Council Regulation (EC) No 584/2006 of 10 April 2006 amending Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea

COUNCIL REGULATION (EC) No 584/2006

of 10 April 2006

amending Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters[(1)],

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(2)] (the basic Regulation),

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Existing measures

(1) By Regulation (EC) No 1480/2003[(3)] (the definitive Regulation), the Council imposed a definitive countervailing duty of 34,8 % on imports of certain electronic microcircuits known as dynamic random access memories (DRAMs) originating in the Republic of Korea and manufactured by all companies other than Samsung Electronics Co., Ltd (Samsung), for which a 0 % duty rate was established. The definitive Regulation was preceded by Commission Regulation (EC) No 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea[(4)] (provisional Regulation).

(2) Two exporting producers located in the Republic of Korea cooperated in the investigation which led to the imposition of the existing measures (the original investigation): Samsung, which was not found receiving subsidies, and Hynix Semiconductor Inc. (Hynix). The European Community (EC) industry in the original investigation consisted of two producers which accounted for the major proportion

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of the total Community production of DRAMs, Infineon Technologies AG, Munich, Germany (Infineon) and Micron Europe Ltd, Crowthorne, United Kingdom (Micron).

(3) The investigation of subsidisation and injury covered the period from 1 January 2001 to 31 December 2001 (IP). The examination of trends relevant for the assessment of injury covered the period from 1 January 1998 to the end of the IP (the period under consideration).

2. Report adopted by the Dispute Settlement Body of the WTO

(4) On 3 August 2005, the Dispute Settlement Body (DSB) of the World Trade Organisation (WTOmm) adopted a Panel report in 'European Communities — Countervailing measures on dynamic random access memory chips from Korea'[(5)].

(5) According to the Panel report, the EC acted in a manner inconsistent with its WTO obligations under:

(a) Article 1.1(a) of the Agreement on Subsidies and Countervailing Measures[(6)] (the SCM Agreement) in determining that the May 2001 restructuring programme constituted a financial contribution by the government;

(b) Article 1.1(b) of the SCM Agreement in its determination of the existence of a benefit in the case of the syndicated loan;

(c) Articles 1.1(b) and 14 of the SCM Agreement in directly applying, for the purposes of the calculation of the amount of benefit, its grant methodology to all programmes found to constitute a subsidy;

(d) Article 15.4 of the SCM Agreement by not evaluating the factor 'wages' as a relevant factor affecting the state of the domestic industry; and

(e) Article 15.5 of the SCM Agreement by failing to make sure that the injury caused by certain other factors (in particular, decline in demand, overcapacity, and other (non-subsidised) imports) was not attributed to the subsidised imports.

(6) On the other hand, the EC was found to have acted consistently with its WTO obligations under:

(a) Article 1.1(a) of the SCM Agreement in determining that the syndicated loan, the KEIC guarantee, the KDB debenture programme and the October 2001 restructuring programme constituted a financial contribution by the Government of Korea (GOK);

(b) Article 1.1(b) of the SCM Agreement in determining that a benefit was conferred on Hynix by the KEIC guarantee, the KDB debenture programme, the May 2001 restructuring programme and the October 2001 restructuring programme;

(c) Articles 1.2 and 2 of the SCM Agreement in finding de facto specificity (two Korean claims);

(d) Article 15.2 of the SCM Agreement in assessing the significance of the volume and price effects of the subsidised imports (2 Korean claims);

(e) Article 15.4 of the SCM Agreement in considering all factors relevant to the overall condition of the domestic industry, except for the factor 'wages';

(f) Article 15.5 of the SCM Agreement in demonstrating the requisite causal link between the subsidised imports and injury; and

(g) Article 12.7 of the SCM Agreement in applying 'facts available' with respect to the subsidy investigation.

3. Reassessment to implement the DSB's recommendations

(7) In the light of the recommendations set out in the Panel report, the Commission conducted a thorough and objective reassessment of the relevant findings in the definitive Regulation on the basis of information on the record. The scope of the reassessment is appropriately limited to an examination of the five specific aspects of the existing measure, as described above, that were found to be inconsistent with the SCM Agreement. This examination is based on the re-evaluation of the existing evidence on the record of the original investigation in light of the relevant findings in the Panel report.

(8) The reassessment set out below shows that injurious subsidisation still exists, although at a slightly lower level.

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

(9) The product under consideration and the like product are the same as that covered by the original investigation, i.e. certain electronic microcircuits known as dynamic random access memories (DRAMs), of all types, densities and variations, whether assembled, in processed wafer or chips (dies), manufactured using variations of metal oxide-semiconductors (MOS) process technology, including complementary MOS types (CMOS), of all densities (including future densities), irrespective of access speed, configuration, package or frame etc., originating in the Republic of Korea. The product concerned also includes DRAMs presented in (non-customised) memory modules or (non-customised) memory boards, or in some other kind of aggregate form, provided the main purpose of which is to provide memory[7].

(10) The product concerned is currently classifiable within CN codes 8542 21 11, 8542 21 13, 8542 21 15, 8542 21 17, ex 8542 21 01, ex 8542 21 05, ex 8548 90 10, ex 8473 30 10 and ex 8473 50 10.

(11) The Panel report did not cover any claims affecting the findings set out in the definitive Regulation concerning the product under consideration and the like product.

C. REVISED FINDINGS BASED ON THE PANEL REPORT

1. Subsidies

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EC) No 584/2006. (See end of Document for details)*

1.1. Introduction

(12) This part sets out the reassessed findings based on the conclusions and recommendations of the Panel report concerning:

(a) whether the May 2001 restructuring programme constituted a financial contribution by the GOK within the meaning of Article 2(1) of the basic Regulation;

(b) whether there was a benefit in the case of the syndicated loan within the meaning of Article 2(2) of the basic Regulation;

(c) the calculation of the amount of the benefit with regard to all subsidy programmes within the meaning of Articles 2(2) and 6 of the basic Regulation.

(13) All other findings concerning subsidies remain as established in the original investigation and set out in the provisional Regulation and the definitive Regulation.

1.2. May 2001 bond purchase by creditor banks in the amount of KRW 1 trillion and first roll-over of debt (restructuring programme)

(14) The Panel found that the determination that the creditor banks were directed to participate in the May 2001 restructuring programme and that their purchase of KRW 1 trillion of convertible bonds (CBs) as part of the programme therefore constituted a financial contribution by the GOK was not consistent with Article 1.1(a) of the SCM Agreement[8]. More specifically, the Panel found that 'while the May 2001 restructuring programme is a close case, we consider that the evidence before the investigating authority was insufficient to reasonably conclude that the government entrusted or directed the private banks to purchase the Hynix CBs.'[9].

(15) In accordance with the Panel's assessment, the funds provided to Hynix in the context of the May 2001 restructuring programme shall not be countervailed[10].

1.3. Syndicated loan of KRW 800 billion

(16) With respect to the syndicated loan of KRW 800 billion, the Panel found that the EC had properly established that the GOK directed the Korea Exchange Bank (KEB) to participate in the loan and that this constituted a financial contribution via entrustment or direction of KEB in accordance with Article 1.1(a) of the SCM Agreement. The Panel also found that the Korea Development Bank (KDB) provided a direct financial contribution through its participation in the syndicated loan, and, because the KDB was a public body, the EC was not required to make a finding of entrustment or direction[11]. However, the Panel found that the EC failed to establish the existence of a benefit from the financial contribution provided by the KDB and the KEB within the meaning of Article 1(b) of the SCM Agreement[12]. Specifically, the Panel stated that the EC had not examined whether there were comparable commercial loans that could actually have been obtained by Hynix on the market and stated that the EC had ignored the other participants in the syndicated loans as possible benchmarks[13].

(17) In the view of the Commission, the participation by the other banks in the syndicated loan cannot serve as a proper benchmark for determining the existence of a benefit. As the Panel itself noted, in determining the existence of a commercial benchmark, authorities must examine whether such loans were so influenced by the alleged government intervention that they do not represent loans that could actually be obtained on the market[(14)]. The Commission has conducted a thorough re-examination of the extensive record in this case and has employed the type of analysis discussed by the Panel. On this basis, the Commission has determined that the loans from the other banks participating in the syndicated loan could not serve as a proper benchmark.

(18) First, bearing in mind the financial condition of Hynix at the time that the syndicated loan was arranged, as noted in recital 19 of the definitive Regulation, at the time the loan was agreed to, at the end of 2000, Hynix was in severe financial distress. It had over USD 9,46 billion in liabilities at the end of 2000, which was over twice its net worth and over four times the market capitalisation of the company. It suffered a loss in 2000, a year in which other large DRAM producers registered profits and which was generally considered to have been a very good year in the DRAM industry. The majority of Hynix liabilities were coming due in 2001 and the company was facing intense liquidity problems. Many independent analysts and brokerage houses were saying at that time that the company would not be able to generate sufficient cash flow or asset disposals to pay off its maturing liabilities. Under such circumstances, profit maximising banks operating under normal commercial conditions would not voluntarily participate in loans with such enormous risk of default[(15)].

(19) Second, there is ample evidence on the record that other participants in the syndicated loan were pressured to participate in the overall restructuring of Hynix's debt. For example, the record contains evidence that one of the participants, Kookmin Bank, was required to lend directly to 'troubled corporate borrowers'. Specifically, in a statement to the Securities and Exchange Commission of the United States, Kookmin stated:

'The Korean government has promoted, and, as a matter of policy, may continue to promote lending to certain types of borrowers. ***It generally has done this by requesting banks to participate in remedial programs for troubled borrowers (such as Hynix) and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors***. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. ***However, government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of government policy***.'[(16)].

It is clear that Kookmin refers to Hynix in mentioning 'troubled borrowers', because the bank's 2001 annual report lists Hynix as the single largest financially troubled borrower[(17)]. Further, Kookmin, as a GOK-invested enterprise, was subject to audit and