

JAPAN – DRAMS (KOREA)¹

(DS336)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Korea	ASCM Arts. 1, 12, 14, 15 and 19 DSU Art. 11	Establishment of Panel	19 June 2006
			Circulation of Panel Report	13 July 2007
Respondent	Japan		Circulation of AB Report	28 November 2007
			Adoption by the DSB	17 December 2007

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Japanese investigation of and final countervailing duty order on imports from Korea.
- **Product at issue:** Dynamic random access memories (DRAMs) manufactured Hynix of Korea.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **ASCM Art. 1.1(a)(1)(iv) (definition of a subsidy – entrustment or direction):** Having rejected one of the intermediary findings relied on by the Japanese investigating authorities (JIA) for finding “entrustment and direction” by the Korean government (namely, the commercial reasonableness of some Hynix creditors participating in certain restructuring transactions in December 2002), the panel found that the JIA’s overall determination was thereby flawed. The Appellate Body found that the Panel had failed to comply with the required standard of review under DSU Art. 11 because it did not examine, as did the JIA, whether the evidence, in its totality, could reasonably support a finding of “entrustment or direction”.
- **ASCM Arts. 1.1(b) and 14 (definition of a subsidy – benefit benchmark and methods for calculating benefit):** Regarding the benchmark for determining whether a “benefit” to Hynix had been conferred by debt-restructuring programmes in October 2001 and December 2002, the Panel considered that the JIA had identified an “insider investor” standard but nonetheless applied an “outsider investor” standard. The Panel also found that, in assigning a zero value to shares exchanged by Hynix in “debt-to-equity” swaps with its creditors, the JIA considered the issue from the perspective of Hynix’s creditors, rather than from that of the recipient, Hynix, as required under Arts. 1.1(b) and 14, and thereby overstated the amount of benefit to Hynix. The Appellate Body did not consider that there were different standards applicable to inside investors and outside investors; instead the Appellate Body found that there is but one standard: the market standard. Nonetheless, the Appellate Body upheld, albeit for different reasons, the Panel’s finding on the benefit determination.
- **ASCM Arts. 12.7 and 12.9 (interested parties):** The Panel rejected Korea’s claim that only entities that “have an interest in the outcome of a countervailing duty proceeding” can be interested parties within the meaning of Arts. 12.7 and 12.9. In upholding the Panel, the Appellate Body explained that, although not unfettered, investigating authorities have some discretion which entities to designate as interested parties for purposes of carrying out an investigation. In the circumstances of the present case, the JIA did not overstep these bounds.
- **ASCM Arts. 15.5 and 19.1 (injury determination – causation):** The Appellate Body agreed with the Panel that Arts. 15.5 and 19.1 did not impose an additional requirement on an investigating authority to examine the “effects of the subsidies” as distinguished from the “effects of the subsidized imports”, in addition to the requirement not to attribute injury caused by other factors to subsidized imports.

¹ Japan – Countervailing Duties on Dynamic Random Access Memories from Korea

² Other issues addressed: ASCM Art. 1.1(a)(1)(i) (direct transfer of funds); ASCM Arts. 1.1(b) and 14 (benefit; methods used); ASCM Art. 2 (specificity); ASCM Art. 19.4 (allocation of benefit and levying of countervailing duty); ASCM Art. 12.7 (facts available); Panel’s treatment of business confidential information; DSU Art. 11.