JAPAN - COUNTERVAILING DUTIES ON DYNAMIC RANDOM ACCESS MEMORIES FROM KOREA

(WT/DS336)

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

November 20, 2006

I. Procedural Issues

1. **Claims 10 and 15 of Korea's Panel Request.** In Item 10, Korea's panel request refers to Article 15 of the SCM Agreement in its entirety; likewise, Item 15 is exceedingly vague, cites to a number of articles containing multiple obligations, and provides no indication of the "problem" that is the subject of the dispute. Insofar as the articles referenced therein contain multiple obligations, those aspects of Item 15 do not meet the standard established under Article 6.2 and, like Item 10, should be considered outside of the Panel's terms of reference.

2. **Analysis of "Prejudice" to the Respondent.** Korea incorrectly asserts that "'prejudice' to the responding party from alleged insufficiency of a panel request can only be established by a consideration of the 'actual course of panel proceedings'" and therefore "a panel cannot rule on a respondent's claim under Article 6.2 until the end of the process."[1] While panels are not *required* in all cases to make findings prior to the conclusion of the proceedings, evaluation of prejudice to the respondent does not preclude them from doing so, and panels have in the past issued preliminary rulings regarding DSU Article 6.2 well before the proceedings have concluded. Korea's argument appears to rest upon a mischaracterization of references by certain panels and the Appellate Body to the "course of the panel proceedings" in analyzing compliance with DSU Article 6.2, and would substantially compromise the ability of respondents and third parties to participate effectively in panel proceedings where a complaining party has made a number of vague assertions of breaches of WTO obligations.

II. Burden of Proof, Standard of Review, and Evidence

3. **Burden of Proof.** In its submission, Korea often appears to advance facts and arguments without specifying the legal obligations that it asserts are breached as a result, or identifies legal obligations it claims have been breached without indicating the arguments that support its conclusion. As the Appellate Body noted in *US – Gambling*, "A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[2] Absent such an analysis with respect to these claims, the United States submits that Korea has not established a *prima facie* case.

4. **Standard of Review.** Certain aspects of Korea's arguments suggest that it misunderstands the proper standard of review that a panel should apply when reviewing the WTO-consistency of an investigating authority's countervailing duty determination. It is well established that a panel may not conduct a *de novo* review of the evidence before the investigating authority or substitute its own judgment for that of the investigating authority. The SCM Agreement does not require an investigating authority to take into consideration economic theories that are not on the record of the proceedings in making its decision. Furthermore, as the Appellate Body noted in *US – Lamb Meat*, a panel may not conclude that a decision is "not reasoned" simply because an alternative explanation is found to be "plausible." Rather, the

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[1] Response of Korea to Preliminary Ruling Request of Japan, paras. 30 and 36.

[2] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 140-41.

explanation under review must be found not "adequate in the light of that alternative explanation."[3]

5. **Evidence.** Korea makes a number of incorrect assertions regarding the nature of the evidence that an investigating authority must identify and how it must analyze that evidence in making its determination. In particular, throughout its submission, Korea claims that there exists a general obligation for an investigating authority to identify "positive evidence demonstrating the existence of each element required for the imposition of antidumping or countervailing duties."[4] Beyond where expressly provided, the SCM Agreement does not contain specific standards regarding the evidence that investigating authorities must use to support their determinations.

III. Subsidy Determination

6. **JIA's Treatment of Several Banks as "Interested Parties".** Korea claims that the JIA improperly treated various financial institutions as "interested parties" and inappropriately applied facts available when these financial institutions failed to respond to requests for information.[5] Korea's narrow interpretation of "interested party" is contradicted by the text of Article 12.9 of the SCM Agreement, which provides that "interested parties" "shall" include certain entities, such as foreign exporters or producers of the product under investigation, but then specifies that "This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties." Furthermore, the ordinary meaning of the term "interested" supports the conclusion that an entrusted or directed entity may be considered an "interested party" under the SCM Agreement. Korea's narrow reading of Article 12.9 is also at odds with how the term "interested party" is used elsewhere in the SCM Agreement, and the panel's findings in *EC – DRAMS* support the conclusion that an investigating authority may apply facts available when a third party entity fails to cooperate with an investigation.[6]

7. **Korea's Interpretation of the "Entrusts or Directs" Standard.** Referencing the Appellate Body report in *US – DRAMS,* Korea asserts that the evidence relied upon by an investigating authority in cases involving entrustment or direction must be "probative and compelling."[7] Neither Article 1.1(a)(1)(iv) itself nor any other provision of the WTO agreements

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[3] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

[4] First Written Submission of Korea, paras. 141 and 220.

[5] *Id.*, paras. 153-164.

[6] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, paras. 7.266-7.267.

[7] First Written Submission of Korea, para. 196.

supports the notion that a special evidentiary standard exists for purposes of determining the existence of entrustment or direction. The Appellate Body's report in *US – DRAMS* states that an investigating authority is not required to base its determination on a "qualitative standard higher than that contemplated by the SCM Agreement."[8] Korea also argues that the determination was insufficient because "there is actually no evidence that the Korean government told any of the creditors what to do in any of the restructurings."[9] Korea's argument appears to suggest that, in order to establish entrustment or direction, an investigating authority must have evidence of a "direct" or "actual" government delegation or command, an interpretation that is unsupported by the text of the SCM Agreement, as clarified by prior panel and Appellate Body findings. Furthermore, Korea appears to introduce an additional requirement of governmental "intent" or "motive" to a finding of entrustment or direction which has no support in the text of the SCM Agreement. Korea also suggests that the JIA could not reach a finding of entrustment or direction absent a finding that the Korean government intended to save Hynix "at the expense of its creditors."[10] The existence of entrustment or direction under Article 1.1(a)(1)(iv) is determined by reference to the actions of the government, as well as the financial condition of the recipient firm *at the time the financial contribution is made*. As long as the investigating authority reasonably concludes based on the record that there is evidence that a government has entrusted or directed a body to provide a financial contribution, Article 1.1(a)(1)(iv) is satisfied. Finally, Korea proceeds to critique evidence cited in the JIA's analysis on a piecemeal basis, contrary to the holistic approach that the JIA appears to have used in its determination. Insofar as the JIA appears to have adopted a holistic approach, the Panel should evaluate whether the evidence as a whole supports the determination, and should avoid looking at individual pieces of evidence in isolation as advocated by Korea in its submission.

8. **Korea's Interpretation of "Financial Contribution".** Korea's interpretation of the term "direct transfer of funds" is inconsistent with the provisions of Article 1.1(a)(1) and at odds with prior findings of WTO panels and the Appellate Body. Article 1.1(a)(1)(i) specifies a number of *examples* of instruments that may result in a direct transfer of funds, but does not suggest that Article 1.1(a)(1)(i) is limited to the enumerated instruments. Nothing in the text of the agreement supports Korea's narrow interpretation of Article 1.1(a)(1)(i), particularly Korea's suggestion that "funds" only refers to "money;" indeed, prior panels have concluded that the types of transactions that Korea claims do not constitute "direct transfers of funds" may in fact qualify as such. Korea's conclusion that the French and Spanish texts of the SCM Agreement support its "money changing hands" interpretation of "direct transfer of funds" is unsupported by the ordinary meaning of those terms. Moreover, the *Korea – Commercial Vessels* panel found that, contrary to what Korea now asserts, loan restructuring, debt forgiveness and debt-to-equity swaps are direct transfers of funds. Korea also incorrectly argues that modifications of existing loan terms and debt-to-equity swaps can only be defined as "revenue foregone" under Article

[8] *Id.*, para. 139.

[9] *Id.*, para. 144.

[10] *Id.*, para. 200.

1.1(a)(1)(ii) of the SCM Agreement.[11] Nothing in the text of Article 1.1(a)(1)(i) obligated the JIA to treat these transactions as foregone revenue under Article 1.1(a)(1)(ii). Further, in the context of Article 1.1(a), the term "revenue" refers to forms of *government* revenue, such as taxes, duties, or other monies collected by a government, rather than income or profit by a creditor, as Korea seems to suggest.

9. **Korea's Approach to the Benefit Analysis.** Korea argues that the government "financial contribution" that confers a benefit is the government's action of entrustment or direction,[12] and that therefore the investigating authority was required to evaluate whether the action of entrustment or direction made Hynix "better off."[13] Korea's emphasis on whether the "restructuring made the *creditors* ... 'better off'" is misplaced:[14] in determining the existence of a benefit, the issue is the position of the *recipient* "but for" or "absent" the government's financial contribution. Korea misidentifies the "financial contribution" by which the existence of a benefit is determined under Article 1.1. In essence, Korea confuses the two-step financial contribution analysis required under Article 1.1(a)(1)(iv) in cases of entrustment or direction with the analysis required under Article 1.1(b) to determine the existence of a benefit. The term "financial contribution," as stated in Article 1.1(a)(1), necessarily refers to the functions of the types listed in subparagraphs (i) through (iii), irrespective of whether the case is one of government entrustment or direction. The term does not, as Korea improperly asserts, refer to the government action of entrusting or directing. Notably, in *US – DRAMS*, the Appellate Body found that "a finding of entrustment or direction, by itself, does not establish the existence of a financial contribution."[15] Further, Korea's argument would be nearly impossible to apply: Korea's approach to the benefit analysis would involve comparing the government entrusted or directed restructuring to a hypothetical non-government entrusted or directed restructuring.

10. **Privatization Jurisprudence and Determination of Benefit From a Debt-to-Equity Swap.** Citing the Appellate Body report in *US – Countervailing Measures on Certain EC Products*, Korea argues that the JIA was required to consider the effect of the change in Hynix's share ownership during the December 2002 restructuring on Hynix's benefit, and that its failure to do so was inconsistent with Articles 10, 14, 19, and 21 of the SCM Agreement.[16] A debt-to-equity swap, in which creditors exchange the debt owed them for equity shares in a firm, is not the same as the privatization of a state-owned firm, and Korea has not demonstrated that a privatization occurred in this case: it has not asserted that the government owned Hynix prior to the debt-to-equity swap and that, through the swap, it transferred all or substantially all of Hynix

[11] *Id.*, paras. 176-178.

[12] *Id.*, para. 228.

[13] *Id.*, para. 228-29.

[14] *Id.*, para. 242 (emphasis added).

[15] Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, para. 124.

[16] First Written Submission of Korea, paras. 261-262.

to a new private owner, retaining no controlling interest for itself. Further, the question posed by privatization analysis is whether the privatization of a firm extinguishes the benefit received from a *prior* financial contribution. As Korea notes, the privatization methodology described above applies to an analysis of the benefit from subsidies "received before the change in ownership."[17] Here, it is the restructuring debt-to-equity swap itself that the JIA concluded *conferred* the benefit. For these reasons, the Appellate Body's assessment of privatization in *US – Countervailing Measures on Certain EC Products* is irrelevant to the analysis of whether the December 2002 debt-to-equity swap resulted in a benefit to Hynix.

IV. Injury Determination

11. **Articles 15.5 and 19.1 of the SCM Agreement.** Korea's claim that the JIA's injury determination is inconsistent with Articles 15.5 and 19.1 of the SCM Agreement proceeds from the premise that these provisions require authorities to demonstrate a causal link between the subsidy practice(s) at issue and the material injury experienced by the domestic industry. Korea's interpretation of Articles 15.5 and 19.1 is inconsistent with their language and prior reports discussing them. The subject of both the first sentence of Article 15.5 and the third clause of Article 19.1 is the same: "the subsidized imports." Thus, under each provision, it is the "subsidized imports" that must be causing injury. This conclusion is buttressed by the second sentence of Article 15.5, which states that "[t]he demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." The "demonstration" that the first clause of this sentence references is the same thing that "must be demonstrated" for purposes of the first sentence of Article 15.5. Additionally, footnote 47 of the SCM Agreement indicates that an authority properly conducts the assessment of"the effects of subsidies" referenced in the first sentence of Article 15.5 by examining the volume, price effects, and impact of the subsidized imports. It does not require an authority to conduct a separate or independent examination of subsidy practices. In *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, the panel rejected the same argument that Korea raises here.[18] Contrary to Korea's assertion, WTO panel and Appellate Body reports reinforce the notion that the *Atlantic Salmon* panel's interpretation of Article 6:4 of the Tokyo Round Subsidies Code is fully applicable with respect to the nearly identical wording of Article 15.5 of the SCM Agreement. This reading is further supported by the two previous panel reports addressing Korean challenges to countervailing duty measures on DRAMs. In both reports, the panels considered injury caused by the *subsidized imports* to be the focus of Article 15.5.[19]

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[17] *Id.*, para. 261.

[18] SCM/153 (adopted 28 April 1994), paras. 335-339.

[19] Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, modified by Appellate Body Report, WT/DS296/AB/R., para. 7.320.