IN THE WORLD TRADE ORGANISATION

WT/DS379

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

Third Party Submission

by

Norway

Geneva

5 June 2009

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Table of cases cited in this submission

Short Title	Full Case Title and Citation
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R
US – DRAMS CVD	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and corr.1
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between China and the United States as to the conformity with the covered agreements of four sets of anti-dumping duty and countervailing duty determinations made by the United States.

2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the following interpretative issues:

   - The criteria for defining a "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (chapter II);

   - The use of a "zeroing" methodology when calculating "benefit" received from inputs provided by State Owned Enterprises (SOEs) (chapter III); and

   - "Double Remedy" (chapter IV).

II. WHETHER STATE OWNED ENTERPRISES ("SOE") AND STATE OWNED COMMERCIAL BANKS ("SOCB") MUST BE CONSIDERED "PUBLIC BODIES".

A. Introduction

3. For a measure to constitute a subsidy according to article 1 of the SCM Agreement:

   - it must entail a financial contribution or income or price support by a government or a public body; and
   - it must confer a benefit;

4. As regards State Owned Enterprises ("SOE") and Sate Owned Commercial Banks ("SOCB"), a key issue in the dispute is whether these enterprises can be considered "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement.*

5. Were the Panel to consider that these enterprises are <u>not</u> public bodies, then the United States would have had to show that a non-public body was nevertheless "entrusted or

directed" by the State to provide a financial contribution to the exporter or producer under investigation. Such analysis was not performed by the United States.[1]

6. China claims that the United States incorrectly found that certain SOEs and SOBCs were "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement*, by focussing only on majority ownership by the government, whereas the United States should have focussed on whether these enterprises exercise governmental functions or not.[2] By mechanistically applying an ownership criterion, China claims that the United States violates the *SCM Agreement.*

7. United States claims that the United States' Department of Commerce's ("USDOC") determinations, that the state-owned enterprises in question are "public bodies", are consistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement.[3] United States argues that "... the ordinary meaning of the term "public body," together with its context and the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned by the government, but not necessarily authorized to exercise, or in fact exercising, government functions."[4]

B. Interpretation of the term "public body"

8. The question at issue is whether majority state ownership alone is sufficient to conclude that an enterprise is a "public body" within the meaning of article 1.1 of the SCM Agreement., or whether "public body" requires a functional relationship to the exercise of some form of governmental authority when providing the financial benefit.

9. Both the disputing parties, and Norway, agree that, according to article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the term should be interpreted in accordance with customary rules of interpretation of public international law. The Appellate Body has recognised Article 31 of the Vienna Convention on the Law of Treaties (the *Vienna Convention*) as representing such rules.[5]

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1 *United States, First Written Submission ("US FWS"),* para. 65.
2 *China, First Written Submission ("China FWS"), see esp. paras. 73 - 83*
3 *US FWS* para. 100.
4 *US FWS* para. 118.
5 See, inter alia, Appellate Body Report, *United States – Gasoline* , page 16-17

10. Article 31 of the *Vienna Convention* directs the treaty interpreter to search for the ordinary meaning of the terms, in their context, and in light of the object and purpose of the agreement to which it forms part.

11. The disputing parties provide different dictionaries to support their views. The essence of their references shows that dictionaries should not be considered dispositive in and of themselves.

12. Norway believes that it is important to read the reference to "government or any public body" also in light of Article 1.1(a)(1)(iv) and its reference to situations where the government "entrusts or directs a private body to carry out one or more of the type of functions ... which would normally be vested in the government..." (emphasis added). Article 1.1(a)(1)(iv) provides important context to the interpretation of "public body" in Article 1.1(a)(1).

13. The purpose of Article 1.1(a)(1)(iv) is to avoid circumvention of the obligations in Article 1.1(a)(1), by providing the financial contribution through non-governmental bodies.[6] By focussing on situations where a private body has been "entrusted or directed" to perform functions that would normally be vested in the government, the provision gives a clear indication of the dividing line between the "public bodies" (that are considered on par with the government as such under Article 1.1(a)(1)) and the "private bodies". This dividing line is not based on an ownership criterion, as advocated by the United States, but on a functional delimitation based on whether the body in question performs governmental functions or not. If the body in question performs governmental functions, then it is covered by Article 1.1(a)1 directly when it acts in that capacity when it provides subsidies. If the body in question does not perform governmental functions, any financial contribution it provides is only attributable to the State if the government has *entrusted or directed* it to provide such contribution.

14. Most of the Panel and Appellate Body reports adopted so far that have dealt with the providers of a financial contribution analyses the issue of "entrustment or direction" of non-public bodies. A clear-cut interpretation of the term "public body" in respect of

[6] Panel Report on *US – Export Restraints*, para. 8.49; Appellate Body Report, *United States – Drams CVD*, para. 113.

commercial companies owned or controlled by government has so far not been put forward by the Appellate Body.

15. In *EC – DRAMS,* the Panel addressed the issue of whether wholly or partially government owned banks could be considered to have been entrusted or directed to provide a financial contribution. The EC had not treated these banks as public bodies, but treated them as private bodies that had either been entrusted or directed to provide a subsidy.

16. The Panel noted that "...it should be clear that, in our view, government ownership, in and of itself , is not sufficient to establish entrustment or direction under Article 1.1(a)(1) of the *SCM Agreement."*[7]. The Panel went on to state that "In the case of a 100 per cent government-owned bank, such as Woori Bank, it thus needs to be demonstrated that the government *actually exercised* its shareholder power to direct the bank to support to Hynix."[8]

17. When government ownership is not sufficient to establish "entrustment or direction", Norway submits that it is even less suited to establish that such companies shall be considered as "public bodies".

18. The same Panel stated, more as an *obiter* in footnote 129, that "We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. [...]". However, as that issue was not before the Panel, it did not shed further light upon what particular circumstances could justify an interpretation of a 100 per cent government owned entity as a public body. Norway would submit that the particular circumstance that could lead to such a conclusion would only be present where the government owned company exercises governmental functions.

19. The Panel in *Korea – Commercial Vessels* took the opposite view that government 100 per cent ownership and control could be sufficient to consider that the Korean Export Credit Guarantee Institute (KEXIM) was a public body.[9] The Panel, however, also noted in support of its conclusion that it also relied on such factors as government appointment of officers, government approval of budget and operations programme and Koreas own

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7 Panel Report, *EC – DRAMS,* para. 7.119.
8 *id.*, para. 7.120.
9 Panel Report, *Korea – Commercial Vessels*, para. 7.50. Similar statements were made in respect of four other Korean government agencies.

description of KEXIM as a "special governmental financing institution" and as an "export credit agency".[10]

20. Although the Panel reports are differently worded, Norway considers that both reports lend support to the position that government ownership is not sufficient in and of itself to determine that a company is a "public body". Other elements must be present, of which Norway suggests that a key element would be the exercise of governmental functions.

21. Norway finds support for its interpretation in the interpretations by the Appellate Body of similar provisions in other covered agreements. Norway recognizes that these provisions are not directly applicable in a subsidy context as they are from another agreement, and the wording is not necessarily identical in all respects, but they shed light on the intent of the Members when considering conduct that should be attributable to the governments.

22. In the GATS Annex on Financial Services, in paragraph 5(c), the term "Public Entity" is defined in the following manner:

> "(c) "Public entity" means:
>
> (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
>
> (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions." (emphasis added)

23. The definition in the GATS Annex on Financial Services applies the essential criterion that the entity in question must be "*engaged in carrying out governmental functions or activities for governmental purposes*". Ownership or control by a government is not sufficient in itself.

24. Based on the above, Norway submits that Article 1.1(a)(1) of the *SCM Agreement* cannot be interpreted to mean that all companies with more than 50 per cent government

[10] *id*, paras. 7.50 – 7.52.

ownership are automatically to be considered "public bodies". Rather, the focus must be on whether the body in question performs governmental functions when providing the financial contribution in question. This requires a factual analysis of the functions the particular body performs, where government ownership is not dispositive in itself. Where the body does not perform governmental functions, it is not a "public body" within the meaning of Article 1.1(a)(1) – but may well be a private body covered by the *SCM Agreement* by virtue of Article 1.1(a)(1)(iv).

25. Norway would add that the position held by the United States would have absurd consequences. Innumerable commercial companies around the world, in all Members of the WTO including the United States, have partial public ownership. According to the United States, whenever there is more than 50 per cent public ownership, they shall be considered "public bodies" no matter what actions they perform, and have their commercial business decisions scrutinized for the wrong reasons. That was never the intention of the drafters of the WTO Agreements, who recognized and accepted that many types of public ownership coexist with private ownership, and rather focussed on whether there was proof of government intention to influence trade.

III. EXCLUSION OF TRANSACTIONS AT PRICES BELOW THE EXTERNAL BENCH-MARK IN THE CALCULATION OF OVERALL BENEFIT.

A. Introduction

26. China claims that the United States acted inconsistently with Article 14 of the *SCM Agreement* and Article VI:3 of the GATT in the calculation of benefit in the OTR CVD investigation.

27. As explained by China[11], and not disputed by the United States[12], the United States calculated monthly benchmark prices for 5 rubber inputs. The United States then compared all transactions within that particular month with SOEs to the 5 separate external benchmarks. It is not clear from the submissions whether the United States compared each transaction with SOEs individually to the monthly benchmarks, or whether the United States calculated a monthly average price for the five types of inputs provided by SOEs and thereafter compared the two monthly averages.

[11] China FWS, paras. 139 – 145.
[12] US FWS, para 317.

28. Where the price paid by the producers to the SOEs during month X was below the external benchmark for that input during month X, the United States calculated a benefit. Where the price paid by the producers to the SOEs were above the external benchmark, no benefit was calculated. At the same time, no "credit" or "offset" was made.

29. Norway understands from the description of the parties that the period of investigation for certain issues was the year 2006, whereas for the benefit calculations it was 24 and 49 months respectively for the two producers in question[13]. The United States added the benefits from the months were a benefit was calculated to arrive at a total benefit for the period of investigation. No offset was made for months were the prices charged by the SOEs to the producers were above the external benchmark.

30. China claims that had the United States conducted an aggregate analysis over the whole period of investigation, without the use of "zeroing" of certain transactions, then the United States should have concluded that there was no benefit.[14]

B. Analysis

31. The United States employed a methodology for calculating benefit that is similar in many respects to the methodologies that have been condemned by Panels and the Appellate Body in cases concerning anti-dumping measures.

32. The issue before this Panel is whether the reasoning that led Panels and the Appellate Body to conclude that "zeroing" is prohibited under the *Anti-Dumping Agreement* and Article VI:1 and VI:2 of the GATT applies equally to the benefit calculations under Article 14 of the *SCM Agreement* and Article VI:3 of the GATT.

33. Norway will not repeat the consistent jurisprudence of Panels and the Appellate Body in respect of anti-dumping here, but point to two elements that support the claim that the use of "zeroing" in the benefit calculations to create a countervailable subsidy (where none would otherwise exist) is inconsistent with Article VI:3 of the GATT.

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[13] China FWS, paras 142 – 143. China, however, in paragraph 149 of its First Written Submission describes the period of investigation as the year 2006.

[14] China FWS, paras. 142 – 143.

34. Article VI:3 of the GATT makes clear that a countervailing duty is levied on *a* product, and that any such countervailing duty shall not be in excess of the benefit (bounty) granted on the manufacture, production or export of *such* product.

35. The use of the singular form of the noun makes clear that the calculation of benefit from inputs received from SOEs must be for all input transactions during the period of investigation. The reasoning that led the Appellate Body to find that similar words in Article VI:2 of the GATT precluded a finding of dumping for individual transactions applies with equal force to the calculation of benefits derived from single input transactions viewed separately.

36. Furthermore, as Norway understands the case, the United States created monthly external benchmark prices to measure benefit from subsidization. "Benefit" to the recipient producers was thus not based on a calculation of production cost for the SOEs providing the five types of rubber, and took no account of factors that could have explained cyclical differences in product prices of such SOEs as compared to the monthly variations in the benchmark prices.

37. Using monthly benchmark prices in such a situation, and "zeroing" monthly results which showed no "benefit", made a finding of a countervailable subsidy almost certain from the outset. The application of a methodology that is almost certain to lead to a conclusion of "benefit" and countervailable subsidization in all cases, based on single transactions compared to a benchmark set by the investigating authorities, cannot be said to comply with the requirements of Article 14(d) of the *SCM Agreement* and Article VI:3 of the GATT.

IV. "DOUBLE REMEDY".

A. Introduction

38. China claims that the United States imposed a "double remedy" in so far as the United States applied concurrently anti-dumping duties and countervailing duties.
39. Norway does not address the issue of the Panel's jurisdiction raised by the United States in its First Written Submission regarding "legal authority" and "as such claims".

40. Norway only addresses certain interpretative issues related to China's claim in paragraph 468(h) and Section VI(E) of its First Written Submission that the US Department of Commerce's use of its Non-Market Economy methodology to determine normal value in the anti-dumping determinations, concurrently with a determination of subsidization and the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the *SCM Agreement* and with Article VI of the GATT.

B. Analysis

41. Norway does not exclude that it may be permissible in certain situations to apply anti-dumping duties and countervailing duties simultaneously to the same imports, notwithstanding the provision of Article VI:5 of the GATT. Norway only wishes to draw the Panel's attention to certain elements that may be pertinent to its analysis of the legal issues surrounding simultaneous application of the two instruments.

42. An investigating authority under the anti-dumping agreement, in its determination of normal value for the product under consideration, may apply a Normal Value based on (i) the prices of the producer in its home market, (ii) the prices of the producer when exporting to a third country market, (iii) a Constructed Normal Value based on constructed cost elements, or (iv) a third country benchmark. The first three methodologies are provided for in Article 2.2 of the *Anti-dumping Agreement*, whereas the fourth methodology is generally ascribed to the *ad note* to Article VI:1 of the GATT.

43. The choice of methodology and the cost elements that go into the calculation of Normal Value can have an important bearing on the issue of subsidization.

44. Where the Normal Value is based on the producer's sales price in his home market in the ordinary course of trade, that price may have been lowered due to e.g. subsidization of inputs into the production. In such cases, a dumping duty only offsets the dumping itself (the "price differentiation" between home market price and export price), not the subsidization of his "cost of production".

45. Where the Normal Value is based on constructed normal value (CNV), the question is whether CNV is based on the producers actual data for the inputs (i.e. subsidized inputs are included with the subsidized price), or constructed prices for the inputs. If CNV is

calculated using the subsidized input prices in its calculation, the CNV will be lower than for non-subsidized production. In such cases AD + CVD may be applied.

46. If the CNV is not calculated with subsidized prices for the inputs – but with "non-distorted" or "benchmark" prices for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the CNV calculation. Applying an anti-dumping duty up to the maximum permitted under the *Anti-dumping Agreement* will thus provide a remedy for the subsidization at the same time (there is no additional "bounty" or "benefit" from subsidization to offset), and there is no right to impose additional CVD. Applying a CVD in such cases will neither be appropriate under Article 19.3 of the *SCM Agreement* nor permissible under Article 19.4 of the *SCM Agreement.*

An example will show this:

- For product A subsidized cost of production is 100, with the subsidy element to the cost of production equal to 10. Non-subsidized cost of production is thus 110.
- SG&A + profit = 20
- Home market price in the ordinary course of trade (with subsidy) is 120
- Export price is 110

In such a situation, a dumping determination based on the producers prices and costs will give a dumping of 10 (difference between export price and home market price). The CVD will also be 10 (the subsidy to the cost of production for product A). Together these two elements will bring the export price up to 130. 130 is the non-subsidized cost of production (110) plus SG&A + profit (20). With an export price of 130 all dumping and subsidy is offset.

Where the investigating authorities elect to base their calculations of normal value on constructed normal value, and constructs the cost of production of the producer based on the prices for non-subsidized inputs, the CNV will be 130 (non-subsidized cost of production (110) plus SG&A + profit (20)). In such a case the dumping will be 20 (difference between CNV and export price), and an anti-dumping duty of 20 will offset both dumping and subsidy.

47. Where the Normal Value is based on a Third Country Market as benchmark, the same issues relating to how the benchmark is calculated applies. China argues, and the United States does not appear to dispute, that in calculating the constructed normal value based on a Third Country Market benchmark, US DOC avoids the use of any surrogate value that may itself be subsidized.[15] It would thus appear (subject to the Panel's assessment of the facts) that the Chinese producer's export price to the United States is compared to a market economy cost of production free from any dumping or subsidy distortion. By applying the full anti-dumping duty up to this Third Country Market benchmark, all effects of subsidization is extinguished at the same time. As in the previous paragraph, applying a CVD in such cases will neither be appropriate under Article 19.3 of the *SCM Agreement* nor permissible under Article 19.4 of the *SCM Agreement.*

V. CONCLUSION

48. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[15] *China FWS,* para. 371 and corresponding footnote 315.