

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

Notification of an Other Appeal by Korea
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 11 September 2007, from the Delegation of Korea, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the Republic of Korea ("Korea") hereby notifies its decision to appeal to the Appellate Body certain issues of law and legal interpretations contained in the report of the panel *Japan – Countervailing Duties on Imports of Certain Dynamic Random Access Memories (DRAMs) from Korea* (WT/DS336) (the "Panel Report"). Korea seeks review by the Appellate Body of the following legal conclusions and related findings and legal interpretations in the Report of the Panel:

- (1) The Panel's finding that Japan acted consistently with its obligations under Articles 1.1(b) and 14 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), when the Japanese investigating authorities ("JIA") determined that Hynix Semiconductor, Inc. ("Hynix") received a "benefit" from a transaction restructuring Hynix's debts in October 2001.¹ The Panel incorrectly interpreted Articles 1.1(b) and 14 of the SCM Agreement to permit an investigating authority to assume that a "benefit" exists based solely on a finding that allegedly entrusted or directed private creditors failed to undertake a satisfactory analysis of the transaction before approving it, in the absence of evidence or a finding by the investigating authority that the alleged entrustment or direction actually made the recipient "better off." The Panel's analysis is inconsistent with the provisions of Article 1.1 of the SCM Agreement, which requires a separate analysis of (i) whether the government action constituted a "financial contribution" as a result, *inter alia*, of government entrustment or direction of non-governmental entities; and (ii) whether the government action has conferred a "benefit" on the recipient. In addition, the Panel's analysis is inconsistent with the requirement of Articles 1.1(b) and 14 of the SCM Agreement that a "benefit" exists when the recipient of the government financial contribution has been made "better off", because the terms of the transaction provided through the government financial contribution are more favourable than the terms that would have been available in the absence of government action.

¹ These findings include paragraphs 7.271 to 7.277, 7.280 to 7.281, and 7.316 to 7.317 of the Panel Report.

- (2) The Panel's finding that Japan acted consistently with its obligations under Articles 15.5 and 19.1 of the SCM Agreement, when the JIA made a determination of injury and imposed countervailing duties, without making a reasonable determination that the allegedly subsidized imports were causing injury to a competing domestic industry through the effects of subsidies.² Article 15.5 requires a demonstration "that the subsidized imports are, *through the effects of subsidies*, causing injury within the meaning of this Agreement."³ Article 19.1 permits the imposition of countervailing duties only if "a Member makes a final determination ... that, *through the effects of the subsidy*, the subsidized imports are causing injury ...".⁴ The Panel adopted an interpretation of these provisions that rendered inutile the language of the provisions referring to "the effects of the subsidy." As a result, the Panel incorrectly allowed an affirmative determination of injury to be made, and countervailing duties to be imposed, when the evidence did not support the conclusion that the volume or price of the imports, or the injury to the domestic industry, would have been any different in the absence of subsidies.
- (3) The Panel's finding that Japan acted consistently with its obligations under Articles 12.7 and 12.9 of the SCM Agreement, when the JIA designated as "interested parties" entities that were not demonstrated to have any interest in the proceeding, and then applied "facts available" when some of those entities failed to provide information requested by the JIA within the time limits established by the JIA. The Panel's interpretation of the term "interested party" was not consistent with the ordinary meaning of that term or with the context and purpose of the relevant provisions of the SCM Agreement. As a result, the Panel approved a determination that was not consistent with the due process obligations that the SCM Agreement imposes on investigating authorities, and authorized Japan to subject an exporter to punitive duties based on the non-responsiveness of entities over which the exporter had no influence or control.⁵
- (4) The Panel's finding that Japan acted consistently with its obligations under Article 1.1(a)(1) of the SCM Agreement, when (i) the JIA classified transactions that did not involve a transfer of funds from the government (or government-entrusted or -directed private entities) to Hynix as "direct transfers of funds" within the meaning of sub-paragraph (i) of Article 1.1(a)(1); and (ii) the JIA failed to demonstrate that the transactions met the requirements for classification as foregone revenue within the meaning of sub-paragraph (ii) of Article 1.1(a)(1). The Panel's analysis is inconsistent with the ordinary meaning of the relevant terms of the SCM Agreement and with the context of the relevant provisions of the SCM Agreement. As a result, the Panel disregarded the SCM Agreement's scheme for classifying financial contributions, and the different analyses that investigating authorities are required to apply when making findings under sub-paragraphs (i) and (ii) of Article 1.1(a)(1).⁶

² These findings include paragraphs 7.405 to 7.425 of the Panel Report.

³ (Emphasis added, footnote deleted.)

⁴ (Emphasis added.)

⁵ These findings include paragraphs 7-381 to 7.398 of the Panel Report.

⁶ These findings include paragraphs 7.439 to 7.446 of the Panel Report.