BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan – Countervailing Duties on Dynamic Random Access Memories from Korea

(AB-2007-3)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

October 11, 2007

I. INTRODUCTION

1. Good morning, members of the division. The United States appreciates this opportunity to appear before you today.

2. In our third party submission, we explained that the panel erred when it found that the Japanese investigating authority ("JIA") improperly countervailed the entire amount of the debt-to-equity swaps involving Hynix Semiconductor, Inc. ("Hynix"). We will not repeat that argument here, though we welcome questions on it. Rather, today the United States will comment, first, on the determination of injury and, second, on the identification and measurement of "benefit" pursuant to the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

II. INJURY DETERMINATION

3. We begin by addressing the injury determination issue. The United States urges the Appellate Body to affirm the Panel's conclusion that Articles 15.5 and 19.1 of the SCM Agreement did not require a demonstration of a causal link between the subsidies at issue and the material injury experienced by the domestic industry.

4. In its Appellee Submission, Japan explains in considerable detail why the Panel correctly rejected Korea's claim of a breach of Articles 15.5 and 19.1. This morning, we wish merely to emphasize a few critical points.

5. 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." Under each provision, it is the "subsidized imports" that must be causing injury.

6. The first sentence of Article 15.5 further states that an authority must demonstrate that the subsidized imports are causing injury "through the effects of subsidies." This phrase does not appear in isolation. Instead, its meaning is explained by footnote 47 of the SCM Agreement. Footnote 47 indicates that the pertinent "effects of subsidies" are those set forth in Articles 15.2 and 15.4.

7. In turn, both Articles 15.2 and 15.4 of the SCM Agreement concern the "subsidized imports." Neither provision requires an authority to make an independent assessment of the effects of the subsidy itself. Rather, Article 15.2 requires the authority to consider "the volume of the subsidized imports" and "the effects of subsidized imports on prices." Article 15.4 concerns examination of "the impact of the subsidized imports on the domestic industry."

8. Consequently, footnote 47 indicates that an authority properly assesses 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*. Thus, the first sentence of Article 15.5, along with its footnote, directs an authority to ascertain that the *subsidized imports* are causing injury. It does not require the authority to conduct a separate or independent examination of the effects of *subsidies*.

9. The Panel's interpretation of Article 15.5 finds support in the *Atlantic Salmon* panel's interpretation of virtually identical language in Article 6:4 of the Tokyo Round Subsidies Code.[1] It is also consistent with numerous dispute settlement panel and Appellate Body reports.[2] Indeed, each of the two previous panel reports addressing Korea's challenges to countervailing

[1] *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153 (adopted 28 April 1994).

[2] *E.g., US – Hot-Rolled Steel (AB),* para. 226; *EC – Cast Iron Fittings (AB)*, para. 175.

duty measures on DRAMs considered injury caused by the *subsidized imports* to be the focus of Article 15.5.[3]

III. IDENTIFICATION AND MEASUREMENT OF BENEFIT

10. Turning to Korea's arguments concerning the panel's identification and measurement of the benefit conferred on Hynix, Korea argues that the JIA should have compared the government-directed restructuring to what hypothetical creditors that were not entrusted or directed would have provided in a similar restructuring.[4] However, neither the restructuring as a whole, nor the government entrustment or direction, is the "financial contribution" whose "benefit" – as that term is used in SCM Article 1.1(b) – is assessed. The term "restructuring" appears nowhere in Article 1.1 of the SCM Agreement. Of course, the components of a restructuring – loans, equity infusions, loan guarantees, etc. – are mentioned in Article 1.1. But the restructuring as a whole is not the financial contribution at issue.

11. Korea also fails to recognize that Article 14 of the SCM Agreement gives investigating authorities the discretion to determine the precise methods for calculating the benefit from a loan or equity infusion, as long as those methods are consistent with the guidelines in Article 14. While we do not take a position on the JIA's specific calculations or whether there was an internal inconsistency in the JIA's determination, we agree with Japan that Article 14 "does not distinguish between outside and inside investors, nor does it set forth any specific methodologies for dealing with a company in a specific financial situation."[5] Korea mischaracterizes Japan's

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[3] *EC – DRAMS*, paras. 7.401-7.402; *US – DRAMS (Panel)*, para. 7.320.

[4] *See, e.g.*, Korea Appellee Submission, paras. 155-159, 162-163, 179; *see also* Korea Other Appellant Submission, paras. 29-31, 34, 38.

[5] Japan Appellant Submission, para. 204.

argument when it claims that Japan suggests that "Article 14 *requires* investigating authorities to follow rigid rules that compare debt restructurings to dissimilar transactions (*new* equity investments and *new* loans by outside investors who have the option of taking their funds and investing them somewhere else) that were not available to the creditors and were never under consideration."[6] As we understand it, Japan is arguing that Article 14 *allows* an investigating authority to use "any"[7] methodology, so long as it is consistent with the guidelines. It is Korea that appears to be arguing for the imposition of requirements in Article 14 that appear nowhere in the text of the Article.[8]

12. We wish to make one final point regarding an argument of Korea's. As mentioned, Korea argues that the JIA was required to compare the financial contributions at issue to a hypothetical restructuring that was not government-directed. Then, remarkably, Korea asserts that the JIA could not treat various financial institutions as "interested parties", and thus could not use "facts available" if those entities failed to provide the requested information.[9] These arguments beg the question of how the JIA was to obtain the information Korea asserts is required to conduct a proper benchmark analysis. Investigating authorities are dependent upon the interested Member and interested parties in obtaining the information necessary for a determination. For Korea to argue that the JIA must gather certain information, but that neither Korea nor the relevant private entities need provide it, puts Japan in a no-win situation. In

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[6] *See* Korea Appellee Submission, para. 158 (emphasis added). *See also* Korea Appellee Submission, para. 159.

[7] *See US – Softwood Lumber IV (AB)*, para. 91 ("The reference to 'any' method in the chapeau [of Article 14] clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.").

[8] Korea Appellee Submission, paras. 156-57.

[9] Korea Appellee Submission, paras. 105-106.

effect, Korea is advocating a benchmark for which an investigating authority would be unable to obtain information, and thus could not apply. This is yet another reason for the Appellate Body to reject Korea's argument that an investigating authority must compare the restructuring as a whole to a non-government directed restructuring in order to determine the existence and amount of benefit.

IV. CONCLUSION

13. Members of the Division, this concludes our opening statement. Thank you for your attention, and we look forward to any questions you may have.