

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

(WT/DS336)

December 22, 2006

Replies of the United States to Question from the Panel

To the United States

8. At para. 10 of its oral statement, the US asserts that "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". Under what circumstances might such government intervention influence the decisions of private entities? Will government subsidies always influence the decisions of private entities?

Answer:

1. This statement from paragraph 12 of our oral statement relates to situations in which an investigating authority may disregard investments or loans from private entities as benchmarks for the purpose of calculating benefit.
2. With respect to investments, Article 14(a) of the SCM Agreement provides that "government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice ... of private investors" in that country. When a government makes (or entrusts or directs other entities to make) investments in a company around the same time as private entities are making investment decisions with respect to that company, an investigating authority may conclude that the private entities' investments do not reflect the usual investment practice of private investors and, therefore, are not appropriate as benchmarks. For example, in certain circumstances, the government investment may lower private investors' risk, thereby affecting the terms on which the private investments are made such that they do not reflect the "usual investment practice . . . of private investors" in the country.
3. Similarly, when a government has made (or entrusted or directed other entities to make) extensive loans to a company around the same time as private entities are making lending decisions with respect to that company, government support may affect the risk faced by private lenders considering whether to lend to the company, and thereby affect the terms on which such loans are made. With respect to loans, Article 14(b) provides that a government loan "shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." An investigating authority may find that the private entities' loans are not "comparable commercial

loans which the firm could actually obtain on the market” and, therefore, are not appropriate as benchmarks.

4. The precise circumstances in which such government intervention might influence the decisions of private entities vary from case to case. The timing of the government intervention in relation to the private party’s decision to lend or invest, the size of the government investment or loan, how the government’s actions are communicated to the public, and other such factors, may affect the likelihood that government influence has rendered those private investments or loans unusable as benchmarks. As the above suggests, government subsidies will not always influence the decisions of private entities. It depends upon the facts of the case. However, when they do, the SCM Agreement does not preclude an investigating authority from disregarding those private investments or loans as benchmarks and does not contain any special evidentiary standard or threshold for doing so.