EUROPEAN COMMUNITIES – COUNTERVAILING MEASURES ON DYNAMIC RANDOM ACCESS MEMORY CHIPS FROM KOREA

(WT/DS299)

THIRD PARTY STATEMENT OF THE

UNITED STATES OF AMERICA

November 4, 2004

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, it is my privilege to appear here today to present the views of the United States concerning certain issues in this dispute. In our written submission, we already commented on the submissions of the European Communities ("EC") and Korea. Therefore, the principal focus of my comments today will be on the third-party written submission of Japan.

2. At the outset, however, I would like to make a couple of general observations. First, with respect to the issue of directed lending by the Government of Korea ("GOK"), as we explained in our written submission, "the issue before the Panel is whether a reasonable, unbiased person looking at the totality of the evidence before the EC authorities could have reached the same conclusion as did those authorities; namely, that the GOK entrusted and directed private financial institutions to bail out the financially distraught Hynix."[1] In our view, this issue is not even a

[1] *Third Party Submission of the United States of America*, June 16, 2004, para. 31 [hereinafter "US Submission"].

close call. There can be no serious question that a reasonable, unbiased person could have reached the same conclusion as the EC authorities.

3. Second, with respect to the question of material injury, the United States is not in a position to comment on the details of the EC's injury determination. However, it appears to the United States that Korea would have this Panel believe that the GOK's intervention in the market to artificially sustain the existence of the number three producer of DRAMs in the world had no adverse consequences on Hynix's competitors. While the consequences of Korea's subsidization of Hynix likely varied from market to market, we strongly disagree with Korea's suggestion that the subsidization of Hynix had no adverse consequences whatsoever.

4. Having made these general observations, I now would like to comment on certain aspects of the third-party submission of Japan.

The Evidentiary Standard for Entrustment or Direction

5. The United States agrees with most of Japan's discussion regarding the evidentiary standard applicable to questions of entrustment or direction under Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[2] The United States agrees that there is no special evidentiary standard for government entrustment or direction. The United States also agrees that subparagraph (iv) does not require that a government's delegation or command be so detailed as to instruct every step that the bank must follow. Finally, the United States agrees that the elements of entrustment or direction may be found on the basis of circumstantial evidence or by evidence from secondary sources. Indeed, the United States would

[2] *Third Party Submission of the Government of Japan*, 16 June 2004, paras. 7-13 [hereinafter "Japan Submission"]; *see also* US Submission, paras. 16-31.

go further and submit that circumstantial and secondary evidence takes on particular importance in situations where, as in the case of the Hynix bailout, a government acts behind the scenes and takes advantage of its ownership stakes in banks to direct their behavior.

6. The one exception the United States would take to Japan's discussion of evidentiary standards for entrustment or direction involves the heading to Section II.B.1 of its submission. There, Japan states that "[t]he Panel should apply the correct evidentiary standards to review the existence and the extent of entrustment or direction ... ." The Panel's task is not to determine *de novo* whether entrustment or direction existed, but instead is to review *the EC's* determination. Therefore, it is more accurate to say that the Panel's task is to determine whether *the EC* applied the correct evidentiary standard.

The EC's Injury Determination

7. Turning to the EC's injury determination, Japan criticizes the EC for failing to separate and distinguish the injurious effects of other known factors to the domestic industry from the effects of subsidized imports.[3] More specifically, Japan asserts that the EC did not address subsidized imports and non-subsidized imports separately in its overcapacity analysis. In addition, Japan asserts that the EC, after acknowledging the harmful effects of non-subsidized imports, failed to adequately separate the injurious effects of subsidized imports from non-subsidized imports.

8. In the view of the United States, these assertions suggest a standard of analysis that is beyond what the SCM Agreement actually requires. In this regard, the United States would note

[3] Japan Submission, para. 6.

that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of unfair imports from the injurious effects of the other known causal factors are not prescribed by the WTO agreements. The Appellate Body has reached this same conclusion consistently. For example, the Appellate Body has stated as follows: "Thus, provided that the investigating authority does not attribute the injuries of other causal factors to [unfair] imports, it is free to choose the methodology it will use in examining the 'causal relationship' between [unfair] imports and injury."[4]

9. Similarly, there is no requirement in the plain text of the SCM Agreement that an investigating authority "isolate" subject imports or the effects of the subject imports and other known factors on the domestic industry. Neither in *US - Hot-Rolled Steel* nor in subsequent reports has the Appellate Body found any requirement for the investigating authority to "isolate" the injurious effects of the unfair imports. Instead, the standard articulated has been whether the investigating authorities provided a satisfactory explanation of the nature and extent of the injurious effects of those other factors, as distinguished from the injurious effects of the unfair imports.

10. Second, Article 15 of the SCM Agreement does not require that the subject imports alone, in and of themselves, be the cause of material injury. Even in the context of reviewing safeguards determinations, the Appellate Body has stated that Article 4.2(b) of the *Agreement on*

[4] *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R, Report of the Appellate Body adopted 18 August 2003, para. 189, relying on *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, Report of the Appellate Body adopted 23 August 2001 [hereinafter "*US - Hot-Rolled Steel*"].

Safeguards does not require that increased imports alone be the cause of serious injury.[5] In *Wheat Gluten*, the Appellate Body found that the causation requirement of the *Agreement on Safeguards* can be met where serious injury is caused by the interplay of increased imports and other factors.[6]

The EC's Use of Facts Available

11. Moving on to the EC's use of facts available in connection with its subsidy determination, the United States in its written submission addressed Korea's arguments concerning the facts available. Today, I would like to comment briefly on Japan's arguments regarding this topic.

12. Japan asserts that "the general principle of good faith under international law and the specific requirements under Articles 12.7 and 12.11 mandate that facts available are the last resort for the authorities."[7] The United States has several problems with this statement.

13. First, with respect to Japan's reference to "good faith," there is no basis for using a principle of "good faith" to depart from the text of the agreements – including the SCM Agreement – as negotiated. There is also no basis or justification in the WTO Agreement for a WTO dispute settlement panel to enforce a principle of "good faith" as a substantive obligation agreed to by WTO Members.

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[5] *See, e.g.*,*United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, Report of the Appellate Body adopted 19 January 2001, paras. 70, 79 [hereinafter "*Wheat Gluten*"];*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, Report of the Appellate Body adopted 16 May 2001, paras. 165-170.

[6] *Wheat Gluten*, paras. 67-68.

[7] Japan Submission, para. 14.

14. Dispute settlement panels have clear and unequivocal terms of reference: they are to examine the matter before them "in the light of the relevant provisions in ... the covered agreements cited by the parties to the dispute ... ."[8] Nowhere in Appendix 1 to the DSU, which defines the "covered agreements" for purposes of the DSU, is there listed an international law principle of good faith.

15. Second, there is no basis for Japan's assertion that Articles 12.7 and 12.11 of the SCM Agreement "mandate" that facts available be used only as a "last resort." The text of Article 12.7 describes the prerequisites for using facts available. That text does not include the phrase "last resort" or any similar concept, nor does the text of Article 12.11.

16. Thus, the task for the Panel is to determine whether the EC reasonably determined whether the prerequisites existed under the relevant provisions of the SCM Agreement for relying on facts available. The Panel's task is not to rewrite those provisions so as to incorporate an undefined notion of good faith.

17. Finally, the United States would not take issue with Japan's observation that cooperation in a countervailing duty investigation is a two-way process.[9] However, the United States would emphasize that the process is, indeed, two-way, and requires cooperation from the investigated parties as well as from the investigating authorities. In the report cited by Japan – which, it must be noted, involved the interpretation of provisions not found in the SCM Agreement – the Appellate Body emphasized that "the level of cooperation required of interested parties is a high

[8] DSU Article 7.1.
[9] Japan Submission, para. 18.

one ... ."[10] Can Korea's extremely narrow interpretation of the EC's questions and its withholding of information regarding the meetings of Economic Ministers be regarded as a "high level" of cooperation? Can Hynix's submission of one page of the Arthur Andersen report to the EC authorities, even though it submitted the entire report to U.S. authorities in their countervailing duty investigation, be regarded as a "high level" of cooperation? Can Hynix's refusal to give consent to Citibank to provide EC authorities with documents pertaining to Citibank's role in the Hynix bailout be regarded as a "high level" of cooperation? To merely pose these questions is to answer them.

Conclusion

18. Mr. Chairman, members of the Panel, that concludes the third-party statement of the United States. Thank you for your attention.

[10] *US - Hot-Rolled Steel*, para. 100.