WORLD TRADE ORGANIZATION

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Dispute Settlement Body
25 April 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 April 2000

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

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1. United States - Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabit or above from Korea

(a) Recourse to Article 21.5 of the DSU by Korea

1. The Chairman drew attention to the communication from Korea contained in document WT/DS99/8.

2. The representative of Korea said that on 19 March 1999, the DSB had adopted the Panel Report on "United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea" (WT/DS99/R). The Panel had found that both the US regulation regarding revocation of the anti-dumping order and the US application of that regulation in the anti-dumping proceeding on DRAMS from Korea were inconsistent with Article 11 of the Anti-Dumping Agreement (ADA). On 19 May 1999, pursuant to Article 21.3(b) of the DSU, Korea and the United States had agreed that the reasonable period of time for the United States to implement the DSB's recommendations and rulings and to bring its measures into conformity with the ADA should end on 19 November 1999.

3. Korea regretted that the United States had not complied with the DSB's recommendations and rulings. First, instead of adopting a standard conforming to the Panel's findings and rulings, the United States had adopted a very general standard that could be, and in fact had been, misapplied. The amended regulation did not impose on the United States the burden to establish that continued imposition of the anti-dumping duty was necessary. Although the Panel Report had not used the words "burden of proof," the Panel had required a "demonstrable basis on which to reliably conclude that the continued imposition of the duty is necessary" (paragraph 6.50), thus clearly imposing the burden on the US administering authority. Rather than limiting the administering authority's discretion so as to bring the US law into conformity with Article 11 of the ADA, the amended regulation increased its discretion in disregard of the Panel's decision.

4. Second, in applying the altered, yet still flawed, standard for revocation, the United States had continued to apply the antidumping order to Korean DRAMS without demonstrating by substantial, positive evidence that the anti-dumping duty order needed to be maintained in order to offset dumping, as required by the Panel. The US Department of Commerce (the US Department) had failed to conduct any new analysis in its redetermination. The unpublished Final Results of Redetermination simply reproduced the analysis contained in the US Department's earlier determination not to revoke the anti-dumping duty order. Indeed, the Results repeated verbatim much of the text of the original determination. Moreover, the Results were not based on "substantial, positive evidence" that the order was necessary to offset dumping. They were based merely on conjecture and supposition like the original results of the third administrative review.

5. Third, Korea believed that by failing to publish the Final Results in the Federal Register, the United States had failed to meet its obligations under Article X:1 of GATT 1994 and Article 12.3 of the ADA. On these grounds, Korea was requesting, pursuant to Article 21.5 of the DSU, that the matter be referred to the original Panel. Korea firmly believed that the Panel would find that the United States had not taken measures to comply with the DSB's recommendations and rulings. Korea also wished to invoke Article 19 of the DSU to ensure that the Panel, in addition to issuing its rulings, suggest how the United States might implement in this case.

6. The representative of the United States said that his country regretted Korea's decision to prolong this matter. The United States was confident that it would be found to have fully implemented the DSB's recommendations and rulings. On 14 January 2000, the United States had circulated its status report on this matter, in accordance with Article 21.6 of the DSU. At the 27 January DSB meeting, his delegation had described how the United States had fully complied with the DSB's recommendations. He did not wish to reiterate that description at the present meeting. Instead, he would respond to the allegations in document WT/DS99/8 containing Korea's recourse to Article 21.5 of the DSU. Since Korea's allegations had been expressed in general terms and because Korea had declined to consult with the United States in advance on the specifics of its concerns, the US responses - of necessity - had to be general in nature. First, with respect to the revised regulation of the US Department, Korea claimed that by incorporating the "necessary" standard of Article 11.2 of the ADA into its regulations, the US Department had acted inconsistently with the Panel's findings. This assertion was baseless. Contrary to Korea's statement, what the Panel had actually stated was that the US Department's prior standard of "not likely" was inconsistent with the "necessary" standard of Article 11.2 of the ADA because the "not likely" standard would not adduce the level of evidence required by the "necessary" standard. Purely as a matter of logic, the adoption of the "necessary" standard addressed the Panel's concerns.

7. In addition, Korea had complained that the "necessary standard effectively is not a standard at all". However, that was the standard set out in of Article 11.2 of the ADA. As the Unites States had previously stated, while Korea might prefer a different standard, the "necessary" standard was the standard to which Members had agreed to adhere. Indeed, if, as Korea had asserted, "the necessary" standard was "not a standard at all", it followed as a matter of logic that the Panel had erred in having found the United States to have violated a non-existent standard. What Korea really was asserting was that it was not enough for Members to conform their domestic legislation to the provisions of the WTO Agreements. Instead, according to Korea, Members had to go beyond the text of the WTO Agreements and flesh out through statutes or regulations all of those provisions that, in the view of Korea, were insufficiently precise. In other words, Members were obligated to go where the drafters of the WTO Agreements had declined to go. Members should be extremely concerned about Korea's argument. If accepted as valid, the United States was confident that each Member, including Korea, would suddenly find itself in violation of multiple WTO Agreements. That would be particularly true for those Members under whose legal systems the WTO Agreements were incorporated directly into domestic law.

8. Second, it was particularly difficult to respond to Korea's assertions concerning the US Department's factual findings since Korea did not cite any specific error in its analysis. Suffice it to say that while the US Department had made its revised determination with an open mind, the fact that the bottom line result did not change should not come as a surprise, because the evidence showed that a resumption of dumping by the Korean DRAMS exporters was likely, thus making the continued imposition of anti-dumping duties necessary. Indeed, while the US Department had not considered this for purposes of its revised determination, the United States would be remiss if it did not point out that a subsequent review of the DRAMS anti-dumping order for a later time period showed that, in fact, the Korean exporters had resumed dumping. In addition, it should be noted that in commenting on the US Department's analysis of the evidence in the course of the revised determination process, the Korean exporters had repeated arguments that had been made previously before the Panel and had been rejected by the Panel. Indeed to the extent that the Panel had addressed factual issues, it had upheld the US Department's consideration of the facts.

9. Finally, Korea had made claims regarding Article X:1 of GATT 1994 and Article 12.3 of the ADA. In the view of the United States, the publication by the US Department of its revised determination on its Internet Web Site the same method by which the US Department had published its revised determinations made in the context of domestic litigation satisfied the requirements of these two provisions. The United States could not imagine a more public method of disseminating a decision than putting it on the World Wide Web. The United States considered that Korea's recourse to Article 21.5 of the DSU was ill-founded and ill-advised, and was confident that the panel would so find.

10. The DSB took note of the statements and agreed to refer to the original Panel, pursuant to Article 21.5 of the DSU, the matter raised by Korea in document WT/DS99/8. The Panel would have standard terms of reference.

11. The representative of the European Communities reserved his delegation's third-party right to participate in the Panel's proceeding.

2. Canada - Patent protection of pharmaceutical products

(a) Implementation of the recommendations of the DSB

12. The Chairman recalled that in accordance with the DSU provisions, the DSB kept under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 7 April 2000, the DSB had adopted the Panel Report on "Canada - Patent Protection of Pharmaceutical Products". He invited Canada to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

13. The representative of Canada said that, pursuant to Article 21.3 of the DSU, her country wished to inform the DSB of its intentions with respect to implementation of the DSB's recommendations and rulings with regard to the case under consideration. As stated at the 7 April DSB meeting, Canada was disappointed with the Panel's ruling on Section 55.2(2) of the Patent Act, the so-called "stockpiling exception". Nevertheless, Canada intended to implement fully the DSB's recommendations and rulings. Canada would require a reasonable period of time in which to do so, in the light of the legal changes that would be necessary to bring its measures into conformity with its WTO obligations. Her country looked forward to discussing this issue bilaterally with the EC, and hoped to report back shortly to the DSB on this matter.

14. The representative of the European Communities said that his delegation noted the statement made by Canada and its commitment to implement fully the DSB's recommendations. The EC remained at Canada's disposal to discuss a reasonable period of time for implementation.

15. The DSB took note of the statements, and of the information provided by Canada regarding its intentions in respect of implementation of the DSB's recommendations.