of the Hynix restructuring supported a finding that there was a pattern of practices by the GOK to direct banks’ lending decisions with regard to Hynix.¹ A number of those press reports indicated that the GOK had engaged in coercion of Hynix’s creditors as a means of effectuating the GOK’s policy to bail out the financially distressed company.² One set of press reports examined by the DOC related to the GOK’s pressure on KFB to participate in the Fast Track Program and its ultimate surrender to the GOK’s pressure to participate in the Hynix bailout.³

¹ See *Issues and Decision Memorandum* at 59 (Exhibit GOK-5).

² The Panel found “that an objective and impartial investigating authority could properly have found that the GOK had a policy to save Hynix” based upon the DOC record evidence cited by the United States. Panel Report, para. 7.51. Korea has not appealed this finding of the Panel.

³ Panel Report, paras. 7.107-7.115 (summarizing multiple press reports on the GOK’s threats against KFB); see also *First Written Submission of the United States of America*, May 21, (continued...)

3. In the context of its analysis of GOK coercion as evidence of entrustment or direction,⁴ the Panel considered the press reports of GOK threats against KFB. In describing the U.S. arguments, the Panel stated:

The US asserts that, notwithstanding the KFB's initial resistance, it ultimately surrendered to the GOK's pressure by agreeing to participate in the bailout. The US argues that Horie [KFB's CEO] committed to share about \$38 million among \$1.5 billion funding for Hynix's D/As after a personal meeting with a high-level FSS official. The US notes that, in fact, KFB ultimately participated in a number of the Hynix restructuring and recapitalization measures. According to the US, such capitulation by a foreign majority-owned bank simply underscores the even more precarious position of Korean-owned banks when it came to GOK pressure.⁵

After consideration of the record evidence and the parties' arguments, including the U.S.

arguments that KFB ultimately participated in multiple elements of the Hynix bailout, the Panel

³ (...continued)

2004, para. 112 (hereinafter "U.S. First Submission"). The GOK enacted the Fast Track Program in January 2001 to provide for refinancing of maturing bonds. Absent this program, Hynix would have defaulted on its maturing bonds. *See* U.S. First Submission, paras. 134-137.

⁴ The Panel's finding concerning KFB falls within the section of its Report entitled "(iii) GOK Coercion". In this regard, the United States notes that Korea is not appealing the Panel's factual finding that the DOC had sufficient evidence to conclude that the GOK threats aimed at KFB constituted coercion. *Other Appellant's Submission of the Republic of Korea*, April 13, 2005, para. 10 (hereinafter "Korea Appellant Submission"). Nevertheless, Korea insinuates that there was insufficient record evidence to support such a finding. *See* Korea Appellant Submission, paras. 4, 10. In light of this, the United States points out that the DOC record contained much more than a single newspaper article documenting the GOK's coercion of KFB (as well as other Hynix creditors). *See, e.g.*, Exhibits US-14, 56-63. Unfortunately, the Panel disregarded part of this evidence based on its erroneous conclusion that U.S. reference to such evidence in the panel proceeding constituted *post hoc* rationalization. As the United States has demonstrated, this conclusion by the Panel constituted legal error. *Appellant Submission of the United States of America*, April 5, 2005, section II.F (hereinafter "U.S. Appellant Submission").

⁵ Panel Report, para. 7.114. KFB's capitulation to the GOK's threats was particularly remarkable because it was a foreign majority-owned bank. *See* U.S. First Submission, para. 112.

properly found that the DOC had a sufficient factual basis for concluding that there was GOK entrustment or direction in respect of KFB.⁶

4. Korea claims that the Panel erred in finding GOK entrustment or direction of KFB because the alleged object of the GOK coercion – KFB participation in the Fast Track Program – did not occur.⁷ According to Korea, the Panel’s finding “related specifically to the Fast Track Program as discussed in a particular newspaper article”⁸ and that the “link” between the newspaper quotes and the Fast Track Program is found in footnote 136.

5. Korea has misunderstood the analysis and findings of the Panel. In the section of the Panel Report cited by Korea,⁹ the Panel was addressing GOK coercion and threats against Hynix creditors generally as evidence of entrustment or direction. The fact that KFB did not participate in the Fast Track Program was never in dispute.¹⁰ Moreover, the Panel recognized that the GOK’s threats and coercive behavior occurred *because of* “KFB’s failure to participate in the Fast Track Programme.”¹¹ Contrary to Korea’s assertions, footnote 136 indicates that the Panel’s

⁶ Panel Report, para. 7.117.

⁷ Throughout its submission, Korea consistently refers to “the” act that was not undertaken by KFB; *i.e.*, participation in the Fast Track Program. *See, e.g.*, Korea Appellant Submission, paras. 4 (“the step”), 5 (“the supposed governmental act”), and 11 (“the act”).

⁸ Korea Appellant Submission, para. 14.

⁹ Korea Appellant Submission, note 1, citing paragraphs 7.107 to 7.117 of the Panel Report, which is part of section (b)(iii) of the Panel Report, entitled “GOK Coercion.”

¹⁰ *See, e.g., Issues and Decision Memorandum* at 60 (Exhibit GOK-5) (noting that “KFB refused” to participate in the Fast Track Program). Notwithstanding the KFB’s initial resistance to purchase bonds in the Fast Track Program, it ultimately surrendered to the GOK’s pressure by purchasing tens of millions of dollars in Hynix convertible bonds as part of the May 2001 restructuring. *See* Panel Report, para. 7.114.

¹¹ Specifically, the Panel found that the GOK had “strongly urged” KFB to participate in the Fast Track Program and that by not participating, KFB risked losing some of its clients. Panel Report, para. 7.117. As the United States noted, as a result of these threats, KFB

(continued...)

finding in paragraph 7.117 concerns coercion of KFB in respect of entrustment or direction generally. In the footnote, the Panel clarified that it would also consider whether its finding of GOK entrustment or direction of KFB based on coercion has “evidentiary value” in respect of Commerce’s finding of entrustment or direction of other Hynix creditors. The Panel did address this issue later in its Report.¹² Thus, Korea’s interpretation that the Panel’s finding of GOK entrustment or direction of KFB is solely related to participation or non-participation in the Fast Track Program is incorrect.¹³

6. Korea also argues that an act by a private body cannot be attributed to the government unless there is an act by the private body to attribute.¹⁴ This, of course, is axiomatic, and the United States does not disagree. However, whether there were acts by private bodies to attribute to the GOK was never an issue in this case. As the Panel correctly found, “[t]here was no disagreement between the parties concerning the DOC’s determinations that the relevant acts that

¹¹ (...continued)

ultimately agreed to participate in other elements of the bailout. For example, KFB agreed to fund additional D/A financing for Hynix after its Chief Executive Officer met with a high-level official with the GOK’s Financial Supervisory Service. *See* Panel Report, para. 7.114.

¹² *See* Panel Report, para. 7.130. The Panel concluded that GOK coercion was an “isolated incident” with “limited probative value in respect of the alleged entrustment or direction of other private creditors.” As set forth in the U.S. Appellant Submission, the Panel’s finding in this regard is in error for multiple reasons.

¹³ In this regard, Korea’s assertion that the Panel found that “private bodies’ reaction to the government coercion was not relevant,” also is incorrect. *See* Korea Appellant Submission, paras. 11 and 24. The Panel did not say that the actions of private bodies are never relevant. Rather, the Panel correctly recognized that it is ultimately the acts of the government that are potentially implicated by the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). Specifically, the Panel recognized that a Member’s compliance with its WTO obligations is premised upon *the Member’s acts*, not the reactions of private entities. *See* Panel Report, para. 7.33 and note 49. Korea itself took this position before the Panel. *See First Written Submission by the Republic of Korea*, 19 April 2004, para. 382.

¹⁴ Korea Appellant Submission, para. 26.

the private bodies were allegedly entrusted or directed to undertake constitute ‘financial contributions.’”¹⁵ Thus, while the Panel did not relate its finding of “entrustment or direction” to whether the KFB did or did not participate in the Fast Track Program or in any other particular aspect of the Hynix bailout, it did find, and properly so, that KFB’s participation in the bailout was the result of entrustment or direction by the GOK.

7. Moreover, Korea has confused the issue of “entrusts or directs” with the act of “carry[ing] out one or more of the type of functions illustrated in [subparagraphs] (i) to (iii) [of Article 1.1(a)(1)].”¹⁶ The fact that the entrustment or direction and the private body actions do not occur simultaneously does not obviate the government entrustment or direction.¹⁷ As the Panel correctly recognized, “leaving discretion to a private body is [not] necessarily at odds with entrusting or directing that private body.”¹⁸ As an example of discretion left to a private body, the Panel stated that “it is possible that a government could entrust or direct a private body to

¹⁵ Panel Report, note 42. Korea has not disputed this finding by the Panel.

¹⁶ See Korea Appellant Submission, para. 7 (arguing that there can be no entrustment or direction where no action was taken by the private body). Pursuant to Article 1.1(a)(1) of the SCM Agreement, if the government itself carries out one of the functions illustrated in subparagraphs (i) to (iii) (*i.e.*, transferring funds, foregoing revenue otherwise due, or providing goods or services or purchasing goods), such action constitutes a financial contribution. If a private body carries out the same function, there is a financial contribution if it is established that the private body was “entrusted or directed” by the government to carry out the function. See Panel Report, para. 7.37.

¹⁷ For example, if a government directs a private bank to provide financial assistance to a particular company, the fact that the bank has not yet done so does not mean there is no government direction. It simply means that the bank has yet to provide the actual financial assistance. When the bank does provide that financial assistance, such assistance (assuming it is a type of function illustrated in subparagraphs (i) to (iii)) represents a financial contribution that can be attributed to the government.

¹⁸ Panel Report, para. 7.38.

make a loan, but leave the terms of that loan to the discretion of the private body.”¹⁹ The timing of the loan also could be left to the discretion of the private body.

8. A finding of entrustment or direction is not precluded simply because a government does not specify in great detail what or when something must be done. As the Panel properly recognized, “the plain meaning of [entrusts or directs] does not require that [the act or actor] must necessarily be specified in great detail.”²⁰ In the instant case, the DOC had a sufficient factual basis, based upon record evidence, to conclude there was GOK entrustment or direction of KFB to participate in the Hynix bailout. The issue of whether that participation constituted financial contributions as defined in Article 1.1(a)(1) of the SCM Agreement was never in dispute.

III. CONCLUSION

9. For the foregoing reasons, the United States respectfully requests that the Appellate Body affirm the Panel’s findings in the portions of the Panel Report cited by Korea that the DOC had a sufficient factual basis on which to conclude that there was GOK entrustment or direction in respect of KFB.

¹⁹ Panel Report, para. 7.38.

²⁰ Panel Report, para. 7.35. Korea has not challenged the Panel’s findings in this regard, and the United States agrees with the Panel’s statements in this paragraph on this limited point. However, as the United States has demonstrated, the Panel erred, *inter alia*, in its interpretation of “entrusts or directs” as “delegation or command.” See U.S. Appellant Submission, paras. 14-38.