

***KOREA – MEASURES AFFECTING THE IMPORTATION OF  
BOVINE MEAT AND MEAT PRODUCTS FROM CANADA***

***(WT/DS391)***

**COMMENTS OF THE UNITED STATES ON  
KOREA'S PRELIMINARY RULING REQUEST**

**December 14, 2009**

**TABLE OF REPORTS CITED**

<i>China – Audiovisual Products</i>	China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, circulated 12 August 2009
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>US – FSC (Article 21.5 II) (Panel)</i>	Panel Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW2, adopted 14 March 2006, as modified by the Appellate Body Report, WT/DS108/AB/RW2
<i>US – FSC (Article 21.5 II) (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006
<i>US – Gambling (Panel)</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R
<i>US – Carbon Steel from Germany (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002

1. The United States thanks the Panel for the opportunity to comment on Korea's Preliminary Ruling Request and Canada's response. The United States makes this submission in order to provide its views on two of the issues raised in the submissions of the parties: (1) the parties' discussion of the proper form of panel requests, and (2) the remedies proposed by Korea should the Panel find Canada's panel request insufficient.

2. First, the United States is in agreement with both Korea and Canada that a complainant may identify a measure by its legal form and also by providing a narrative description of the nature of the measure.<sup>1</sup> The United States notes Korea's statement that "a complaining party may choose to identify the measure at issue *either* by describing the substance of the measure, *or* by identifying the legally operative documents."<sup>2</sup> As a general matter, the United States assumes that this statement is not meant to indicate that these two means of identifying the measures at issue are mutually exclusive. Indeed, nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") or any Dispute Settlement Body finding indicates that a complainant would need to make such a binary choice. Nor does the panel report to which Korea cites, *China – Audiovisual Products*<sup>3</sup>, make such a finding. Rather, the panel in that dispute found that a complainant could identify a measure "by its form" and "by its substance," but nowhere did it state, or even imply, that these two methods were mutually exclusive.<sup>4</sup> Indeed, Members often use these methods to complement one another.<sup>5</sup>

3. Second, the United States turns to Korea's suggestions on remedies should Canada's panel request be found deficient. Before proceeding, the United States notes that it is not taking a position on whether the various articles, addenda, lists, and forms enumerated by Korea in Part B of its Preliminary Ruling Request are included in the Panel's terms of reference.

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<sup>1</sup> Korea's Preliminary Ruling Request, para. 5; Canada's Response to Korea's Preliminary Ruling Request, para. 8.

<sup>2</sup> Korea's Preliminary Ruling Request, para. 5. (Emphasis added).

<sup>3</sup> An appeal of this panel report is currently pending before the Appellate Body. The panel's findings with respect to the panel request are not subject to that appeal, however.

<sup>4</sup> See, *China – Audiovisual Products*, para. 7.17.

<sup>5</sup> For example, in reviewing the panel request in *US – FSC (Article 21.5 II)*, the panel found that a general reference to a law as part of a recounting of the history of the dispute under the heading "The History of the Dispute", was sufficient to bring a specific section of that law within the panel's terms of reference even though the part of the panel request under the heading "The Subject of the Dispute" did not refer to that law at all. See, the panel request (WT/DS108/29) and *US – FSC (Article 21.5 II) (Panel)*, paras. 7.76-7.82. The Appellate Body also found that the section of the law was within the panel's terms of reference even though it was not referenced under the heading "The Subject of the Dispute." *US – FSC (Article 21.5 II) (AB)*, para. 66.

4. Korea proposes a novel remedy. Korea requests that the Panel require Canada to “remedy the defects in its panel request in a manner that is consistent with Korea’s due process rights to have adequate notice of the claims against it, and that is also consistent with the Panel’s terms of reference.”<sup>6</sup> To achieve this, Korea proposes a two-step approach, based on its view of the purpose of Article 6.2. First, it suggests that the Panel require Canada to further explain and clarify its panel request. Second, once Canada has done so, Korea requests the Panel to determine if it can address Canada’s claims consistent with its terms of reference. If the answer is no, Korea says, the Panel should terminate the dispute; if the answer is yes, the Panel should give Korea more time to prepare its defense in light of the insufficiency of Canada’s “initial panel request.”<sup>7</sup> There is no support in the terms of the DSU for such an approach.

5. As an initial matter, it is unclear whether Korea’s references to “due process rights” is intended to assert that there are “due process rights” over and above the provisions of Article 6.2 of the DSU.<sup>8</sup> There would be no basis for asserting some form of independent “due process rights” with respect to a panel request beyond those negotiated and agreed as reflected in the text of Article 6.2. Article 6.2 states (in relevant part) that a panel request must “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”<sup>9</sup> That Article 6.2 provides notice to the responding party and to potential third parties in no way supports the assertion of due process rights separate and apart from the requirements of the DSU. Any due process rights with respect to the sufficiency of a panel request are embodied in the text of the DSU itself.

6. Korea argues that Canada’s panel request does not meet the requirements of Article 6.2. If Korea is correct and Canada’s panel request is insufficient, the Panel’s only option is to find that the particular measures or claims are not within its terms of reference. A panel cannot

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<sup>6</sup> Korea’s Preliminary Ruling Request, para. 24.

<sup>7</sup> Korea’s Preliminary Ruling Request, paras. 24-25.

<sup>8</sup> *See*, for example, paragraph 24 of Korea’s Preliminary Ruling Request, in which Korea states: “In that spirit, Korea requests that the Panel issue a ruling, prior to the filing by Canada of its first written submission, that will give Canada an opportunity to remedy the defects in its panel request in a manner that is consistent with Korea’s due process rights to have adequate notice of the claims against it, *and that is also consistent with the Panel’s terms of reference.*” (Emphasis added.) This sentence appears to indicate that “due process rights” are independent from the Panel’s terms of reference.

<sup>9</sup> DSU Article 6.2.

“terminate” its proceeding. As stated in Article 7 of the DSU, a panel is required to make such findings as will assist the DSB. Furthermore, Canada would not have the opportunity to “restate” the claims in its panel request since an insufficient panel request cannot be retroactively corrected by further explanation. Rather, as the Appellate Body has noted, “compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be ‘cured’ in the subsequent submissions of the parties.”<sup>10</sup>

7. The proposal that Canada be required to further explain its panel request has perhaps introduced some confusion between claims and arguments. So long as Canada has stated its claims with a level of specificity that meets the requirements of Article 6.2, further refinement of Canada’s claims over the course of the proceedings is possible. It has been explained, for example, that a complainant’s first submission “may be consulted in order to confirm the meaning of the words used in the panel request.”<sup>11</sup> It can be expected that Canada’s arguments in subsequent submissions will provide further clarification about the precise aspects of the measures identified by Canada that are under challenge.<sup>12</sup>

8. Canada is not required to make those arguments in response to the preliminary ruling request, however. While Korea states that it “does not believe that Canada should be required in its panel request to set forth its arguments *in full*,”<sup>13</sup> a panel request is not required to set out arguments *at all*.<sup>14</sup> Korea is therefore also mistaken when it states that Canada is trying to

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<sup>10</sup> *US – Carbon Steel from Germany (AB)*, para. 127.

<sup>11</sup> *US – Carbon Steel from Germany (AB)*, para. 127; *see also, US – FSC (Article 21.5 II) (AB)*, para. 67.

<sup>12</sup> *See, US – Gambling (Panel)*, Annex B, para. 36. The panel in that dispute, in making its preliminary ruling on the sufficiency of the panel request, found that “[a]lthough it may be difficult at this stage to understand why Antigua and Barbuda is challenging ... penal laws,” – i.e., “laws on bribery, cheating, etc., rather than [laws] regulating the supply of gambling services” – it was “conceptually possible” that some of these measures affected cross-border gambling services, and this question should be answered during the panel’s proceedings, not at that preliminary ruling stage.

<sup>13</sup> Korea’s Preliminary Ruling Request, para. 22. (Emphasis added).

<sup>14</sup> *EC – Bananas III (AB)*, para. 143 (“Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of the

“reverse the burdens in this proceeding”<sup>15</sup> and force Korea “to make Canada’s case for it.”<sup>16</sup> A panel request is not part of the complaining party’s substantive arguments and cannot be considered to meet – or shift – the burden of establishing a *prima facie* case.

9. In short, while Canada’s claims may be further clarified in later submissions, if Korea has shown that Canada’s panel request is deficient, the only remedy is to find that the relevant measures or claims are not within the Panel’s terms of reference.

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panel.”) (Emphasis in original).

<sup>15</sup> Korea’s Preliminary Ruling Request, para. 16.

<sup>16</sup> Korea’s Preliminary Ruling Request, para. 9.