

***JAPAN - COUNTERVAILING DUTIES ON DYNAMIC RANDOM
ACCESS MEMORIES FROM KOREA***

(WT/DS336)

**Oral Statement of the United States at the Third Party Session
of the First Substantive Meeting of the Panel with the Parties**

December 6, 2006

Mr. Chairman, members of the Panel:

1. It is a pleasure to appear before you to present the views of the United States concerning certain issues in this dispute. Today, we would like to make a few brief points on the following topics: (1) the preliminary ruling requests of Japan; (2) certain threshold issues regarding burden of proof, standard of review, and evidence; (3) two issues regarding the subsidy determination of the Japanese investigating authority (or “JIA”); and (4) the JIA’s injury determination.

Preliminary ruling requests

2. Regarding Japan’s preliminary ruling requests, a panel must evaluate the consistency of a panel request with DSU Article 6.2 based on the terms of the request itself. Contrary to Korea’s assertion in its December 1 submission, “information reasonably available to the responding parties at the time they received the panel request”, but that was not included in the request, is not relevant to an assessment of whether the panel request complies with Article 6.2.¹ Korea asserts that information submitted to the JIA could be deemed “reasonably available” such that Japan would not be prejudiced by a defective panel request. The United States believes that this

¹ Initial Comments of the Republic of Korea on the Expanded Request for a Preliminary Ruling in Japan’s First Written Submission (Dec. 1, 2006), para. 7.

assertion is legally irrelevant and factually doubtful. However, even if it were correct, Korea ignores the fact that such information was not “reasonably available” to other WTO Members, including the third parties to this proceeding.

3. DSU Article 6.2 establishes a standard that is no different for claims relating to antidumping and countervailing duty determinations than for claims relating to other types of measures. In all instances, a panel request must “identify the specific measures at issue and present a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” With respect to Items 10 and 15 of Korea’s panel request, the United States agrees with Japan that, to the extent they reference articles containing multiple obligations without specifying the particular subprovision at issue, Items 10 and 15 do not satisfy the requirements of DSU Article 6.2, and the Panel should find them to be outside the Panel’s terms of reference. Korea’s arguments to the contrary do not accord with the text of Article 6.2, and, if accepted, would substantially compromise the ability of both third parties and responding Members to participate effectively in panel proceedings.

Burden of proof, standard of review, and evidentiary standards

4. Turning to a different topic, as the United States discussed in its written submission, Korea’s first submission fails to make a *prima facie* case with respect to certain claims, suggests an incorrect standard of review in analyzing others, and mischaracterizes how the Panel should properly assess the evidence before the JIA in evaluating Korea’s claims.

5. For example, in its five paragraphs challenging Japan’s specificity determination, Korea does not cite once to Article 2 of the *Agreement on Subsidies and Countervailing Measures*

(“SCM Agreement”), much less a particular provision or obligation of that Article.² Korea simply has not met its burden of putting forth both evidence and *legal argument* to support each element of its claim.³ Korea cannot expect the Panel to make its case for it, by choosing which particular provisions of the SCM Agreement might be implicated and how Japan might have breached its obligations under those provisions. In our submission, we noted several other areas in which Korea’s submission appears to have failed to set forth a *prima facie* case.⁴

6. In addition to asking the Panel to make its case for it, Korea would have the Panel engage in a *de novo* review of Japan’s subsidy determination. Korea advances an alternative theory to the JIA’s analysis of entrustment or direction, based upon economic and corporate workout theories.⁵ However, it appears that the evidence upon which this theory is based was not on the record before the investigating authority. As the Appellate Body noted in *US – DRAMS*, a panel’s findings may not be based on facts that were not before the investigating authority at the time it made its determination.⁶ Moreover, and just as importantly, as the Appellate Body noted in *US – Lamb Meat*, the question before the Panel is not whether an alternative explanation advanced by Korea is “plausible.” Instead, the question is whether the JIA provided a reasoned and adequate explanation of how the evidence on the record supported its findings, and how those findings supported its overall determination.

² Korea First Written Submission, paras. 253-257.

³ See Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 140-41.

⁴ U.S. Third Party Submission, para. 15.

⁵ See, e.g., Korea First Written Submission, paras. 43-57.

⁶ Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, para. 175.

7. Additionally, in several portions of its submission, Korea erroneously urges the Panel to impose an evidentiary standard on an investigating authority not contemplated by the SCM Agreement. Other than where expressly stated, the SCM Agreement does not require an investigating authority to support a subsidy determination with “positive evidence,” and the Agreement contains no requirement that evidence of entrustment or direction be “probative and compelling.”⁷

8. Thus, Korea’s first submission rests on a number of incorrect characterizations regarding the burden of proof, standard of review, and evidentiary standards to be applied in evaluating the claims raised in this proceeding. The Panel should decline Korea’s invitation to make its case for it, based upon a *de novo* review of the evidence and economic theories not on the record in the investigation, using evidentiary standards not contemplated by the SCM Agreement.

Rejection of Private Benchmarks

9. Turning to the JIA’s benchmark analysis, we have addressed Korea’s arguments in our written submission. Today, we would like to address the assertion by China in its own third party submission that there is a “very high threshold” for rejecting as benchmarks investments or loans made by private entities that were not entrusted or directed.⁸ Contrary to China’s assertion, the SCM Agreement does not impose a special standard on investigating authorities in selecting a benchmark. Therefore, consistent with SCM Agreement Article 12.2, the task for the Panel is to evaluate whether a reasonable, objective decisionmaker, looking at all the evidence on the

⁷ Korea First Written Submission, para. 196.

⁸ China Third Party Submission, section 2.1.

investigation record, could have concluded that the benchmark selected by the JIA was appropriate.

10. A number of factors may render a private entity’s loan or investment an inappropriate benchmark, and the text of Article 14(a) and (b) does not impose a higher burden on an investigating authority in making such a determination. For example, as the panel in *EC – DRAMS* noted, the nature of a private entity’s relationship with the recipient of the financial contribution as well as with the government, and the particular characteristics of the private entity’s investment or loan in relation to the financial contribution at issue, may make it an inappropriate benchmark for purposes of an investigating authority’s analysis.⁹ In such circumstances, an investigating authority may properly disregard investments or loans of those entities insofar as, consistent with SCM Agreement Article 14(a) or (b), they do not reflect “the usual investment practice ... of private investors in the territory” or a “comparable commercial loan,” respectively. Likewise, circumstances may exist in which the government’s financial contribution affects the terms on which private entities invest in, or lend to, a particular industry or company, such that private investments in, or loans to, the subsidy recipient would not be appropriate benchmarks.

11. Furthermore, the United States disagrees with China’s assertion that the threshold is “even higher if certain private entities also participate in the *same* transactions that are alleged to be subsidies.”¹⁰ In fact, in such circumstances, the private loan or investment may be even less likely to reflect “the usual investment practice ... of private investors” or a “comparable

⁹ Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, para. 7.206 fn. 185.

¹⁰ China Third Party Submission, para. 15 (emphasis in original).

commercial loan,” insofar as the terms on which the loan or investment was made may be influenced by the government’s financial contribution. Accordingly, an investigating authority may properly reject such loans or investments as benchmarks.

12. Finally, China’s reliance on the Appellate Body’s findings in *Softwood Lumber* is misplaced. As China concedes, the Appellate Body in that case was analyzing the language of Article 14(d), not Article 14(a) or (b). Furthermore, the Appellate Body *acknowledged* that private benchmarks may be inappropriate if they are affected by extensive government involvement in the market,¹¹ explaining that private market prices may be inappropriate as benchmarks if the extensive government involvement in the market indirectly affects those prices. Similarly, if a government intervenes in the market to support a particular industry or company, through grants, loans, or investments, this government support could influence the decisions of private entities to invest in, or lend to, an industry or company. In such circumstances, grants, loans, or investments by these entities may not be appropriate benchmarks, even if the entities have not been entrusted or directed by the government.

The Chapeau of Article 14

13. With respect to Korea’s assertion that Japan breached its obligation under the chapeau of Article 14 to provide in its national legislation or regulations for any method used to calculate the benefit, the United States does not offer a view on the particular facts. However, we agree with the EC that, even if the Panel finds that Japan breached this obligation, such a finding does not necessarily mean that the countervailing duty determination itself is invalid.¹² Nothing in the text

¹¹ Appellate Body Report, *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*, WT/DS257/AB/R, adopted 17 February 2004, paras. 100-103.

¹² EC Third Party Submission, para. 35.

of the chapeau so provides, and Korea does not identify any obligation in the WTO Agreements that requires such a result. If the Panel finds that Japan acted inconsistently with the chapeau, then – consistent with DSU Article 19.1 – any recommendation to Japan to bring its measures into conformity with the Agreement should leave it to Japan to decide precisely how it does so.

Injury determination

14. With respect to the JIA’s injury determination, the United States disagrees with Korea’s contention that Articles 15.5 and 19.1 of the SCM Agreement require authorities to demonstrate a causal link between the subsidy practice(s) at issue and the material injury experienced by the domestic industry.

15. Let us first look at the text of the pertinent provisions. The subject of both the first sentence of Article 15.5 and the third clause of Article 19.1 is the same: “the subsidized imports.” Under each provision, it is the “subsidized imports” that must be causing injury.

16. The first sentence of Article 15.5 further states that an authority must demonstrate that the subsidized imports are causing injury “through the effects of subsidies.” This phrase does not appear in the text in isolation. Instead, its meaning is explained by footnote 47 of the SCM Agreement. Footnote 47 indicates that the pertinent “effects of subsidies” are those set forth in Articles 15.2 and 15.4.

17. In turn, both Articles 15.2 and 15.4 of the SCM Agreement concern the “subsidized imports.” Neither provision requires an authority to make an independent assessment of the effects of the subsidy itself. Rather, Article 15.2 requires the authority to consider “the volume of the subsidized imports” and “the effects of subsidized imports on prices.” Article 15.4 concerns examination of “the impact of the subsidized imports on the domestic industry.”

18. Consequently, footnote 47 to the SCM Agreement indicates that an authority properly conducts the assessment of the “effects of subsidies” referenced in the first sentence of Article 15.5 by examining the volume, price effects, and impact of the *subsidized imports*. Thus, the first sentence of Article 15.5, along with its footnote, directs an authority to ascertain that the *subsidized imports* are causing injury. It does not require the authority to conduct a separate or independent examination of the effects of *subsidy practices*.

19. This interpretation of Article 15.5 finds support in the *Atlantic Salmon* GATT panel’s interpretation of virtually identical language in Article 6:4 of the Tokyo Round Subsidies Code.¹³ It is also consistent with numerous dispute panel and Appellate Body reports. Indeed, each of the two previous panel reports addressing Korea’s challenges to countervailing duty measures on DRAMs considered injury caused by the *subsidized imports* to be the focus of Article 15.5.¹⁴

20. Finally, the *Korea – Commercial Vessels* panel report on which Korea relies does not purport to address injury or causation standards in countervailing duty investigations. Instead, it addresses the unrelated “serious prejudice” provisions of Article 6.3(c) of the SCM Agreement. The Panel’s conclusion in *Commercial Vessels* was dependent on the distinctive textual structure of Article 6.3 – one that is not shared by Article 15.5. Indeed, in its submissions to the panel in *Commercial Vessels*, Korea argued that the causation standards for “serious prejudice” inquiries under Article 6 were different from those for countervailing duty investigations under Article 15. Korea was correct at the time in drawing a distinction between the provisions in Articles 6 and 15. The Panel should draw the same distinction for purposes of this dispute.

¹³*United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153 (adopted 28 April 1994).

¹⁴ *EC – DRAMS*, paras. 7.401-7.402; *US – DRAMS (Panel)*, para. 7.320.

Conclusion

21. This concludes our statement. Thank you for your attention.