WORLD TRADE ORGANIZATION

WT/DS296/9
28 July 2005

(05-3392)

Original: English

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

Statement by Korea

The following statement received from the delegation of Korea in relation to the adoption by the Dispute Settlement Body, at its meeting on 20 July 2005, of the reports of the Appellate Body and Panel in *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea* (WT/DS296/AB/R, WT/DS296/R), is circulated at the request of that delegation.

Introduction

Mr. Chairman, the DSB today considers the Reports in *US – DRAMS* (DS296). This dispute arises from a countervailing duty order imposed by the Unites States on certain semiconductors imported from Hynix of Korea. The US Department of Commerce ("the DOC") claimed that the Government of Korea subsidized Hynix through a series of financial contributions from September of 2000 through October 2001. The key issue in the DOC investigation was whether or not certain private financial institutions had been entrusted or directed by the Government of Korea to make such financial contributions. In a thorough and detailed review, the Panel found that, with one exception, an objective and unbiased investigating authority could not have reached the conclusions in the DOC's determination. The legal and factual findings by the Panel that led them to this conclusion were the subject of appeal by the United States. Korea cross-appealed on one issue where the Panel found that there had been entrustment or direction with respect to one Korean bank when that bank never actually carried out the act it was supposedly directed to do.

The US International Trade Commission ("the ITC") also found that the allegedly subsidized imports had caused material injury. The Panel found that the ITC had not offered any explanation as to how it had reached its conclusion that the impact of factors other than the allegedly subsidized imports was not attributed to such imports. Therefore, the United States is not in conformity with its obligations under Article 15.5 of the SCM Agreement. There were no appeals on the injury issues. Thus, the US measure was found to be inconsistent with its obligations under Article 15.5 of the SCM Agreement and the United States should act immediately to bring its measure into conformity. As for the inconsistencies that the Panel found with respect to the DOC's subsidy determination, it is important to note that, as the Appellate Body expressly stated in its Report, its ruling reversing these findings does not mean it actually upheld the US countervailing duty order as being in conformity with the SCM Agreement.

Mr. Chairman, first of all, Korea would like to offer its thanks to all involved for their hard work. In Korea's view, with one relatively narrow exception, the Panel Report was a thorough and

acceptable review of the facts and law, even though Korea certainly does not agree with a number of the conclusions reached by the Panel. However, Mr. Chairman, Korea has grave reservations regarding the Appellate Body Report. While there were some issues of legal review, this Appellate Body Report is, unfortunately, not confined to such issues as required by the clear mandate of Article 17.6 of the DSU which prescribes that an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Instead, it is a clear example of unwarranted fact-finding by the Appellate Body.

Mr. Chairman, Korea asks the indulgence of this Body to take a few moments to discuss the issues of the scope and nature of the Appellate Body's Report in greater depth. Obviously, Korea cannot deal with each aspect of the Appellate Body's analysis even in extended remarks, but the most salient examples need to be brought to Members' attention. Among the legal matters before the Appellate Body, we will review the issues of the legal interpretation of the term "entrusts or directs," Korea's cross-appeal on the question of whether a private body can be found to have been entrusted or directed to carry out a governmental function when it actually never carries it out, the question of the evidentiary standards applied by the Panel and the Appellate Body's extraordinary legal interpretation of the reporting requirements of Article 22.5 of the SCM Agreement. Finally, we will look at some of the most salient and unfortunate examples of *de novo* fact-finding engaged in by the Appellate Body because Korea considers that this case represents a break-down in the process of appellate review that raises serious concerns.

The Interpretation of "Entrusts or Directs"

First, some legal issues must be noted in order for the overall dispute to be understood. There were arguably three legal issues before the Appellate Body, although the parties differed on how to characterize some of these matters. The first clearly legal issue was the question of the definition of the terms "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement. The United States had argued that the Panel had imposed too stringent a standard in interpreting this. The Panel had stated that the term was based on the notion of "delegation or command". The Appellate Body modified the Panel's interpretation as being too strict to the extent it relied just on the terms "delegation" or "command". In reality, and as the Appellate Body seemed to agree, this was more of a clarification than a modification of the Panel's rulings. In either case, Korea accepts this ruling of the Appellate Body. It is clearly within the confines of Article 17.6 of the DSU.

Korea's Cross-Appeal

The Appellate Body rejected Korea's cross-appeal on the issue of "entrustment or direction". Korea noted to the Appellate Body that the Panel had actually upheld the DOC's findings with respect to the alleged direction of Korea First Bank, or KFB. This finding by the Panel was based on a single piece of hearsay, circumstantial evidence in a newspaper article relating to a single transaction among the four alleged financial contributions. However, KFB never undertook the transaction that was the sole issue of this newspaper article. In Korea's view it was impossible that a private body could be entrusted or directed "to carry out" a governmental financial contribution if, in fact, the private body did not carry it out. Indeed, the United States agreed and considered this point "axiomatic." In a startling departure from the whole rest of its argument against the Panel Report, the United States argued that the Panel made this finding as part of a broader context, based on a totality of the evidence. This argument that the Panel was actually not limiting its conclusions to the subject of the newspaper article, but, instead, was taking it as evidence of broader entrustment or direction was directly contrary to the US arguments underlying the main portion of its own appeal to the effect that the Panel had looked at each piece of evidence in isolation. Indeed, highlighting this contradiction in the US argument was one of the reasons Korea brought the cross-appeal. Even though this contradiction did not seem to be an overly subtle point, the Appellate Body seems to have completely missed it in its own analysis.

But this issue of whether the Panel examined matters in a broader context will come up again later; at the moment the point here is that the Appellate Body did not agree with the parties and found that there could be entrustment or direction when there was no action taken by the private body. Apparently, the very next phrase in Article 1.1(a)(1)(iv) – "to carry out" – was not considered sufficiently important context for the Appellate Body to take note of it. Moreover, to say that there can be entrustment or direction in some sort of void where there is no financial contribution is an academic exercise of the most sterile sort. The overall legal issue is whether Article 1.1(a)(1)(iv) has been correctly applied, not just a small piece of it viewed in isolation. This part of the Appellate Body's textual analysis can be characterized as *dicta* and would have been better left out of its analysis.

The Evidentiary Standard Applied by the Panel

The next legal issue was whether the Panel had imposed too strict an evidentiary standard on the US by stating that the evidence proving entrustment or direction had to be "probative and compelling". The Appellate Body upheld the Panel's description of the evidentiary standard and the manner in which it was applied. Importantly, the Appellate Body rejected the US characterization of the terms probative and compelling and found that the Panel had not actually applied such an improper standard. The Appellate Body stated:

> It appears to us, on balance, that the Panel did not apply the term "compelling" in the manner suggested by the United States; **had it done so, it would have erroneously imposed a qualitative standard higher than that contemplated by the *SCM Agreement.***[1]

This is an important point because, as Korea pointed out to the Appellate Body, this very improper standard of "compelling evidence" was actually imposed by the DOC against Korea during the investigative process. At the preliminary determination stage, the DOC created a presumption of guilt against the Korean respondents based on historical findings involving other producers and other banks. Then, in the final determination, the US DOC stated that Korea had failed to rebut this presumption with "compelling evidence". Korea has to mention this point here because, unbelievably, the Appellate Body Report is absolutely silent in this regard. It is as if Korea never made the argument. And it will be of critical importance when we get to the issue of whether the Appellate Body should have "completed the analysis" after reversing parts of the Panel's findings.

Article 22.5 of the SCM Agreement and Ex Post Facto Arguments

The last of the legal issues was the interpretation of Article 22.5 of the SCM Agreement. Among other things, Article 22.5 requires that investigating authorities issue a public report that contains "***all*** relevant information on the matters of fact and law and reasons" for an affirmative determination. On this and other bases, the Panel rejected some evidence proffered by the US as *ex post facto* rationalizations, because it was not contained or referenced in the report of the DOC's determination and there was no indication that the DOC had actually taken such information into consideration.

In Korea's view, the Panel was absolutely correct. It would be improper to subject respondents to such double jeopardy. First, respondents would have to make their arguments before the investigating authority. Then, as a second step, they would have to address wholly new assertions

[1] Appellate Body Report at para. 139 (emphasis added).

about factual issues concocted by the other side's lawyers after the fact in front of the Panel. This double jeopardy is inconsistent with the clear requirements of the SCM Agreement.

As part of its arguments, Korea brought to the Appellate Body's attention the language from the old GATT Subsidies Code. However, this is not mentioned in the Appellate Body Report; it is not even referenced. This is puzzling indeed, given the importance Korea placed on this issue. The Appellate Body certainly may disagree with an important argument presented by a party; it is improper to simply ignore it.

Since the Appellate Body did not bother to review the language, Korea will provide it here for the DSB record. Article 2.15 of the GATT Subsidies Code reads as follows:

> In the case of an affirmative finding each such notice shall set forth the findings and conclusions reached on **all issues of fact and law** considered material by the investigating authorities.

As can be seen, the word "all" appears in a very different place in the SCM Agreement compared to the GATT Subsidies Code. It is no longer sufficient that a report merely set out "all issues of fact and law". It is now required that "all relevant information" supporting the conclusions of such matters of fact and law be presented. Article 22.5 of the SCM Agreement was a major step forward in the requirements for transparency of the administrative processes, as well as a protection against just the sort of *ex post facto* arguments that the Panel was confronted with in this dispute.

Or, at least, that was the requirement before this dispute. In an astounding case of legislation by judicial decision, the Appellate Body has simply written the key element of Article 22.5 out of existence. The Appellate Body seems to consider it too burdensome on investigating authorities to require that they provide "all" of their relevant supporting information in their reports. Note, it is not "all information"; it is "all *relevant* information" that supports the administrative determination. This is not a great burden. It is simple transparency and fairness.

Thus, as of today, "all" no longer means "all". So what does it mean? Does it mean "none" or does it mean "some"? Korea presumes that the Appellate Body will eventually rule that "all" will mean "some," but we will not know the parameters of the new definition of Article 22.5 until there is further litigation, and it is now certain that there will be further litigation on this issue.

It is not up to the Appellate Body to throw out treaty terms simply because it considers them inconvenient. And why should the Members be sitting here speculating on how the Appellate Body will rule in the future? We already negotiated the standard once. It was very clear. "All" relevant information" was to be provided.

The United States routinely demands that Members agree to rules for more transparency in dispute settlement. Yet, here we have an instance where there was a very clear rule already negotiated regarding transparency in domestic trade remedies investigations. However, the United States has petitioned to strip that requirement of all meaning, obtained its wishes and now celebrates this huge step backwards in transparency. Mr. Chairman, actions have consequences. It is difficult to see how the United States can have any expectation that Members will agree to new transparency requirements when those already agreed to are summarily discarded in this fashion.

The Appellate Body's De Novo Fact-Finding

Now, we must turn to the even more troubling aspect of this Appellate Body Report; namely, the Appellate Body's *de novo* review of the facts in a manner inconsistent with Article 17.6 of the DSU. As Members are aware, pursuant to Article 17.6 of the DSU, only issues of law are subject to

appeal. There is a spurious attempt to deal with this limitation by a passing comment in footnote 277 of the Appellate Body Report to the effect that the Panel was applying the law to the facts. This is disingenuous at best and would strip DSU Article 17.6 of any meaning. That is precisely what panels do and it is *all* that they do. There is no such thing as a weighing of facts in a vacuum. It must be done in light of the law. By this standard, there is simply nothing at all that is not subject to appellate review. This is not what the negotiators intended when they drafted the eminently clear language of Article 17.6.

The key to understanding the issue here is to first note the method of analysis pursued by the investigating authority, the DOC. The DOC took two particularly important steps. It relied upon a "totality-of-the-evidence" approach and linked several distinct transactions together in a "single program" to support the approach.

As noted earlier, the DOC created a presumption of entrustment or direction on the part of the Government of Korea based on previous determinations by the DOC. But these previous determinations had nothing to do with Hynix nor the large majority of financial institutions involved here. Moreover, even the DOC recognized that the situation arising out of the Asian financial crisis was qualitatively different. The IMF was closely involved in the recapitalization of the financial sector that was necessary to keep the Korean economy from collapsing. Due to illiquidity that threatened to paralyze the whole country, the Government of Korea ended up with temporary ownership stakes in a number of banks that it had never been affiliated with before. The IMF confirmed on a number of occasions that Korea engaged in this process of working through insolvencies based on market principles.

It was these banks with some degree of government ownership that the DOC focused on in its findings and for which it created the presumption of guilt. Of course, it must first be noted that the SCM Agreement does not provide for such presumptions. It requires that findings be made on "positive evidence".

Having created this presumption of guilt, the DOC stated that it was relying on the "totality of the evidence" in finding that the Korean respondents had not sufficiently rebutted this presumption. In its totality of the evidence approach, the DOC lumped together four distinct financial contributions. It developed a supporting theory that this was all part of a so-called "single program" to subsidize Hynix. However, as the DOC explicitly recognized, at least the fourth alleged financial contribution had no factual nexus with the other three. The first three arose out of the financial difficulties in which Hynix found itself beginning in September of 2000 following the Asian financial crisis. The fourth came about in the summer and autumn of 2001 and was specific to the semiconductor industry. It arose from a dramatic and unexpected general downturn in the sector.

The Panel looked at a number of critical pieces of evidence upon which the DOC relied. There were approximately 10 such pieces of evidence although the parties, the Panel and the Appellate Body all examined and counted them in somewhat different ways.

The Panel found that 9 of these 10 were impugned in various ways. Some were not probative in that they went to prove a different point other than establishing that there was an affirmative action taken by the Government of Korea to entrust or direct the banks to make financial contributions. Some were factually inaccurate. Some were incomplete in that the DOC jumped to a conclusion without reviewing all of the relevant facts regarding such evidence. Some had combinations of these flaws.

The one piece of evidence that was left standing was the supposed entrustment or direction of KFB by a single official. This was based on the contested evidence represented in a single newspaper article, as noted previously. However, even with that one piece of affirmed evidence of entrustment

or direction, the Panel overturned the DOC's subsidy determination. Taken individually or collectively, the Panel found the evidence was not compelling and that an objective and unbiased investigating authority could not have reached an affirmative conclusion on that basis. Indeed, that had to be the case. The DOC built an undifferentiated affirmative determination based on ten legs. When nine were knocked out, it was simply impossible to find that the DOC's determination could be supported by the one remaining leg.

The US appealed on this issue of whether the Panel had properly examined the facts on a "totality of the evidence" basis or had improperly found that each and every individual piece of evidence had to demonstrate entrustment or direction in and of itself. It was a most remarkable appeal, because the Panel demonstrably did not do what the United States said it did. Indeed, a good deal of Korea's very lengthy submission to the Appellate Body was juxtaposing the actual language of the Panel Report with the chopped-up and twisted "quotations" submitted by the United States.

Unfortunately, the Appellate Body also ignored the plain language of the Panel Report and reversed the Panel's factual findings. Oddly, the Appellate Body seems to have implicitly recognized that it was not examining all of the Panel Report. In paragraph 146 of the analytical section of the Report, the Appellate Body refers to the Panel "often appearing" to examine whether each piece of evidence resulted in entrustment or direction. Similarly, in paragraph 158, the Appellate Body argues that the Panel did this with "many" pieces of evidence. Yet, in paragraph 209(b)(ii)(B) of its Findings and Conclusions, it reaches a generalized conclusion about what it admitted was less than the whole of the Panel's analysis.

Of the ten legs holding up the DOC's totality-of-the-evidence determination, the Appellate Body only examined four, not "many". Moreover, it only examined the four where the language of the Panel was most tilted in the direction of the Appellate Body's conclusion.

In Korea's view a fair reading of the Panel's language even in the so-called examples did not support the US arguments. One cannot simply lift language out of its context and then twist its meaning in this fashion. Just as the Vienna Convention requires that treaty language be read in its proper context, so Report language must be read in context and not lifted out in convenient isolated portions. This is simply a matter of logic, common sense and fairness.

Ironically, as noted previously, the Appellate Body upheld the Panel's finding with respect to the entrustment or direction of KFB even though, in order to do so, it had to agree with the US that the Panel had not limited itself to the alleged instance of coercion cited in the newspaper article. Instead, the Appellate Body found that in this one convenient instance the Panel had actually looked at the evidence in a broader context. This was, indeed, a highly selective review of the Panel's decision

The Appellate Body did not even bother to examine the other five instances of evidentiary examination engaged in by the Panel. Since the Appellate Body did not cite any language that was inconvenient to its conclusions, Korea will offer an example so that at least the DSB record will be more complete. For instance, with respect to the implications of a meeting of Korea's Economic Ministers, the Panel stated:

> Thus, even if the US argument regarding signaling was correct, that alone was not sufficient for the DOC to properly treat the circumstances surrounding the Economic Ministers' meetings as evidence of government entrustment or direction.

That is, because it was not probative of legally relevant points, it could not be considered as *part of* the evidence of entrustment or direction, not that it *alone* had to prove entrustment or direction. This was an important issue, indeed considered one of the most important by the DOC in

its determination. It is difficult to understand how the Appellate Body could reach a generalized conclusion without even mentioning it, much less addressing it.

Korea would like to further recall the point regarding the so-called "single program" approach of the DOC. That is, in making its totality of the evidence analysis, the DOC linked all of the financial contributions together even though there was a qualitative difference between, at least, the first three and the last one. That is, factual circumstances changed in the summer of 2001 in a manner that no one could have contemplated previously. The Panel found this to be critically important and Korea argued that it was a keystone upholding the whole edifice of the DOC determination. However, the Appellate Body did not even bother to address this critical issue. It only mentioned it in the breeziest of manners when it came to the post-conclusion stage of "completing the analysis", but that is an overt fact-finding done to a different legal standard than the primary review of the Panel's determination pursuant to Article 11 of the DSU.

Why was the Appellate Body analysis done this way? In its partial approach to the evidence, the Appellate Body examined only a few instances – not "many" as it purported to do – and then only focused on the weakest language of the Panel. If the Appellate Body is going to engage in this sort of in-depth factual analysis it must do so in a comprehensive manner. It cannot look at a few instances and simply stop there and draw a generalized conclusion.

What is striking, Mr. Chairman, is how closely this approach resembles the way litigation briefs are often written. They stress the opponent's weaknesses and extrapolate conclusions from them while sidestepping the strongest counter-arguments. But why is this Appellate Body Report written like a litigant's submission?

Mr. Chairman, Korea must also bring to this Body's attention some of the more remarkable individual instances of *de novo* fact-finding contained in the Appellate Body's Report. In one example, the Appellate Body discusses certain statements made by Kookmin Bank in its prospectus filed with the US Securities and Exchange Commission. Rather than going through a full recitation of the Appellate Body's troubling *de novo* review of the evidence on this issue, Korea would like to draw Members' attention to a statement in paragraph 156 of the Appellate Body Report to the effect that "Kookmin Bank ... acknowledged making loans in pursuit of government policy". This is a factually inaccurate statement. This is not what the prospectus stated; it was not even what the DOC found, nor what the United States argued before the Panel and Appellate Body. Rather, the prospectus made conditional statements about what might happen in the future. There was no such acknowledgement by Kookmin Bank with respect to past actions. This is raw fact-finding by the Appellate Body that not only ignored the thrust of the Panel's factual weighing and analysis, but flatly misstates a critical fact.

It is possible that this statement by the Appellate Body was referring back to an earlier analysis of Kookmin Bank's participation in the Syndicated Loan, although there is no footnote indicating this. But even then, such a reference would highlight another problem with the Appellate Body's analysis. In paragraph 148 of its Report, the Appellate Body quotes the Panel's reference to Kookmin Bank acting in response to a "government policy request". The Appellate Body then reverses the results of the explicit weighing of the facts done by the Panel and says this one factor out of the nine listed in Kookmin Bank's statement is determinative regardless of the other eight commercial reasons provided by the bank.

Not only was this an improper reweighing of the evidence by the Appellate Body, it reflects a breakdown in basic practices of appellate review. This reference to "government policy" was a contested translation. The proper translation was "public policy considerations". These are the very sort of broad concerns that corporations often take into consideration. For instance, BP, once known as British Petroleum, has spent huge sums of money arguing that it should be thought of as "Beyond

Petroleum" based on its new environmentally friendly focus. Virtually every large company takes these sorts of public policy issues into account. This is very different from following "government policy" directives.

The Panel, however, used this term "government policy" because it was construing the facts in the manner most favourable to the United States before reaching a conclusion contrary to the US argument. In contrast, the Appellate Body made this fact-finding in the manner most unfavourable to Korea and then ruled for the United States on the facts. Mr. Chairman, this is simply improper. The Appellate Body should not be in the business of fact-finding in the first place, but if it is going to do so, it must follow the most basic principles of appellate review and not construe disputed facts in favour of the party it is ruling *for* rather than the party it is ruling *against*.

The Appellate Body repeated this fundamental error in its discussion of the supposed attendance of government officials at a meeting of Hynix's Creditors' Council. In paragraph 147 of its Report, the Appellate Body makes a factual finding that the attendee was a Vice Chairman of the Financial Supervisory Commission, or "FSC". The FSC is a government agency that participates in financial regulatory policy. However, the actual attendee at the meeting was an official of the Financial Supervisory Service, or "FSS". The FSS employees are not civil servants. They are technical specialists whose main functions are examining and auditing financial institutions. This distinction can make a substantial difference in what inferences one draws from the attendance of such a person at a meeting of the Creditors' Council.

The Panel, once again, did not actually make a fact-finding resolving this disputed fact; instead, the Panel construed the facts in the manner most favourable to the US before ruling against the US. Incredibly, the Appellate Body even acknowledged that this was a disputed fact, but then said that it would continue with the assumption that it was an FSC official "similarly" to what the Panel had done. But this was not similar in any way. Indeed, it is exactly the opposite of what the Panel did. Once again, the Appellate Body construed a disputed fact against Korea and then proceeded to rule for the United States. This is simply unacceptable for the Appellate Body to engage in such unfair and improper fact-finding.

Mr. Chairman, Korea would like to ask the indulgence of Members for the examination of one further extreme example of improper fact-finding by the Appellate Body because it relates to a critical issue. There was an important question as to whether some of the creditor banks actually took part in the October 2001 restructuring that was countervailed by the DOC. The focal point of the DOC's determination with respect to the October 2001 restructuring was that creditors controlling Hynix's Creditors' Council were able to set the terms for all banks. However, despite the picture painted by the DOC of a web of supposed coercion, several of the banks, including wholly government-owned banks, refused to participate in this restructuring. They exercised their appraisal rights and, when they were offered a deal on their Hynix debt, disagreed with the terms of the deal and asked for mediation. All parties, the Panel and the Appellate Body know at this point that there is not at this time any dispute about the real situation. These banks did not participate. Thus, the DOC countervailed transactions that did not occur. The only question was whether or not there was evidence *in the record* that the DOC ignored in this regard.

The Panel found that there was such evidence in the record. It was three-fold. First, there was the overarching law, the CRPA, that provided for such mediation. Second, there was a clear statement in the Hynix audit report that indicated that banks exercised their rights to mediation pursuant to the relevant provisions of the CRPA. Third, this was further corroborated by statements made by the DOC's own experts.

The key section of the Hynix audit report was not the least bit ambiguous. It stated that pursuant to "this clause" the banks exercised their rights. And what was "this clause"? The previous

sentence referred to the CRPA and the "Mediation Committee" set up pursuant to it. There was no ambiguity. Korea even provided a dictionary definition of the word "this" to make clear the grammatical construction of the paragraph in question.

However, once again the Panel construed the disputed fact in favour of the United States and found that, even if it could be considered ambiguous, it still put the DOC on notice that there were further actions by the banks in this regard. Again, this was standard procedure in reviewing another body's fact-finding.

Korea is forced to take the time here to refer to the discussion about the meaning of "this clause" because it was not even referenced in the Appellate Body's analysis. Indeed, the Appellate Body side-stepped it by referring to a discussion in the oral hearing about appraisal rights. However, the discussion at the hearing, at least on Korea's part, was primarily about the meaning of the phrase "this clause." The only reason that there was talk about the appraisal issue at all was because the Appellate Body skipped right over the Panel's analysis and directed its question at the record, not how the Panel actually analyzed the record. This can be seen by the next step of the Appellate Body's analysis.

The Appellate Body rests its conclusion on the fact that the Korean respondents did not unambiguously state in their questionnaire responses that there had been mediation. Members should review this discussion in paragraph 178 of the Appellate Body's Report. Members should also look at footnotes 334 and 335. At no point in the Appellate Body's discussion is there even a citation to, much less analysis of, the Panel's factual findings. Because the Appellate Body did not make any mention of the manner in which the Panel weighed the facts, Korea considers it only fair that the following at least be reflected in the record of this DSB meeting. In paragraph 7.87 of its Report, the Panel states:

> Although the GOK questionnaire response should perhaps have made a reference to the request for mediation by three of the four option 3 creditors, we consider that there was in any event sufficient information on the record to bring into question the DOC's determination that creditors "controlling" the Creditors' Council were able to "set the terms for all banks". In these circumstances, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the CRPA, that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors".

Thus, the panel explicitly took into consideration that the questionnaire responses should have been more complete, but found that, nonetheless, the evidence was clear that the DOC determination was fundamentally undermined.

Korea would like to emphasize here that this was not a question of withholding information. The information that could have been included in the questionnaire responses would have been *favourable* to the Korean respondents. It was simply an error that resulted from a misunderstanding of the focus of the inquiry which had been, up to that time, on the issue of asking for appraisals, not going the extra step to mediation. In any event, there could never be a clearer example of a Panel taking an adverse fact into consideration, carefully weighing it and then coming to a conclusion in light of the facts at hand.

Mr. Chairman, it should not be the case that Korea is forced to take the time to bring to the DSB's attention what the Panel said in evaluating this factual aspect of the dispute. Why was this weighing of the evidence by the Panel not even acknowledged in the Appellate Body Report, much

less discussed? It is possible that one can disagree with the Panel's conclusion. The United States certainly disagrees. But it cannot simply be ignored in a proper appellate review.

At this point, Mr. Chairman, it is useful to recall the words of the Appellate Body with respect to the interpretation of Article 11 of the DSU. In 1998, the Appellate Body stated in *EC – Hormones*:

> "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.[2]

Where, Mr. Chairman, is the bad faith exhibited by this Panel? Clearly there is none. One can disagree with the Panel's conclusions, but there was clearly a good faith effort to examine the evidence in great detail and with objectivity. Obviously, in the years between this earlier interpretation of the language of DSU Article 11 and today, there has been a drastic change in the approach of the Appellate Body. This was hinted at in some other cases, but we have gone much further today. Now we are in the situation where the Appellate Body has undertaken the explicit re-examination of facts.

As has been shown, the Appellate Body construed disputed facts in favour of the United States and then ruled for the United States. Because it violates the basic principles of appellate review to construe disputed facts in favour of the prevailing party, one can only conclude that the Appellate Body engaged in its own *de novo* fact-finding. On critical issues such as the question of whether there was evidence of mediation, the Appellate Body went directly into the case record and reversed the Panel's conclusions without the merest mention that the Panel had actually looked at those same facts and weighed them.

This is a 180 degree change in direction. This Appellate Body Report cannot in any manner be squared with the jurisprudence of seven years ago. Either the words of the treaty text mean the one thing or the other. This dramatic change in the interpretation of Article 11 should not come about by mere judicial fiat.

Mr. Chairman, the WTO does not need a dispute settlement system where one panel reviews the fact-findings of another panel, which is what effectively has happened here. It is a waste of time and resources and inevitably leads to continuing disputes about which fact-finder was correct. This undermines the integrity of the system. The Appellate Body's Report is outside the parameters of Article 17.6 of the DSU and should be rejected.

So, what should Korea do at this point? As the Appellate Body stated in paragraph 198 of its Report, its reversal of the Panel's findings does not actually mean that it upheld the DOC's determination. Should Korea start a new case? It might be interesting to let the Panel make even more clear what it actually said in its findings, but that would be an expensive and time-consuming effort that might involve another *two* fact-finding exercises given the current state of affairs. Korea reserves all of its rights in this regard and will consider the matter further.

Given the recognition by the Appellate Body that it was not actually upholding the DOC's determination, the Appellate Body asked the parties about the issue of "completing the analysis". The US declined to respond to this request except to state that Korea should respond. This was a very curious answer given that the US was defending a totality-of-the-evidence analysis that was dependent on maintaining all ten legs of the DOC's determination.

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[2] Appellate Body Report in *EC – Hormones* at para. 133.

Bizarrely, the bulk of the Appellate Body's questioning on this issue which arose early in the oral hearing was directed at Korea. Normally, one would not ask the Appellee in such a situation to speculate on which one or several combinations of issues it might lose on and then propose solutions. There were simply too many combinations of the three legal issues and ten factual ones to be addressed in detail.

However, Korea did offer two suggestions for how the analysis could be completed by the Appellate Body. The first relates to the DOC's "single program" theory. As Korea pointed out, the DOC's totality of the evidence determination relied on this single program theory as a keystone. Without the single program, there would be more than one set of totality of the evidence to examine and the DOC clearly did not do that. The Appellate Body declined to follow this suggestion in a breezy discussion which leaves it unclear if they read either the Panel's or the DOC's findings in this regard.

The second suggestion offered by Korea was the "compelling evidence" standard. As discussed previously, the Appellate Body found that the US definition of "compelling evidence" would be inconsistent with the requirements of the SCM Agreement. As Korea also pointed out, the DOC determination was based on a rejection of the Korean respondents' arguments to rebut the presumption the DOC had built. The DOC stated that the Korean respondents had not rebutted the presumption with "compelling evidence". As the US definition of this term was rejected by the Appellate Body, it necessarily follows that the DOC's determination is inconsistent with the terms of the SCM Agreement. But Members will find no reference to this issue whatever in the Appellate Body Report

Of course, assuming the legality of the ability of the Appellate Body to "complete the analysis," Korea agrees that it is a discretionary matter. However, what is inexplicable is why, having raised the issue at length, gotten two suggestions from Korea, the Appellate Body simply ignored one of the suggestions. It is even more puzzling when the suggestion ignored did not require any fact-finding at all. It was purely an issue of law and logic. If ever there was a time to exercise discretion as a matter of fairness and complete the analysis, this was it.

Conclusion

Mr. Chairman, Korea has concluded that it cannot support the flawed findings of the Appellate Body. The Appellate Body's analysis was outside the bounds of Article 17.6 of the DSU and, as such, was *ultra vires*. Korea commends the Panel Report to the Members for adoption.

In any event, at the very least, the US countervailing duty order has been found inconsistent with the US's obligations under Article 15.5 of the SCM Agreement and should be brought into conformity without delay.