IN THE WORLD TRADE ORGANISATION

Before the Appellate Body

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

(AB-2010-3 / DS379)

Third Participant Submission[1]

by

Norway

Geneva

22 December 2010

[1] Due to the brevity of this submission, no separate executive summary is provided.

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Table of cases cited in this submission

Short Title	Full Case Title and Citation
Panel Report	Panel Report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R.
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

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third participant before the Appellate Body in this appeal by China against the findings and conclusions of the Panel in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*[2].

2. Norway will not address all of the issues before the Appellate Body in this appeal. Norway will confine itself to discuss the following interpretative issues:

   - The definition of "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (chapter II);
   - "Double Remedy" (chapter III).

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;
   - that financial contribution must be given by either a government or a public body, or a private body entrusted by government to do so; and
   - it must confer a benefit;

4. As regards State Owned Enterprises ("SOE") and State Owned Commercial Banks ("SOCB"), the Panel considered that these enterprises can be considered "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement.* The Panel relied on "government control" through ownership (wholly of partially) of the enterprises to arrive at this conclusion, which encompassed – in the words of the Panel – *any entity controlled by government* within the term "public body".[3] China appeals against these findings.

5. Norway is concerned with this sweeping interpretation by the Panel.

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2 Panel Report, WT/DS379/R
3 Panel Report, para. 8.94

6. During the financial crisis that the world is still undergoing, a great number of governments have been forced to bail out commercial banks by taking a stake in them – often at a level of share-holding that could be considered to imply government control over the banks. Any financing provided by these commercial banks – regardless of government intervention in their lending policies - may be deemed a financial contribution by government under Article 1.1(a)(1) of the *Subsidies Agreement* if the Panel's interpretation is upheld.

B. Analysis

7. The relevant text of Article 1.1 of the SCM Agreement reads as follows:

> "1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a *government* or *any public body* within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> [...]
>
> (iv) a government makes payments to a funding mechanism, or *entrusts or directs a private body* to carry out one or more of the type of functions illustrated [...] above." (emphasis added)

8. There are thus three terms of relevance in this Article: "governments", "public bodies", and "private bodies" that have been "entrusted or directed" by the government to make a financial contribution. The Panel states, in para. 8.68, that

> "From the standpoint of pure logic, this is a complete universe of all potential actors: every entity (individual, corporation, association, agency, Ministry, etc.) must fall into one of these three categories. In other words, the SCM Agreement does not *a priori* rule out <u>any</u> entity from <u>potentially</u> coming within its scope. The specific question raised in this dispute is whether wholly or majority government-owned enterprises that produce and sell goods and services are more appropriately categorized as "governments", "public bodies" or "private bodies" for purposes of the SCM Agreement."[4]

9. The Panel came to the conclusion that *"a "public body", as that term is used in Article 1.1 of the SCM Agreement, is any entity controlled by a government"*[5]. The Panel thus went even further in its conclusion, by not only including wholly or majority government-

[4] Panel Report, para 8.68

owned enterprises within the meaning of "public body", but any entity controlled by a government, which could be an enterprise with minority government ownership but with some form of controlling stake or influence.

10. In reaching its conclusion, the Panel consulted to various dictionaries in the English, the French and the Spanish languages regarding the terms "public body", or "organisme public", or "organismo público", without drawing firm conclusions from these dictionaries.[6]

11. Rather, the Panel placed emphasis on contextual elements, and in particular the importance of avoiding an interpretation that in their words would "allow avoidance of the SCM Agreement's disciplines by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities".[7] However, this argument is difficult to follow, since – as duly noted by the Panel[8] – the question is whether an enterprise belongs in one or the other category. None of the interpretations advanced before the Panel would exclude companies with state ownership *ipso facto* entirely from the ambit of the *Subsidies Agreement.*

12. Norway disagrees with the Panel's interpretation of "public body" for the reasons set out below.

13. 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).

14. 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.[9] By focussing on situations where a private body has been "entrusted or directed" to perform

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5 Panel Report, para. 8.94.
6 Panel Report, para. 8.63.
7 Panel Report, para. 8.76.
8 Panel Report, para. 8.68.
9 Panel Report on *US – Export Restraints,* para. 8.49; Appellate Body Report, *United States – Drams CVD,* para. 113.

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 stated by the Panel, 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.

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 in *EC – DRAMS* 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.*"[10]. 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."[11]

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

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10 Panel Report, *EC – DRAMS,* para. 7.119.
11 *id.,* para. 7.120.

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.[12] 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 description of KEXIM as a "special governmental financing institution" and as an "export credit agency".[13]

20. Although the above referenced 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 a similar provision in the *General Agreement on Trade in Services (GATS)*. Norway recognizes that this provision is not directly applicable in a subsidy context as it is taken from another agreement, and the wording is not necessarily identical in all respects, but it sheds 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:
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> (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

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12 Panel Report, *Korea – Commercial Vessels,* para. 7.50. Similar statements were made in respect of four other Korean government agencies.

13 *id,* paras. 7.50 – 7.52.

(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 ownership (or even a lesser, but 'controlling stake') 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. In practical terms, the issue becomes one of establishing whether the burden of proof lies with the investigating authority to prove "entrustment or direction" of a company in which the government has a stake, or if the investigating authority can escape this step and assume government intervention in the business decisions of companies based on partial government ownership.

26. Norway notes that innumerable commercial companies around the world, in all Members of the WTO including the United States, have partial public ownership. If the Panel's legal interpretation is upheld, whenever there is some form of control over an otherwise private company, they shall be considered "public bodies" no matter what actions they perform, and their commercial business decisions considered to entail a financial contribution. Norway submits that this 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. "DOUBLE REMEDY".

A. Introduction

27. The choice of the methodology and the costs elements that go into the calculation of the normal value in an anti-dumping investigation can have an important bearing on the issue of subsidization.

28. Where the "normal value" in an anti-dumping investigation is constructed on the basis of the producer's actual data for the inputs (i.e., subsidized input prices), the "constructed normal value" will be lower than for non-subsidized production. In such cases, simultaneous anti-dumping and countervailing duties may be applied. If, on the other hand, the "constructed normal value" is calculated not with subsidized prices, but with "non-distorted" or "benchmark" prices (including prices from a surrogate county) for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the "constructed normal value" calculation and applying an anti-dumping duty up to the maximum permitted by the AD Agreement will provide a remedy for the subsidization at the same time.

29. It does not seem disputed that, in calculating the constructed normal value based on a third country market benchmark, the USDOC avoids the use of any surrogate value that may itself be subsidized. Thus, it appears undisputed that the USDOC used as a surrogate a market-economy cost of production free from any dumping or subsidy distortion in the dumping margin calculation.[14]

30. The United States could have chosen to apply a different methodology, with subsidized input prices, but it elected not to do so. By applying the full anti-dumping duty up to this third-country market benchmark, all effects of the subsidization were extinguished.

B. Analysis

31. The Panel found that *inter alia* Articles 19.3 and 19.4 of the *Subsidies Agreement* do not address the issue of "double remedies". Furthermore, the Panel did not address China's claim that the imposition of a "double remedy" violated Article 32.1 of the *Subsidies*

[14] See Panel Report, para 14.75

Agreement.[15] China appeals *inter alia* these findings. Norway will only address these three Articles of the *Subsidies Agreement.*

32. The issues of legal interpretation before the Appellate Body are whether a subsidy that has been offset through the imposition of an anti-dumping duty may still be considered to "exist" under Article 19.4 of the *Subsidies Agreement,* or be "[in-]appropriate" under Article 19.3 of the *Subsidies Agreement*, or whether there is an implicit limitation on the amount of duty that may be levied in situations where the subsidies have already been off-set through the level of anti-dumping duty that is imposed. Furthermore, whether Article 32.1 of the *Subsidies Agreement* imposes restriction of the imposition of anti-dumping duties that concurrently addresses subsidization.[16]

33. It may well be that the primary purpose of Article 19.4 is not to address the issue of "double remedies", but rather establish a general limit to a CVD-duty based on the calculation of subsidization per product. And that Article 19.3 is primarily concerned with non-discrimination and not with the level of the duty.

34. However, the reasoning that led the founding fathers of the GATT to set forth in Article VI:5 of the GATT that the application of a "double remedy" was inappropriate in cases of the concurrent imposition of anti-dumping duties and countervailing duties to countenance the same export subsidization, applies with equal force to situations where a countervailing duty is considered to counter a domestic subsidy. It was never the intention of Members that an investigating authority should be able to offset the same subsidization twice through the concurrent application of anti-dumping and countervailing duties – neither in Non-market economy situations nor when applying constructed normal values in investigations of market economies.

35. The fact that Members did not intend the anti-dumping instrument as being appropriate to off-set subsidies can also be seen in Article 32.1 of the *Subsidies Agreement,* which provides that any specific action against subsidies must be undertaken under the *Subsidies*

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15 Panel Report, paras. 14.115, 14-123,

16 Norway notes that there could be other provisions of the *Anti-Dumping Agreement, the Subsidies Agreement and the GATT 1994* of relevance to the issue of double remedies. .Norway does not address such other possible grounds for the non-permissibility of the imposition of "double remedies" in this Third Participant Submission.

Agreement. In light of the above, the Appellate Body should find that where the subsidy has already been off-set through an anti-dumping duty that extinguishes the effects of subsidization, the imposition of a concurrent countervailing duty to off-set the same subsidy already off-set by the anti-dumping duty is not appropriate under Article 19.3 of the *Subsidies Agreement.*[17] And, furthermore, that the imposition of an anti-dumping duty to offset subsidization – should the facts dictate that this is the case - is inappropriate under Article 32.1 of the *Subsidies Agreement.*

IV. CONCLUSION

36. Norway hopes that the Appellate Body will find the above reflections useful when considering the above interpretative issues in this appeal.

[17] Whether there is in actual fact a situation of a "double remedy" will have to be assessed in each particular case based on the methodology used by the investigating authority and the duty actually imposed.