BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan – Countervailing Duties on Dynamic Random Access Memories from Korea

(AB-2007-3)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

September 24, 2007

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Service List

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States makes this third party submission to provide the Appellate Body with its view of the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement") that are relevant to this dispute. Without prejudice to other issues the United States may wish to raise at the oral hearing, in this written submission the United States will address the Panel's erroneous finding that the calculation of the benefit from the debt-to-equity swaps was inconsistent with Article 14 of the SCM Agreement. In making this finding, the Panel overlooked the fact that the commercial market would not have provided an equity infusion to Hynix, and failed to distinguish between Hynix and its shareholders.

II. ARGUMENT: The Panel Erred With Respect to the Calculation of the Benefit from a Debt-to-Equity Swap

2. The United States agrees with Japan that the Panel erroneously found that the JIA improperly countervailed the entire amount of the debt-to-equity swaps. The Panel stated that the JIA's approach "erroneously overstates the amount of the benefit conferred on the recipient, for it overlooks the perspective of the recipient, *i.e.*, Hynix, which must dilute the ownership of existing shareholders in return."[1] There are two fundamental problems with the Panel's finding.

3. First, the Panel's finding misses the critical point that the commercial market *would not have provided an equity infusion to Hynix*. The Panel quoted the JIA as finding that "'there were no investors who would additionally invest in or make loans to Hynix from a normal commercial perspective, and thus, there were no normal investments by private investors that can be

[1] Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, circulated 13 July 2007, para. 7.313 ("Panel Report").

reasonably compared to the equity infusions granted by creditor banks.'"[2] This is the goal of the benefit analysis – to compare the financial contribution to what the market would have provided.[3] When the market would not have provided an equity infusion (which, unlike a loan, does not need to be repaid), it is reasonable to treat the entire equity infusion as conferring a benefit. The Panel's conclusion neglects this fundamental principle. At the very least, it cannot be said that a reasonable and objective investigating authority could not have reached the conclusion that the entire amounts of the equity infusions conferred benefits.

4. Second, the Panel's finding purports to be consistent with the "benefit to the recipient" perspective (as opposed to the perspective of, or cost to, the provider of the financial contribution), but it does not even accomplish that. As just discussed, from the perspective of Hynix, it received a financial contribution which it could not have received on the market; accordingly, it is reasonable to conclude that there was a benefit in the entire amount. Moreover, the Panel's rationale was that Hynix would have to dilute the ownership of existing shareholders upon receipt of the equity infusion, and, therefore, that Hynix did not receive a benefit in the entire amount of that infusion.[4] But the need to dilute the ownership of existing shareholders, even if true as a factual matter, is irrelevant. Any such dilution would affect only the existing shareholders, not Hynix. *Hynix* was the recipient of the financial contribution, *not* the shareholders. This is a type of scenario in which it is logical to make a distinction between a

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[2] Panel Report, para. 7.308.

[3] *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

[4] Panel Report, para. 7.313.

company and its shareholders.[5] Otherwise, a situation in which a government entity holding shares in a company makes a further equity infusion into the company might not confer a benefit, under the theory that the shareholder has only benefitted itself. At least one prior panel – in *Korea – Commercial Vessels* – has rejected this approach, in the context of a "financial contribution" analysis.[6] The same result should apply in the context of a benefit analysis. Indeed, the Panel implicitly adopted the approach of the *Korea – Commercial Vessels* panel in its findings regarding the change in ownership of Hynix effected by the equity infusions.[7] The Panel's conflation of Hynix and its shareholders therefore reveals in the Panel Report the type of "internal inconsistency" for which the Panel itself chastised the JIA.[8] It also reveals an erroneous interpretation of Article 14(a) of the SCM Agreement.

5. For these reasons, the Panel erred in its finding that the JIA's calculation of the benefit from the debt-to-equity swaps was inconsistent with the SCM Agreement.

III. CONCLUSION

6. The United States thanks the Appellate Body for the opportunity to comment on the issues raised in this appeal.

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[5] *See* Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, para. 118 (concluding that panel incorrectly determined that in all cases, for purposes of the benefit determination under the SCM Agreement, no distinction should be made between a company and its shareholders).

[6] *See*, Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, paras. 7.419-7.423.

[7] *See* Panel Report, paras. 7.456-7.458

[8] *See, e.g.*, Panel Report, para. 7.310.