KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

(AB-2018-3 / DS504)

THIRD PARTICIPANT SUBMISSION
OF THE UNITED STATES OF AMERICA

June 22, 2018

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this appeal. In this submission, the United States will present its views on the proper legal interpretation of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") as relevant to certain issues identified by the Parties on appeal.

2. In sum, the Panel erred in this dispute by imposing a requirement in relation to legal claims not found in DSU Article 6.2. The Panel considered that it was applying an approach of the Appellate Body in examining whether Japan's Panel Request set out "how and/or why" Korea's measures were in breach. However, Article 6.2 does not require that a panel request explain "how and/or why" a measure breaches, which would require a complaining party to present *arguments* in its panel request. Instead, identifying the aspects of the provision of the covered agreement alleged to have been breached provides the legal basis of the complaint sufficient to present the problem clearly.

II. ARGUMENT

A. Japan's Claims Regarding the Interpretation of Article 6.2 of the DSU

3. In the first part of its Panel Request, Japan identified the Korean measures it considered to be inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). According to the Panel Request, the measures in dispute were set forth in the Korea Trade Commission's "Resolution of Final Determination on Presence of Dumped Facts of Valves for Pneumatic Transmissions from Japan and Injury to Domestic Industry," which was based on a determination found in the Office Trade Investigation's "Final Report on Dumping Fact and Injury to Domestic Industry of Japanese Produced Valves for Pneumatic Transmissions."

4. After setting out the measures at issue, Japan separately listed twelve claims arising from the alleged imposition of the measures and cited various obligations under the AD Agreement alleged to have been breached.[1] Japan appeals the Panel's finding that five of its original twelve claims, Claims 1, 2, 3, 7 and 10, did not meet the requirements of DSU Article 6.2.[2]

5. Japan's claims, including the five claims at issue on appeal, followed the text of various provisions of the AD Agreement, in some cases, word-for-word. Japan argues that the manner in which it presented these claims satisfied the requirements under DSU Article 6.2 to set out its legal claims. Specifically, Japan argues "for each of these five claims, Japan's Panel Request identified the specific provision of the Anti-Dumping Agreement at issue, focused on the

[1] *See generally* Japan's Panel Request; Japan's Appellant Submission, para. 26.

[2] *See* Japan's Appellant Submission, n. 22.

particular obligations within each provision, and provided a brief narrative explanation of the claim."[3]

6. Japan argues that no further explanation of the legal basis of its claim was required to meet the requirements of DSU Article 6.2 because the obligations themselves were "narrow and well-defined on their face."[4] Japan asks the Appellate Body to find the five claims at issue on appeal to be within the Panel's terms of reference and to complete the analysis with respect to these claims.

B. Korea's Claims Regarding the Interpretation of Article 6.2 of the DSU

7. Korea appeals the Panel's finding that five of Japan's original twelve claims, Claims 4, 5, 6, 8 and 9, were within the Panel's terms of reference. Korea argues that the claims did not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly because Japan did not explain "how and why" it considered the measure at issue to be inconsistent with the cited legal obligation in the AD Agreement.[5] In the Panel Request, Japan's fourth, fifth, sixth, eighth and ninth claims, like Japan's other claims, followed the text of provisions of the AD Agreement.

8. Korea's Other Appellant Submission appears to argue that a panel request which generally identifies a measure, and then goes on to cite a provision of an agreement, and to paraphrase or quote relevant language from that provision, cannot sufficiently explain "how and why" the measure is inconsistent with the obligation. Korea considers that such an approach cannot provide a summary of the legal basis of the complaint that presents the problem clearly, as required by DSU Article 6.2.

9. Korea also alleges that the Panel erred in looking to Japan's written submission when determining whether the Panel Request was sufficient under DSU Article 6.2.[6]

C. The Proper Interpretation of DSU Article 6.2 As It Relates to Legal Claims

10. Article 7.1 of the DSU establishes that a panel's terms of reference are to examine the "the matter referred to the DSB" by the complaining party in the request for the establishment of a panel, in the light of relevant provisions of the covered agreement cited by the parties to the dispute.

11. Article 6.2 of the DSU, in relevant part, provides that the panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." These two distinct requirements – "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the

[3] *See* Japan's Appellant Submission, para. 26.

[4] *See e.g.*, Japan's Appellant Submission, para. 74.

[5] *See e.g.*, Korea's Other Appellant Submission, paras. 44, 45, 68, 304, 305.

[6] *See* Korea's Other Appellant Submission, para. 16.

legal basis of the complaint" – "constitute the 'matter referred to the DSB,' which forms the basis of a panel's terms of reference under Article 7.1 of the DSU."[7]

12. In relation to the legal claims, Article 6.2 describes this element as "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Thus, it is not a full explication of the legal basis, but rather a "summary" that presents the problem clearly. That summary of the legal basis is found in the provisions of the covered agreements alleged to be breached. Those provisions set out the foundation for a complaint (basis) in the (legal) rights or obligations of a Member.

13. Identifying the aspect of the provisions of the covered agreements alleged to be breached by a measure presents the problem clearly. That is, the panel request would then provide the relevant covered agreement, the commitment of a Member under that covered agreement, and the relevant aspect of that commitment, to the extent the provision may contain more than one obligation.

14. This understanding of Article 6.2 is supported by numerous provisions of the DSU. For example, Article 3.3 speaks of the prompt settlement of situations in which a Member considers benefits accruing to it under the covered agreements are being impaired. Identifying the relevant provision of the covered agreement ensures the benefit expected to accrue is clearly presented. Article 11 on the function of panels sets out that the panel's objective assessment of the matter includes "the applicability of and conformity with the relevant covered agreements." Article 12.7 states that a panel report shall set out "the applicability of relevant provisions." Article 19.1 speaks of a panel or Appellate Body conclusion "that a measure is inconsistent with a covered agreement." In each instance, identifying the relevant provision of the covered agreement in the panel request permits the panel or Appellate Body to fulfill this function.

15. Accordingly, the Appellate Body has stated that the "legal basis of the complaint . . . [is] 'the specific provision of the covered agreement that contains the obligation alleged to be violated.'"[8] The identification of the covered agreement provision claimed to have been breached is thus the "minimum prerequisite" for presenting the legal basis of the complaint.[9] Consequently, "to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[10] A panel request must be compliant with DSU Article 6.2 "on its face," and any deficiencies cannot be "cured" in subsequent submissions.[11]

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[7] *Argentina – Import Measures* (AB), para. 5.39.

[8] *China – HP-SSST* (AB), para. 5.14; *US – Countervailing and Anti-Dumping Measures (China)* (AB), para. 4.12; *EC – Selected Customs Matters* (AB), para. 130.

[9] *China – HP-SSST* (AB), para. 5.14; *Korea – Dairy* (AB), para. 124.

[10] *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* (AB), para. 4.8.

[11] *US – Carbon Steel* (AB), para. 127.

11. As the Appellate Body in *China – HP-SSST* observed,

> The reference in Article 6.2. of the DSU to the legal basis of the complaint refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated; and that it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly.

Arguments, in contrast to claims, are "statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[12] DSU Article 6.2, however, does not prohibit a party from including in its panel request statements "that foreshadow its arguments in substantiating the claim" if the complainant so chooses, but the presence of such arguments "should not be interpreted to narrow the scope of … the claims."[13]

12. The United States considers that the Panel erred by not applying the text of DSU Article 6.2. Instead, the Panel looked to certain past Appellate Body statements and considered that the panel request must set out "how and/or why" the measure breaches a WTO commitment.[14] However, there is no such requirement for a complainant to include an explanation of "how and/or why" the measure being challenged is inconsistent with a specific legal obligation.

13. Such an exercise would require a complainant, at the very early stages of dispute settlement, to disclose legal theories to explain why the complainant believes a set of facts breach a legal obligation. Such statements would amount to argumentation.[15] As observed by the Appellate Body in *EC – Selected Customs Matters*, "Article 6.2. of the DSU requires that the claims – not the arguments be set out in a panel request in a way that is sufficient to present the problem clearly."[16]

14. Indeed, the Panel appears to have applied the "how and/or why" verbiage from a prior Appellate Body report without considering its relevance to understanding the text of Article 6.2. Reviewing the phrase in isolation, the Panel concluded that citing the language of a provision of the covered agreement could *not* explain "how and/or why" a measure is WTO-inconsistent. But, applied in the manner of the Panel, to ask "how and/or why" a measure breaches a WTO obligation necessarily invites an answer beginning with "because." Any "because" statement

[12] *China – HP-SSST* (AB), para. 5.14.

[13] *EC – Selected Customs Matters* (AB), para. 153.

[14] *See e.g.,* Panel Report, para. 7.24 (citing *EC – Customs (AB)*, para 130); *see also* Panel Report, para. 7.35

[15] *China – HP-SSST* (AB), para. 5.14 (finding that "it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly"); *EC – Selected Customs Matters* (AB), para. 153 ("Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly).

[16] *EC – Selected Customs Matters* (AB), para. 153.

that goes beyond the provision of the covered agreement alleged to be breached is highly likely to constitute an argument. Therefore, the Panel applied an Appellate Body explanation, outside of its proper context, and in such a way as to impose a requirement not found in the text of DSU Article 6.2.

15. The United States understands that early Appellate Body references to whether a panel request had set out "how and/or why" a measure was alleged to breach a covered agreement arose early in the use of the WTO dispute settlement process. In certain early panel requests, Members merely listed legal obligations without identifying relevant aspects of the provision. An encouragement to provide greater clarity on the legal basis, for example, in circumstances in which a legal provision contains multiple obligations, was therefore understandable.[17] Today, however, to insist a panel request set out "how and/or why" a measure is in breach imposes a requirement far beyond the text of DSU Article 6.2 and invites the type of error seen in parts of the Panel Report.[18]

D. Application of DSU Article 6.2 to Japan's Legal Claims

16. Taking Japan's first claim under Articles 3.1 and 3.2 of the AD Agreement as an example, the imposition of the "how and why" requirement might require Japan to explain and/or provide examples of those areas of Korea's investigation that were based on what Japan considers to be circumstantial evidence or a subjective examination. Similarly, in order for Japan to demonstrate "why" it believes Korea's investigation was deficient, Japan might need to explain or provide reasons why certain evidence Korea's investigators relied upon was insufficient, or why Korea's investigation could not be considered objective. Both demonstrations, however, would require argumentation on behalf of the complaining party. Notably, in *US –Washing Machines* (AB), which involved different obligations under the AD Agreement than those at issue here, the Appellate Body observed that examples used by Korea in its panel request to describe how certain U.S. measures allegedly were inconsistent with obligations under the AD Agreement were "in the nature of arguments rather than claims."[19]

17. The United States considers that Japan's first claim as written in its Panel Request provides a brief summary of the legal basis sufficient to present the problem clearly. The

[17] It is notable, however, that the DSU text for Article 6.2 did not differ materially from the Montreal Rules, which provide: "The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the

complaint sufficient to present the problem clearly." GATT CONTRACTING PARTIES, Improvements to the GATT Dispute Settlement Rules and Procedures: Decision of 12 April 1989 (L/6489), section F (a). Therefore, the listing of legal provisions found in numerous GATT and WTO panel requests reflected an understanding of Contracting Parties and Members of the information necessary to "provide a brief summary of the … legal basis of the complaint sufficient to present the problem clearly."

[18] The imposition of the how and why "requirement" has also functioned as a double-edged sword. Where complainants have sought to provide argumentation or examples to demonstrate how or why a challenged measure breaches an obligation in a panel request, panels have, on occasion, inappropriately interpreted the use of such arguments or examples to limit the scope of the panel request. *EC – Selected Customs Matters* (AB), para. 153.

[19] *See US – Washing Machines* (AB), para. 5.61.

problem, as asserted by Japan, is that Korea's determination of whether there had been a significant increase in the importation of pneumatic valves was inconsistent with Articles 3.1 and 3.2 of the AD Agreement. While Articles 3.1 and 3.2 contain multiple provisions, the manner in which Japan described its first claim makes clear that the basis of Japan's claim is the first clause of the cited articles, namely that Korea's determination of whether there had been a significant increase in imports did not involve an objective examination based on positive evidence.

18. Following a similar pattern, Japan's second, third, seventh and tenth claims also provide a brief summary of the legal basis sufficient to present the problem clearly. Japan's second claim asserts that Korea's price effects determination is inconsistent with Articles 3.1 and 3.2 of the AD Agreement, and Japan's description makes clear that the legal basis of the claim is the first clause of Article 3.1 and the third provision of Article 3.2. Japan's third claim asserts that Korea's impact analysis is inconsistent with the obligation in the first provision of Article 3.1 and the first provision of Article 3.4 of the AD Agreement. Japan's seventh claim asserts that Korea's domestic injury determination is inconsistent with the singular obligation found in Article 4.1 of the AD Agreement, and Japan's tenth claim asserts that Korea did not disclose essential facts as required by the first provision of Article 6.9. Each of these claims identifies the provision of the covered agreement alleged to have been breached and therefore presents the problem clearly.

19. Before closing, we note that Korea's Other Appellant Submission appears to request the Appellate Body to state that panel requests which paraphrase or quote the legal obligations of a particular provision of an agreement summarily fail to meet the requirements of DSU Article 6.2.[20] While the United States considers that the "how and/or why" approach of the Panel is inconsistent with DSU Article 6.2, we also note that any examination of the sufficiency of a panel request must be considered on a case-by-case basis. [21] The Appellate Body, therefore, should reject Korea's invitation in this regard.

20. A panel request that identifies the aspect of the provision of the covered agreement alleged to be breached meets the minimum prerequisite for providing a summary of the legal basis sufficient to present the problem clearly under DSU Article 6.2. Following the text of the relevant provision of the covered agreement, and even quoting it, as Japan did, should be sufficient to satisfy the requirements of DSU Article 6.2.

III. CONCLUSION

21. The United States appreciates the opportunity to submit its views in this appeal on the proper interpretation of Article 6.2 of the DSU.

[20] *See e.g.,* Korea's Other Appellant Submission, para. 54.

[21] *See US – Countervailing and Anti-Dumping Measures (China)* (AB), para. 4.17.