

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

**WT/DS296**

**CLOSING STATEMENT OF THE  
UNITED STATES OF AMERICA**

**AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

**June 24, 2004**

Mr. Chairman, members of the Panel:

*Subsidy Issues*

1. In closing, we would like to comment briefly on Korea's suggestion that the Commerce Department is an over-zealous agency run amok. Korea characterizes the U.S. position in alarming terms, portending unlimited discretion for investigating authorities and a world in which the financial community has no choice but to stand by and watch ailing companies go bankrupt. The alarm Korea sounds is necessary to justify the fact that Korea is asking the Panel to read into the "entrusts or directs" language of Article 1.1(a)(1)(iv) a special evidentiary requirement that would immunize all informal government action from the disciplines of that provision, by prohibiting reliance on circumstantial evidence, no matter how compelling, and by requiring explicit, concrete evidence of government entrustment or direction not only for a particular task, but also for each action necessary to accomplish that task. Korea's solution, in

short, is to make Article 1.1(a)(1)(iv) so easy for governments to circumvent that it would render the provision meaningless – an absurd result that Korea apparently does not find alarming.

2. As we discussed in our submission and over the past two days, the DOC provided a well-reasoned analysis of why the facts – and admittedly the facts are very complex – when viewed as a whole, present a clear picture of a government bailout of Hynix.

### *Injury Issues*

3. In its written submission, Korea repeatedly asserted that the volume of subsidized imports declined. In its opening statement, Korea retreated from this assertion, arguing in paragraphs 7 and 9 only that the Hynix brand declined. Indeed, Korea even conceded in paragraph 11 that subject imports did increase.

4. Even without an increase, subject imports can have price effects if, for example, they force other market players to lower their prices. For the sales that the financially troubled Hynix did make, there was significant price undercutting, however measured. It does not take much to set the margin in a commodity market where prices are rapidly disseminated.

5. Korea admitted that there was injury here. The fact that other factors may have been causing injury at the same time as subsidized subject imports does not, under the SCM Agreement, invalidate or prevent an investigating authority from finding that subsidized subject imports caused material injury to the domestic industry.

### *Standard and Scope of Review*

6. Over the course of the past two days, we and Korea have repeatedly referred to the fact that “we have a disagreement” or “we have a dispute.” It is important that we be clear about what the disagreement before the Panel is all about.

7. One possible disagreement is historical, involving the question of whether Hynix received subsidies and whether imports of subsidized merchandise caused injury to a U.S. industry. That issue was resolved by the Department of Commerce and the International Trade Commission in their determinations, and is not before the Panel.

8. The present disagreement – the disagreement before the Panel – is different; it is whether a reasonable, unbiased person *could* have reached the same conclusions as those agencies, based on the evidence before them.

9. Korea says that there is no disagreement concerning the standard of review, but there is. Korea said earlier that your job is to determine what a reasonable authority *should* have found. However, your task is *not* to determine what a reasonable authority *should* have found. Rather, your task is to determine what a reasonable investigating authority *could* have found based upon the evidence before it.

10. A related issue is the scope of the Panel's review. We can certainly understand the Panel's desire to have as much information before it as possible. However, once you stray into the area of non-record evidence, you risk running afoul of the provisions of Article 11 of the DSU. We urge you to consider that if you are thinking of accepting non-record evidence. The Panel cannot perform its assigned function if it is considering information that was not before the agency.

11. Finally, it is Korea that bears the burden of proving that a reasonable, unbiased person could not have reached the same conclusions as the DOC and the ITC. So far, all Korea has done is to say that there are conflicting pieces of evidence in the record, but it has failed to prove – although it repeatedly suggests – that the agencies' consideration of such evidence was improper.

In other words, Korea has failed to satisfy its burden of proof with respect to the disagreement that is before this Panel.

12. Thank you again for agreeing to participate in the work of this Panel. We look forward to continuing that work with you in the coming weeks.