

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

Recourse by Korea to Article 21.5 of the DSU

*Request for the Establishment of a Panel*

The following communication, dated 9 September 2008, from the delegation of Korea to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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On 17 December 2007, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (WT/DS336). At the DSB meeting of 15 January 2008, Japan announced its intention to comply with the recommendations and rulings of the DSB. Korea and Japan were not able to reach an agreement on the reasonable period of time, and on 25 February 2008, Korea requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Dispute* ("DSU"). The arbitrator determined that the reasonable period of time for Japan to comply with the recommendations and rulings of the DSB in this dispute would be eight months and two weeks from the date of the adoption of the Panel and Appellate Body reports, expiring on 1 September 2008. This arbitration report was circulated to WTO members on 5 May 2008 (WT/DS336/16).

On 29 August 2008, Japan issued Cabinet Order No. 266 published in the Special Issue No. 189 of the Official Gazette, modifying the countervailing duties imposed on DRAMs from Korea in response to the recommendations and rulings of the DSB. Japan also reported to the DSB on that date that it had complied with the recommendations and rulings of the DSB in a manner consistent with its WTO obligations.

Korea strongly disagrees. Korea considers the determination by Japan, as modified on 29 August 2008, to be inconsistent with Japan's obligations under the relevant provisions of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

As a result of the disagreement between Korea and Japan as to the existence or consistency with covered agreements of measures taken to comply with the recommendations and rulings of the DSB, and in accordance with paragraph 1 of the "Confirmed Procedures" agreement between Korea and Japan of 9 September 2008 regarding this dispute, Korea requests the establishment of a panel, pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement, regarding Japan's countervailing measures against DRAMS from Korea.

Korea respectfully requests that the panel:

1. find that the measures adopted by Japan on 29 August 2008 do not comply with the recommendations and rulings of the DSB in this dispute, and
2. find that Japan has acted inconsistently with its obligations under Article 3.10 of the DSU, as well as Articles 1.1, 14, 19 and 21 of the SCM Agreement. Specifically, Korea makes claims under the following:
  - (a) Article 3.10 of the DSU, because Japan has failed to engage in the dispute-settlement procedures mandated by the DSU in good faith in an effort to resolve the dispute, and instead has made incorrect and misleading statements to the Panel, the Appellate Body, and the Arbitrator appointed under Article 21.3(c) of the DSU, and has also continued to impose countervailing duties on imports of DRAMs exported by respondent Hynix Semiconductor Inc. ("Hynix") based on arguments that have no logical basis and fail to comply with the recommendations and rulings of the DSB in this dispute.
  - (b) Article 1.1 of the SCM Agreement because, *inter alia*, Japan failed to demonstrate the existence of a financial contribution by the Government of Korea within the meaning of Article 1 of the SCM Agreement, when the alleged financial contribution was undertaken pursuant to a financial analysis that, as Japan has conceded, was "commercially reasonable."
  - (c) Articles 1.1 and 14 of the SCM Agreement because, *inter alia*, Japan (1) failed to demonstrate that a benefit was conferred on Hynix by the alleged subsidy transactions (which, as noted above, were undertaken pursuant to a financial analysis that, Japan has conceded, was "commercially reasonable"); (2) failed to identify the relevant market and market benchmark for purposes of determining whether a benefit was conferred and measuring the amount of the benefit; (3) assigned no value to the equity that the creditors received in the restructurings for purposes of calculating the amount of the benefit; and (4) otherwise calculated the amount of the alleged benefit in a manner inconsistent with the requirements of Articles 1.1 and 14 of the SCM Agreement.
  - (d) Articles 19 and 21 of the SCM Agreement because, *inter alia*, Japan is improperly levying a countervailing duty on imports when there is no longer a benefit from the alleged past subsidies, and the duty is not necessary to counteract alleged subsidization.

Korea continues to reserve its rights in respect of all other aspects of Japan's purported compliance with its obligations in this case.

Korea requests that the panel be established with the standard terms of reference set out in Article 7 of the DSU.

Korea further requests that the current request be placed on the agenda for the meeting of the DSB on 23 September 2008.

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