

US – COUNTERVAILING DUTY INVESTIGATION ON DRAMS¹

(DS296)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Korea	ASCM Arts. 1, 2 and 15	Establishment of Panel	23 January 2004
			Circulation of Panel Report	21 February 2005
Respondent	United States	DSU Art. 11	Circulation of AB Report	27 June 2005
			Adoption	20 July 2005

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US final countervailing duty order on imports from Korea.
- Product at issue: DRAMS and memory modules containing DRAMS from Hynix of Korea.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

ASCM Art. 1.1(a)(1)(iv) ("Entrusts or directs")

- "Entrusts" or "directs" (interpretation): The Panel found that the ordinary meanings of "entrusts" and "directs" must contain a notion of delegation or command. The Appellate Body explained that although "direction" or "command" are two means by which a government may provide a financial contribution, the scope of actions covered by "entrustment" and "delegation" could extend beyond what is covered by the terms "direction" and "command" if strictly construed. It explained that "entrustment" occurs where a government gives responsibility to a private body, and "direction" where the government exercises its authority over a private body and that, in both cases, "the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii)." It also said that involvement of some form of "threat or inducement" could serve as evidence of entrustment or direction.
- Panel's standard of review (DSU Art. 11): The Appellate Body found that the Panel failed to apply the proper standard of review under DSU Art. 11 by (1) engaging improperly in a *de novo* review of the evidence before the United States Department of Commerce ("USDOC") by failing to consider the USDOC evidence in its totality and requiring, instead, that individual pieces of evidence, in and of themselves, establish entrustment or direction; (2) excluding certain evidence on the record from its consideration; and (3) relying on evidence that was not on the record of the USDOC. The Appellate Body found that the errors found above invalidated the basis for the Panel's conclusion that there was not sufficient evidence to support the USDOC finding of entrustment or direction, and so reversed the Panel's finding that the USDOC's determination of entrustment or direction of certain Hynix creditors was inconsistent with Art. 1.1(a)(1)(iv).

ASCM Arts. 1.1(b) and 2 (benefit and specificity)

- The Appellate Body found that the Panel's findings on "benefit" and "specificity" was premised exclusively on its finding on entrustment or direction. Since it had reversed the Panel's finding on entrustment or direction, it found no basis to uphold the Panel's finding on benefit and "specificity". Consequently, the Appellate Body reversed the Panel's finding that the USDOC's benefit determination was inconsistent with Art. 1.1(b) and similarly reversed the Panel's finding that the USDOC's determination of specificity was inconsistent with Art. 2. The Appellate Body did not complete the analysis in either case.

ASCM Art. 15 (injury analysis)

- The Panel found that the ITC violated the non-attribution requirement under Art. 15.5 for the 'decline in demand' factor, but it rejected Korea's other claims under Art. 15 in respect of the ITC injury analysis. The Panel's finding was not appealed.

¹ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*

² Other issues addressed: ASCM Art. 15.2 (import volumes and price effects); Art. 15.4 (economic factors); Art. 15.5 (causation); Arts. 15.2 and 15.4 (domestic industry, subject imports, and non-subject imports); Art. 15.5 (non-attribution); Art. 12.6 (verification meetings); DSU Art. 19.1 (Panel's recommendation).