

February 9, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results in the
Fourth Administrative Review of the Countervailing Duty Order
on Dynamic Random Access Memory Semiconductors from the
Republic of Korea

Background

On August 13, 2008, the Department of Commerce (“the Department”) published the preliminary results of this administrative review. See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 73 FR 47131 (“Preliminary Results”). The “Analysis of Programs” and “Subsidies Valuation Information” sections, below, describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the “Analysis of Issues” section, below, which also contains the Department’s responses to the issues raised in the briefs.¹ We recommend that you approve the positions described in this memorandum. Below is a complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties:

Comment 1: Timing of the Benefit on a Previously Countervailed Debt-to-Equity Swap (“DES”)

Comment 2: Allegation that Hynix is Circumventing the Order

¹ The Department received a case brief and supplemental case brief from Micron Technology, Inc. (“Micron”) and rebuttal brief and supplemental rebuttal brief from Hynix Semiconductor Inc. (“Hynix”).

Changes in Ownership

Effective June 30, 2003, the Department adopted a new methodology for analyzing privatizations in the countervailing duty (“CVD”) context. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003). This methodology is based on a rebuttable “baseline” presumption that non-recurring, allocable subsidies continue to benefit the subsidy recipient throughout the allocation period (which normally corresponds to the average useful life (“AUL”) of the recipient’s assets). However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a change in ownership occurred in which the former owner sold all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm’s-length transaction for fair market value.

Hynix’s ownership changed during the AUL period as a result of debt-to-equity conversions in December 2002 and various asset sales. In addition, Hynix reported that its ownership changed during the period of review (“POR”) because Hynix’s Share Management Council decreased its ownership share in Hynix from 50.6 percent to 36 percent. However, during the current administrative review, Hynix has not rebutted the Department’s baseline presumption that the non-recurring, allocable subsidies received prior to the equity conversions, asset sales, and the POR ownership change, continue to benefit the company throughout the allocation period. See Hynix’s November 26, 2007, questionnaire response at pages 9 and 10.

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the AUL of the renewable physical assets used to produce the subject merchandise. 19 CFR 351.524(d)(2) creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service’s 1977 Class Life Asset Depreciation Range System (the “IRS Tables”). For dynamic random access memory semiconductors (“DRAMs”), the IRS Tables prescribe an AUL of five years. During this review, none of the interested parties disputed this allocation period. Therefore, we continue to allocate non-recurring benefits over the five-year AUL.

Discount Rates and Benchmarks for Loans

For loans that we found countervailable in the investigation or in the first three administrative reviews, and which continued to be outstanding during the POR, we have used the benchmarks from the first, second, and third administrative reviews. These benchmarks are described below.

Long-term Rates

For long-term, won-denominated loans originating in 1986 through 1995, we used the average interest rate for three-year corporate bonds as reported by the Bank of Korea (“BOK”) or the International Monetary Fund (“IMF”). For long-term won-denominated loans originating in

1996 through 1999, we used annual weighted averages of the rates on Hynix's corporate bonds, which were not specifically related to any countervailable financing.

For U.S. dollar-denominated loans, we relied on the lending rates as reported in the IMF's International Financial Statistics Yearbook.

For the years in which we previously determined Hynix to be uncreditworthy (2000 through 2003), we used the formula described in 19 CFR 351.505(a)(3)(iii) to determine the benchmark interest rate. For the probability of default by an uncreditworthy company, we used the average cumulative default rates reported for the Caa- to C- rated category of companies as published in Moody's Investors Service, "Historical Default Rates of Corporate Bond Issuers, 1920-1997" (February 1998). For the probability of default by a creditworthy company, we used the cumulative default rates for investment grade bonds as published in Moody's Investors Service: "Statistical Tables of Default Rates and Recovery Rates" (February 1998). For the commercial interest rates charged to creditworthy borrowers, we used the rates for won-denominated corporate bonds as reported by the BOK and the U.S. dollar lending rates published by the IMF for each year.

Analysis of Programs

I. Programs Previously Determined to Confer Subsidies

We examined the following programs determined to confer subsidies in the investigation and first three administrative reviews and find that Hynix continued to receive benefits under these programs during the POR.

A. Government of the Republic of Korea ("GOK") Entrustment or Direction Prior to 2004

In the investigation, the Department determined that the GOK entrusted or directed creditor banks to participate in financial restructuring programs, and to provide credit and other funds to Hynix, in order to assist Hynix through its financial difficulties. The financial assistance provided to Hynix by its creditors took various forms, including new loans, convertible and other bonds, extensions of maturities and interest rate reductions on existing debt (which we treated as new loans), Documents Against Acceptance financing, usance financing, overdraft lines of credit, debt forgiveness, and debt-for-equity swaps ("DES"). The Department determined that these were financial contributions that constituted countervailable subsidies during the period of investigation.

In the first three administrative reviews, the Department found that the GOK continued to entrust or direct Hynix's creditors to provide financial assistance to Hynix throughout 2002 and 2003. The financial assistance provided to Hynix during this period included the December 2002 DES and the extensions of maturities and/or interest rate deductions on existing debt.²

² The Department also found that Hynix received a benefit for a 2001 DES. However, the benefit was fully allocated as of the prior administrative review.

In an administrative review, we do not revisit past findings unless new factual information or evidence of changed circumstances has been placed on the record of the proceeding that would compel us to reconsider those findings. See, e.g., Certain Pasta from Italy: Preliminary Results and Partial Rescission of the Seventh Countervailing Duty Administrative Review, 69 FR 45676, 45681 (July 30, 2004) (“Pasta from Italy”), unchanged in Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review, 69 FR 70657 (December 7, 2004) (“Pasta Final”). No such new factual information or evidence of changed circumstances has been placed on the record in this review. Thus, we find that a re-examination of the Department’s findings in the investigation, first administrative review, second administrative review, and third administrative review with respect to the debt forgiveness, 2002 DES, loans, and extensions of maturities and/or interest rate deductions on existing debt is unwarranted.

Because we found Hynix to be unequityworthy at the time of the 2002 DES, we have treated the full amount swapped as a grant and allocated the benefit over the five-year AUL. See 19 CFR 351.507(a)(6) and (c). We used a discount rate that reflects our finding that Hynix was uncreditworthy at the time of the debt-to-equity conversions. For the loans, we have followed the methodology described at 19 CFR 351.505(c) using the benchmarks described in the “Subsidies Valuation Information” section of this notice, above.

We divided the total benefits allocated to the POR from the various financial contributions by Hynix’s POR sales. On this basis, we determine the countervailable subsidy to be 4.86 percent ad valorem during the POR.

B. Operation G-7/HAN Program

Implemented under the Framework on Science and Technology Act, the Operation G-7/HAN Program (“G-7/HAN Program”) began in 1992 and ended in 2001. The purpose of this program was to raise the GOK’s technology standards to the level of the G-7 countries. The Department found that the G7/HAN Program ended in 2001. See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003), and accompanying Issues and Decision Memorandum at 25. However, during the POR, Hynix had outstanding interest-free loans that it had previously received under this program. See Hynix’s November 26, 2007, questionnaire response at 13 and Exhibit 10.

We found that the G-7/HAN Program provided countervailable subsidies in the investigation. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these loans confer a countervailable subsidy.

To calculate the benefit of these loans during the POR, we compared the interest actually paid on the loans during the POR to what Hynix would have paid under the benchmark described in the “Subsidy Valuation Information” section of this notice. Next, we divided the total benefit by Hynix’s total sales of subject merchandise for the POR to calculate the countervailable subsidy. On this basis, we determine the countervailable subsidy to be 0.03 percent ad valorem during the POR.

C. 21st Century Frontier R&D Program

The 21st Century Frontier Research & Development Program (“21st Century Program”) was established in 1999 with a structure and governing regulatory framework similar to those of the G-7/HAN Program, and for a similar purpose, *i.e.*, to promote greater competitiveness in science and technology. The 21st Century Program provides long-term interest-free loans in the form of matching funds. Repayment of program funds is made in the form of “technology usance fees” upon completion of the project, pursuant to a schedule established under a technology execution or implementation contract.

Hynix reported that it had loans from the 21st Century Program outstanding during the POR. See Hynix’s November 26, 2007, questionnaire response at page 14 and Exhibit 10.

In the investigation, we determined that this program conferred a countervailable benefit on Hynix. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these loans confer a countervailable subsidy.

To calculate the benefit of these loans during the POR, we compared the interest actually paid on the loans during the POR to what Hynix would have paid under the benchmark described in the “Subsidy Valuation Information” section of this notice. We then divided the total benefit by Hynix’s total sales in the POR to calculate the countervailable subsidy rate. On this basis, we find countervailable benefits of less than 0.005 percent *ad valorem* during the POR. Consistent with our past practice, we did not include this program in our preliminary net CVD rate because the rate of the program is less than 0.005 percent *ad valorem*. See, e.g., Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007), and accompanying Issues and Decision Memorandum at 15 (“CFS”); and Final Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 70 FR 39998 (July 12, 2005), and accompanying Issues and Decision Memorandum at “Purchases at Prices that Constitute ‘More than Adequate Remuneration,’” (citing Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada, 69 FR 75917 (December 20, 2004), and accompanying Issues and Decision Memorandum at “Other Programs Determined to Confer Subsidies”) (“Uranium from France”).

D. Import Duty Reduction Program for Certain Factory Automation Items

Article 95(1).4 of the Korean Customs Act provides for import duty reductions on imports of “machines, instruments and facilities (including the constituent machines and tools) and key parts designated by the Ordinance of the Ministry of Finance and Economy (“MOFE”) for a factory automatization applying machines, electronics or data processing techniques.”

Hynix reported that it had received duty reductions under this program during the POR. See Hynix’s November 26, 2007, questionnaire response at 19 and Exhibit 14.

In the last administrative review, the Department found that the above program provided a

financial contribution in the form of revenue forgone and a benefit in the amount of the duty savings. See section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (“the Act”), and 19 CFR 351.510(a). See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 73 FR 14218 (March 17, 2008) (“DRAMS 3rd AR Final”), and accompanying Issues and Decision Memorandum at 6 – 7 and Comment 6. The Department also found the program to be de facto specific under section 771(5A)(D)(iii)(III) of the Act. Id. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these duty reductions confer a countervailable subsidy.

To calculate the benefit, we divided the total duty savings Hynix received during the POR by Hynix’s total sales during the POR. On this basis, we determine the countervailable subsidy to be 0.02 ad valorem percent during the POR.

II. Newly Alleged Subsidy Program Determined To Provide No Benefit During the POR

A. Import-Export BOK Loan

Micron alleges that Hynix received a new, subsidized loan during the POR from the Import-Export Bank of Korea (“KEXIM”), which the Department has previously found to be a government authority. Therefore, Micron alleges that KEXIM, as a government authority, provided a financial contribution within the meaning of section 771(5)(D) of the Act and a benefit within the meaning of section 771(5)(E) of the Act. Furthermore, Micron argues the loan was specific within the meaning of section 771(5A) of the Act as the loan was based on export performance, an import substitution program or another enumerated domestic program. We initiated an investigation of this newly alleged subsidy program.³

The GOK has stated Hynix received a loan from KEXIM during the POR under the “Import Financing Program.” This program, as outlined in Article 18, paragraph 1, subparagraph 4 of the KEXIM Act, is provided to Korean importers to facilitate their purchase of essential materials, major resources, and operating equipment, the stable and timely supply of which is essential to the stability of the general economy. The equipment and materials eligible to be imported under the program fall under 13 headings listed in Article 14 of the KEXIM Business Manual. The listed items range from raw materials to factory automation equipment and include products and materials described in government notices.

Further, according to the GOK, any Korean company is eligible for the “Import Financing Program” as long as the equipment or material appears under the 13 headings of eligible items, the company can satisfy the financial criteria laid out in “KEXIM’s Credit Extension Regulation,” and KEXIM’s Credit Extension Committee approves the financing application. Regarding the last item, the GOK stated that all decisions to offer this financing are based on the application and financial status of the applicant company.

³ See Fourth Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea: New Subsidy Allegations Memorandum (March 17, 2008).

Based on our analysis, any potential benefit to Hynix under this program is less than 0.005 percent ad valorem. To determine this, we applied Micron's proposed interest benchmark, the highest submitted rate on record, in the calculation. As explained above, where the countervailable subsidy rate for a program is less than 0.005 percent, the program is not included in the total CVD rate. See CFS and Uranium from France. Accordingly, it is unnecessary in this review for the Department to make a finding as to the countervailability of this program for this POR. We will include an examination of this subsidy in the next administrative review.

III. Programs Previously Found Not to Have Been Used or Provided No Benefits

We preliminarily determine that the following programs were not used during the POR:

- A. Short-Term Export Financing
- B. Reserve for Research and Human Resources Development (formerly Technological Development Reserve) (Article 9 of RSTA / formerly, Article 8 of TERCL)
- C. Tax Credit for Investment in Facilities for Productivity Enhancement (Article 24 of RSTA / Article 25 of TERCL)
- D. Tax Credit for Investment in Facilities for Special Purposes (Article 25 of RSTA)
- E. Reserve for Overseas Market Development (formerly, Article 17 of TERCL)
- F. Reserve for Export Loss (formerly, Article 16 of TERCL)
- G. Tax Exemption for Foreign Technicians (Article 18 of RSTA)
- H. Reduction of Tax Regarding the Movement of a Factory That Has Been Operated for More Than Five Years (Article 71 of RSTA)
- I. Tax Reductions or Exemption on Foreign Investments under Article 9 of the Foreign Investment Promotion Act ("FIPA")/ FIPA (Formerly Foreign Capital Inducement Law)
- J. Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates
- K. Export Insurance
- L. Electricity Discounts Under the RLA Program
- M. Import Duty Reduction for Cutting Edge Products
- N. System IC 2010 Project

See Hynix's November 26, 2007, questionnaire response at 13 and 16 and the GOK's November 26, 2007, questionnaire response at 9.

In the first administrative review, the Department found that "any benefits provided to Hynix under the System IC 2010 Project are tied to non-subject merchandise" and, therefore, that "Hynix did not receive any countervailable benefits under this program during the POR," in accordance with 19 CFR 351.525(b)(5). See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 71 FR 14174 (March 21, 2006), and accompanying Issues and Decision Memorandum at 15. No new information has been provided with respect to this program. Therefore, we find that Hynix did not receive any countervailable benefits from the System IC 2010 Project during the POR.

Cash Deposit Adjustment

In the Preliminary Results, the Department preliminarily determined that there was sufficient information on the record to support Hynix's request for an adjustment to the cash deposit rate to reflect the expiry of certain benefits. See Preliminary Results, 73 FR at 47136. On October 3, 2008, the Department published a Federal Register notice that, inter alia, revoked this order effective August 11, 2008. See Dynamic Random Access Memory Semiconductors From the Republic of Korea: Final Results of Sunset Review and Revocation of Order, 73 FR 57594 (October 3, 2008). As a result, no cash deposits are currently required. Therefore, we do not intend to issue cash deposit instructions to U.S. Customs and Border Protection ("CBP") pursuant to the results of this administrative review and Hynix's claim for an adjustment to the cash deposit rate is moot.

Analysis of Comments

Comment 1: Timing of the Benefit on a Previously Countervailed Debt-to-Equity Swap ("DES")

Micron asserts the Department erred in the preliminary results by failing to reexamine its previous decisions not to allocate the benefits from the DES beginning in 2003 rather than 2002. Micron further argues that the Department should reverse its prior decisions on the DES allocation period for the final results. Its reasoning is based on three factors.

First, Micron argues factual information on the record demonstrates that all of the contingencies for the DES approval were not fulfilled until 2003. Although the Creditors' Council approved the DES in 2002, that approval was not the effectuating event as it has been characterized. Citing information presented in the FIS,⁴ Micron claims the Creditors' Council approval was one of many contingencies which was necessary. Among the other contingencies, Hynix's board of directors and shareholders did not approve the DES and accompanying restructuring plan until 2003, and there was nothing "pro forma" about either event.⁵ Micron asserts several news articles, the 2002 financial statements of Hynix's creditors, and Hynix's own characterization of the relationship between the Creditors' Council and the board of directors demonstrate the DES was neither certain in 2002 nor a foregone conclusion.⁶

Micron also argues that, according to relevant statutes and regulations, the Department is not bound nor obligated to show deference to Hynix's accounting treatment of the DES for its subsidy allocation purposes. Citing the "Statement of Korean Financial Standards No. 13," a MOFE ruling to the Korean Exchange Bank, and a tax provision, Micron claims there is ample information on the record to support that Hynix did not follow Korean accounting standards and tax regulations when it booked the DES in 2002.⁷ Moreover, the accounting treatment of the

⁴ See Micron's Submission of Factual Information (January 18, 2008) ("FIS") at Exhibit 5 (vol. 6 -7).

⁵ See Micron's Case Brief (September 23, 2008) at 18 - 21.

⁶ Id.

⁷ Id. at 21 - 24.

DES in 2003 by its creditors demonstrates Hynix's audited financial statements are unreliable.⁸ Therefore, Micron asserts the Department should not rely on Hynix's accounting of the DES in its 2002 financial statements.

Finally, Micron argues that the Department used irrelevant factors in judging that the DES occurred in 2002. Micron asserts "receipt of a subsidy" and "date agreed" to provide a subsidy are two distinct events and covered under separate regulations.⁹ Citing the Department's prior cases,¹⁰ Micron argues the Department has always considered the timing of any DES to be when a company actually receives the equity. Therefore, Micron contends the Department should follow its prior practice and not use the irrelevant factors it cited in judging the receipt of the equity to be 2002.

Hynix argues that Micron's factual information and arguments on the contingencies surrounding the DES and Hynix's accounting treatment of the DES have already been addressed by the Department in prior reviews and notes that Micron has not rebutted or provided new information to counter any of the Department's prior findings.¹¹ Moreover, citing the CIT DRAMS Decision,¹² Hynix also contends Micron's argument on the timing of the DES and its interpretation of the Department's regulation is also misplaced.¹³ Finally, Hynix counters Micron's interpretation of the Department's prior decisions and argues the cited cases do not support Micron's reading of the Department's regulations.¹⁴

Department's Position: In the Department's NSA Memo,¹⁵ we responded to Micron's resubmission of information from the prior review in this administrative review and stated "...absent new factual information or changed circumstances from Micron that would compel us to reconsider this finding, we do not recommend examining our past decision in this administrative review."¹⁶ This is consistent with our general practice in CVD proceedings not to revisit past findings unless new factual information or evidence of changed circumstances has

⁸ Id.

⁹ See 19 CFR 351.507(b) and 351.524(d)(3)(i). See, also, Micron's Case Brief at 25.

¹⁰ Id. at 24 – 28. See also Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62128 (October 3, 2002) and accompanying Issues and Decision Memorandum at Section I.A; Preliminary Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 5967, 5973 (February 8, 2002); Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 64 FR 38742, 38748 (July 19, 1999); Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France, 58 FR 37304, 37312 (July 9, 1993); Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy, 59 FR 18357, 18360 (April 18, 1994); and Preliminary Affirmative Countervailing Duty Determination: Certain Textile Mill Products And Apparel From The Philippines, 50 FR 1607, 1610 (January 10, 1985).

¹¹ See Hynix's Rebuttal Brief (September 29, 2008) at 7 - 9.

¹² See Micron Technology, Inc. v. United States, Slip Op. 07-183, No. 06-00133 (CIT December 19, 2007) ("CIT DRAMS Decision").

¹³ See Hynix's Rebuttal Brief at 10 - 12.

¹⁴ Id. at 13 – 17.

¹⁵ See Memorandum to Susan Kuhbach, Director, Office 1, regarding "Fourth Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea; New Subsidy Allegations" (March 17, 2008) ("NSA Memo").

¹⁶ Id. at 4.

been placed on the record. See, e.g., Pasta from Italy, unchanged in Pasta Final. Since the NSA Memo, Micron has not provided new information or evidence of changed circumstances on the record of this proceeding. Moreover, the Department has already addressed the arguments presented by Micron.¹⁷ Therefore, we are not reconsidering the Department's prior decisions to allocate the DES beginning in 2002 instead of 2003.

Comment 2: Allegation that Hynix Is Circumventing the Order

Original Case Briefs

In its case brief dated September 23, 2008, Micron argues that the Department must take further action in coordination with CBP to enforce the CVD order. First, Micron notes that CBP reported to Congress in May 2008 that importers of DRAMS were undervaluing and misdescribing DRAMS in express courier manifests. Second, Micron requests the assistance of the Department in directing CBP to investigate specific allegations of circumvention by Hynix.¹⁸ Finally, alleging that Hynix's predecessor company circumvented an antidumping order on DRAMS, Micron contends that the Department must consider Hynix's past actions when it assesses the integrity of the DRAMS CVD order.

Micron requests that the Department take the following actions:

- 1) Further investigate Micron's allegations of circumvention, in collaboration with CBP;
- 2) Obtain additional documentation from Hynix;
- 3) Instruct CBP to reliquidate entries not originally subject to CVD;
- 4) Request that CBP conduct further investigation;
- 5) Issue revised liquidation instructions that instruct CBP to require importers to declare the country of wafer fabrication;
- 6) Apply adverse facts available in the final results; and
- 7) Take any other appropriate action to address Micron's allegations.

In its rebuttal brief dated September 29, 2008, Hynix responds that no amount of investigation by CBP and the Department is sufficient to satisfy Micron's concerns over allegations of circumvention. Hynix argues that the current enforcement system is working and that there is no need for the Department to take extraordinary actions. Regarding the CBP report to Congress, Hynix notes that the report did not suggest that Hynix was one of the parties that had undervalued and misdescribed DRAMS imports. Further, Hynix contends that the report shows that CBP is already paying careful attention to DRAMS imports.

Regarding Micron's specific allegations of circumvention by Hynix, Hynix argues that Micron has exaggerated the facts in a case where there is no serious problem. Hynix cites the decision

¹⁷ See DRAMS 3rd AR Final and accompanying Issues and Decision Memorandum at Comment 1.

¹⁸ We cannot summarize these specific allegations publicly because of the extent of proprietary information in the allegations. See page 1 of Micron's September 23, 2008, case brief for a summary of the allegations; see also pages 6-15 of the case brief for a full discussion of the allegations.

memorandum from the third administrative review¹⁹ to support its argument that the Department has no reason to investigate Micron's allegations further. Finally, Hynix argues that Micron's arguments about a previous antidumping review on DRAMS are not relevant to the current CVD review.

Supplemental Case and Rebuttal Briefs

On November 24, 2008, the Department issued an additional supplemental questionnaire to Hynix.²⁰ We received a response to the questionnaire on December 2, 2008.²¹ On December 12, 2008, the Department issued a memorandum granting permission to parties to submit case and rebuttal briefs that addressed information in Hynix's supplemental questionnaire response.²² Micron submitted a timely case brief on December 17, 2008,²³ and Hynix submitted a timely rebuttal brief on December 22, 2008.²⁴

In its supplemental case brief, Micron contends that the information in Hynix's supplemental questionnaire response makes clear that Hynix has circumvented the DRAMS order.²⁵ Citing Tokyo Kikai,²⁶ Micron argues that the Department has remedial power to address Hynix's circumvention of the order.

In its supplemental case brief, Micron requests that the Department take the following steps in addition to those that Micron included in its original case brief:

- 1) Require additional product entry information from Hynix;
- 2) Instruct the Foreign-Trade Zones Board to take specific action; and
- 3) Instruct CBP to take additional follow-up steps.

In its supplemental rebuttal brief, Hynix contends that the Department should ignore Micron's supplemental case brief. Hynix argues that Micron's supplemental brief contains no credible arguments concerning how the Department should change the preliminary results of this administrative review for the final results of this review. Further, Hynix argues that the Department's November 24, 2008, supplemental questionnaire focused narrowly on information that could have affected the CVD assessment rate. Finally, Hynix contends that Tokyo Kikai

19 DRAMS 3rd AR Final Issues and Decision Memorandum at 21.

20 See letter from the Department to Hynix, "Fourth Supplemental Questionnaire" (November 24, 2008).

21 See letter from Hynix to the Department, "Hynix Semiconductor's Response to Commerce Department's Supplemental Questionnaire dated November 24, 2008" (December 2, 2008).

22 See Memorandum to the File through Nancy Decker, Program Manager, "Post-Briefing Schedule" (December 12, 2008).

23 See letter from Micron to the Department, "Petitioner's Supplemental Case Brief" (December 17, 2008).

24 See letter from Hynix to the Department, "Hynix Semiconductor Inc.'s Supplemental Rebuttal Brief" (December 22, 2008).

25 Because of the extent of proprietary information in Micron's supplemental case brief, we cannot publicly summarize Micron's specific allegations against Hynix. See pages 1-2 of Micron's December 17, 2008, supplemental case brief for Micron's summary of the allegations; see also pages 3-14 of the supplemental case brief for a full discussion of the allegations.

26 Tokyo Kikai Seisakusho, Ltd. v. United States, 473 F. Supp. 2d 1349 (CIT 2007) ("Tokyo Kikai").

involved the Department's self-initiation of a changed circumstances review to address proven claims of intentional fraud. Hynix asserts that Tokyo Kikai has nothing to do with the issues that Micron has raised in the current review.

Department's Position:

Two of Micron's requests for action by the Department concern the final results of the current CVD administrative review. The first is Micron's request to apply adverse facts available. Section 776(a) of the Act states that the Department will apply facts otherwise available ("FA") in reaching a determination if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person
 - (A) withholds information that has been requested by the administering authority or the Commission under this title,
 - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
 - (C) significantly impedes a proceeding under this title, or
 - (D) provides such information but the information cannot be verified as provided in section 782(i).

Section 776(b) of the Act provides that the Department may use an adverse inference (i.e., adverse facts available, or "AFA") in selecting from the facts otherwise available if it finds that an interested party has failed to cooperate. In this review, Hynix has provided responses to all of our questionnaires, including the December 2, 2008, supplemental questionnaire. Hynix has not withheld information, failed to provide timely responses, impeded the proceeding, or provided unverifiable information. Thus, the Department has no basis to apply FA or AFA to the final results of this administrative review.

Micron's second request concerning the final results of the administrative review is that the Department issue liquidation instructions that require importers to declare the country of wafer fabrication.²⁷ The entries subject to liquidation at the end of this current review, however, are entries of Korean-origin products produced and/or exported by Hynix. Thus, the entries subject to liquidation at the end of the review are entries that importers have already declared as Korean-origin products. The Department revoked this order effective August 11, 2008; thus, Micron's

²⁷ We issued draft liquidation instructions with the calculations for the Preliminary Results. See Memorandum to Susan Kuhbach, Office Director, "Preliminary Results Calculations for Hynix Semiconductor, Inc.," at Attachment 5 (July 31, 2008).

request does not apply to future entries. To the extent that Micron's request applies to past entries not currently subject to suspension of liquidation, the Department has no authority to order re-liquidation for the reasons that we explain below.

Micron's remaining allegations and requests for action concern laws and regulations that CBP enforces. Although Micron uses the term "circumvention" throughout its case briefs, the circumvention that Micron alleges is not circumvention under section 781 of the Act. Instead, Micron alleges that Hynix has violated customs laws and regulations. While the Department works closely with CBP, the responsibility for enforcing these customs laws and regulations lies with CBP, not with the Department.

Specifically, the Department has no authority to direct the enforcement activities of CBP or to question the results of CBP's enforcement activities. In the "Requests for Relief" sections of its original and supplemental case briefs,²⁸ Micron asks the Department to "request," "instruct," and "direct" CBP to take certain actions based on CBP's report to Congress and other CBP information. At several points in its original case brief, Micron questions the results of CBP's enforcement activities. For example, on page 6 of the case brief, Micron states, "(T)he (proprietary title) provides very little substantiation for its conclusions." On page 7 of the brief, Micron states, "CBP's conclusions, however, are extremely difficult to accept at face value for several reasons." The Department has no authority to order CBP to take any action over such questions that Micron raises about CBP's own enforcement activities.

Micron cites a previous antidumping review of DRAMS and Tokyo Kikai as supportive of its proposed requests for relief. These cases, however, involved misreporting of information that the Department used in calculating an antidumping margin. In Tokyo Kikai, the respondent failed to report a rebate that affected the antidumping duty margin calculation.²⁹ In the DRAMS antidumping case, as Micron notes on page 10 of its original case brief, "(T)he entities that now comprise Hynix have...been found by the Department not to have reported sales of subject merchandise that was destined for the United States." These are cases in which the Department modified the antidumping duty margin calculation based on information that directly affected the calculation.

In recognition of the importance of this issue to Micron, the Department will share this decision memorandum with CBP and comply with CBP's requests, in accordance with law. In addition to referring this issue to CBP, the Department will refer this issue to the Foreign-Trade Zones Board, which can apply its own criteria and procedures in evaluating the issue. However, we have made no changes to the Preliminary Results based on Micron's requests.

28 See Micron's original case brief at 15-16 (September 23, 2008); see also Micron's supplemental case brief at 13-14 (December 17, 2008).

29 See Tokyo Kikai, 473 F. Supp. 2d at 1356.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE _____ DISAGREE _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

(Date)