

**JAPAN – COUNTERVAILING DUTIES ON DYNAMIC  
RANDOM ACCESS MEMORIES FROM KOREA**

Notification of an Appeal by Japan  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 30 August 2007, from the Delegation of Japan, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (WT/DS336/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute. Japan seeks review by the Appellate Body of the Panel's conclusions and related findings and legal interpretations that:

1. Japan improperly found government "entrustment or direction" of four of the private creditors of Hynix Semiconductor, Inc. ("Hynix") to participate in the December 2002 Restructuring of Hynix, contrary to Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").<sup>1</sup> This conclusion was based on an erroneous interpretation and application of this provision. In particular, the Panel erred in law by:

- (i) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by limiting the scope of its analysis of the findings by the investigating authorities of Japan (the "JIA") regarding the December 2002 Restructuring to only the Deutsche Bank Report without any assessment of other evidence on the record and the JIA's findings thereon, denying the "totality of evidence approach" actually adopted by the JIA, and conducting thereby a *de novo* review of the evidence, the JIA's findings and its determination<sup>2</sup>; and
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU with respect to the intervention into the preparation of the Deutsche Bank Report by the Government of Korea, the lack of independent third party characteristics of the Deutsche Bank Report and the content of the Deutsche Bank Report, by making a *de novo* review of the evidence, the JIA's findings and its determination, by making findings on the characteristics of the Deutsche Bank Report which Korea neither presented the

<sup>1</sup>See Panel Report, paras. 7.245-47, 7.253-54 and 8.2 a.

<sup>2</sup>See, e.g., Panel Report, para. 7.157 in conjunction with paras. 7.155-56; para. 7.162 in conjunction with paras. 7.158-60, 7.246-47, 7.253-54.

relevant evidence or arguments nor sought any findings by the Panel and failing to accord the due process right of defence to Japan, and by improperly rejecting as *ex post* rationalization arguments presented by Japan.<sup>3</sup>

2. Japan improperly found that the December 2002 Restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.<sup>4</sup> This conclusion is in error because it was not based on any analysis of these provisions and was wholly dependent on its conclusions relating to "entrustment or direction" in the context of the December 2002 Restructuring under Article 1.1(a)(1)(iv) of the *SCM Agreement*.<sup>5</sup> It is based solely on the Panel's erroneous conclusion, described in paragraph 1 above, which was made inconsistently with Article 11 of the DSU.

3. Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 Restructurings of Hynix, contrary to Articles 1.1(b) and 14 of the *SCM Agreement*.<sup>6</sup> This conclusion was based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in law by:

- (i) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by finding that the JIA applied exclusively an outside investor benchmark giving rise to an internal inconsistency in the JIA's calculation of benefit, based on an inaccurate understanding of the JIA's actual findings and a *de novo* review of the evidence, the JIA's findings and its determination<sup>7</sup>;
- (ii) finding that the JIA failed to adopt an insider investor benchmark, even though neither Article 1.1(b) nor 14 of the *SCM Agreement* requires the application of a particular methodology, and the benchmark alleged by the Panel lacked necessary support in the evidence on the record required under Article 12.2 of the *SCM Agreement*<sup>8</sup>;
- (iii) erroneously interpreting the provisions of Articles 1.1(b) and 14 of the *SCM Agreement* and failing to conduct the objective assessment of the matter required by Article 11 of the DSU in finding that the JIA made its calculation of the benefit amount from the creditor's perspective<sup>9</sup>;
- (iv) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by reaching conclusions on the JIA's benefit calculation formulae, for which Korea failed to establish a *prima facie* case of inconsistency with Articles 1.1(b) and 14 of the *SCM Agreement*<sup>10</sup>; and
- (v) failing to conduct the objective assessment of the matter required by Article 11 of the DSU without according the due process right of defence to Japan and erroneously interpreting the requirements under Article 22.5 of the *SCM Agreement* as informed by Articles 12.2 and 12.8 thereof and the meaning of facts available under Article 12.7 thereof in rejecting rebuttal arguments presented by Japan<sup>11</sup>;

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<sup>3</sup>See, e.g., Panel Report, para. 7.168 in conjunction with paras. 7.163-67; para 7.188 in conjunction with paras. 7.169-87, para. 7.189, and para. 7.190; paras. 7.199, 7.206, 7.217, 7.221, 7.225, 7.231, 7.238 and 7.244 in conjunction with paras. 7.191-243; and para. 7.245.

<sup>4</sup>See Panel Report, paras. 7.282 and 8.2 b.

<sup>5</sup>See Panel Report, para. 7.282.

<sup>6</sup>See, e.g., Panel Report, paras. 7.315, 7.316 and 8.2 c.

<sup>7</sup>See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304-14.

<sup>8</sup>See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304-14.

<sup>9</sup>See, e.g., Panel Report, para. 7.315 in conjunction with para. 7.313.

<sup>10</sup>See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.305-14.

<sup>11</sup>See, e.g., Panel Report, para. 7.315 in conjunction with paras. 7.304 and 7.314.

4. Japan improperly used methods to calculate the amount of benefit to the recipient that were not provided for in Japan's national legislation or implementing regulations, contrary to the *chapeau* of Article 14 of the *SCM Agreement*.<sup>12</sup> This conclusion was based on an erroneous interpretation and application of this provision. In particular, the Panel erred in law by:

- (i) erroneously interpreting the requirement to provide for the methods in the national legislation or implementing regulations to calculate the amount of benefit under the *chapeau* of Article 14 of the *SCM Agreement*<sup>13</sup>; and
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU in considering whether the methods provided for in Japan's implementing regulations were used and actually applied in the investigation to calculate the benefit amount.<sup>14</sup>

5. Japan improperly levied countervailing duties in 2006 to offset some of the subsidies provided by the October 2001 Restructuring, contrary to Article 19.4 of the *SCM Agreement*.<sup>15</sup> This conclusion was based on an erroneous interpretation and application of this provision as well as other relevant provisions under the *SCM Agreement*. In particular, the Panel erred in law by:

- (i) erroneously interpreting the provisions of Articles 19.1 and 19.4 of the *SCM Agreement*<sup>16</sup>;
- (ii) failing to conduct the objective assessment of the matter required by Article 11 of the DSU by finding that the JIA levied the countervailing duty despite its determination that the non-recurring subsidies in the October 2001 Restructuring would expire in 2005, based on an inaccurate understanding of the actual determination by the JIA and a *de novo* review of evidence on the record and findings and determination by the JIA.<sup>17</sup>

In sum, Japan considers that the Panel erred in law in the interpretation and application of Articles 1.1(a)(1)(iv), 1.1(b), 12.2, 12.7, 12.8, 14, 19.1, 19.4 and 22.5 of the *SCM Agreement* and failed to meet the requirements of Article 11 of the DSU. Japan requests that the Appellate Body reverse the Panel's erroneous findings and conclusions identified above.

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<sup>12</sup>See Panel Report, paras. 7.334 and 8.2 d.

<sup>13</sup>See, e.g., Panel Report, paras. 7.327, 7.330, 7.331, 7.333 and 7.334 in conjunction with paras. 7.326-33.

<sup>14</sup>See, e.g., Panel Report, paras. 7.330, 7.331, 7.333 and 7.334 in conjunction with paras. 7.326-33.

<sup>15</sup>See Panel Report, paras. 7.361 and 8.2 e.

<sup>16</sup>See, e.g., Panel Report, para. 7.361 in conjunction with paras. 7.351-57.

<sup>17</sup>See, e.g., Panel Report, paras. 7.360 and 7.361 in conjunction with paras. 7.358-59.