UNITED STATES - ANTI-DUMPING DUTY ON DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS (DRAMS) OF ONE MEGABIT OR ABOVE FROM KOREA

Report of the Panel
WT/DS99/R

Adopted by the Dispute Settlement Body
on 19 March 1999

TABLE OF CONTENTS

I. INTRODUCTION

A. *Background*

1.1 On 14 August 1997, Korea requested consultations with the United States regarding "the failure of the United States to revoke the anti-dumping duty order on *DRAMs from Korea*" (WT/DS99/1). Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXIII:1 of the General Agreement and Article 17.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the AD Agreement).

1.2 Pursuant to this request, Korea consulted with the United States in Geneva on 9 October 1997. No mutually satisfactory solution was reached.

1.3 On 6 November 1997, Korea requested the establishment of a panel with the standard terms of reference provided by Article 7 of the DSU (WT/DS99/2). Korea made this request pursuant to Article 6 of the DSU, Article XXIII:2 of the General Agreement and Article 17.5 of the AD Agreement.

B. *Establishment and Composition of the Panel*

1.4 At its meeting on 16 January 1998, the Dispute Settlement Body (the DSB) established a panel pursuant to Korea's request (WT/DS99/3). The Panel's terms of reference are:

> To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS99/2 the matter referred to the DSB by Korea in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. (WT/DS/99/3.)

1.5 Pursuant to a request by Korea, and as provided in paragraph 7 of Article 8 of the DSU, on 19 March 1998, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Crawford Falconer
Members: Mr. Meinhard Hilf
Ms. Marta Lemme

C. *Panel Proceedings*

1.6 The Panel met with the Parties on 18/19 June 1998 and on 21/22 July 1998.

1.7 On 18 September 1998, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months of the composition and establishment of the terms of reference of the Panel. The reasons for the delay are set out in WT/DS99/4.

1.8 The Panel submitted its interim report to the parties on 23 October 1998. On 6 November 1998 both parties submitted written requests for the Panel to review precise aspects of the interim report, no further meeting with the Panel was requested. The Panel submitted its final report to the parties on 4 December 1998.

II. FACTUAL ASPECTS

A. *The Original Anti-Dumping Duty Investigation*

2.1 On 22 April 1992, Micron Technologies, Inc. ("Micron")[1] filed an anti-dumping duty petition with the International Trade Commission ("ITC") and the Department of Commerce ("DOC") against imports of DRAMs of one megabit or above, whether assembled or unassembled, from the Republic of Korea.

2.2 On 10 May 1993 pursuant to an investigation, the DOC issued an Anti-Dumping Duty Order and Amended Final Determination for *DRAMs from Korea*.[2] The notice corrected certain clerical errors and found anti-dumping margins of 0.82 percent for Samsung Electronics Co., Ltd ("Samsung"), 4.97 percent for LG Semicon Co., Ltd ("LG Semicon"), 11.16 percent for Hyundai Electronics Co., Ltd (Hyundai) and 3.85 percent for all others. The parties appealed the DOC's Final Determination to the U.S. Court of International Trade, which remanded the case to the DOC to correct certain errors. In its 24 August 1995 Redetermination on Remand, the DOC found corrected dumping margins of 0.22 percent for Samsung (*de minimis*), 4.28 percent for LG Semicon, 5.15 percent for Hyundai and 4.55 percent for all others.

B. *The First Administrative Review*

2.3 The DOC initiated the first annual review of *DRAMs from Korea* on 15 June 1994 and investigated whether the Korean companies made sales of

[1] Micron later changed its name to Micron Technology, Inc.
[2] 58 Fed. Reg. 27520 (10 May 1993)

DRAMs less than normal value, (i.e. dumped) during the period of review. In its 6 May 1996 Final Results, the DOC found that LG Semicon and Hyundai had not dumped during the period of review.[3]

C. *The Second Administrative Review*

2.4 The DOC initiated the Second Administrative Review on 15 June 1995[4] and then investigated whether Hyundai and LG Semicon made sales of DRAMs less than normal value during the period of review. The DOC published its Final Results on 7 January 1997, and found that Hyundai and LG Semicon had not dumped during the period of review.[5]

D. *The Third Administrative Review*

2.5 On 8 May 1996, the DOC published a Notice of Opportunity to Request Administrative Review for the period of 1 May 1995 to 30 April 1996.[6] On 29 and 31 May 1996, LG Semicon and Hyundai, respectively, asked the DOC to conduct an administrative review and to revoke the anti-dumping duty order. On 25 June 1996, the DOC initiated the Third Annual Review of *DRAMs from Korea*, covering the period of 1 May 1995 to 30 April 1996. At the same time the DOC initiated a revocation review pursuant to a request from the respondents under section 353.25(a)(2) of the DOC regulations to revoke the *DRAMs from Korea* order in part.[7]

2.6 On 24 July 1997, the DOC issued its Final Results and Determination Not to Revoke Order in Part ("*Final Results Third Review*").[8] The DOC found that Hyundai and LG Semicon had not dumped during the period of review.

E. *The US Anti-dumping Legislation and Regulation Regarding Revocation*

2.7 The relevant US legislation concerning revocation is set forth in Section 751(d) of the Tariff Act of 1930, as amended, which reads :

> The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section. The administering authority shall not revoke, in whole or in part, a countervailing duty order or terminate a suspended investigation on the basis of any export taxes, duties, or other charges levied on the export of the subject

[3] 61 Fed. Reg. 20216 (6 May 1996)
[4] 60 Fed. Reg. 31447 (15 June 1995)
[5] 62 Fed. Reg. 965 (7 January 1997)
[6] 61 Fed. Reg. 20791 (8 May 1996)
[7] 61 Fed. Reg. 32771 (25 June 1996)
[8] 62 Fed. Reg. 39809 (24 July 1997)

merchandise to the United States which are specifically intended to offset the countervailable subsidy received.

2.8 The relevant DOC regulations concerning revocation are set forth in the DOC's Regulations, Section 353.25(a)(2):

> The Secretary [of Commerce] may revoke an order in part if the Secretary concludes that:
>
> (i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;
>
> (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and
>
> (iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. Korea

3.1 **Korea** requests the Panel to find that: the United States is not in conformity with its obligations under Articles I, VI and X of the General Agreement of Tariffs and Trade1994 ("GATT 1994") and Articles 2, 3, 5.8, 6, 11.1 and 11.2 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement"). Korea also requests the Panel to suggest that the United States take the following actions: (i) revoke the anti-dumping duty order on *DRAMs from Korea*; (ii) alter the *de minimis* standard for reviews of anti-dumping duty orders; and (iii) eliminate the "no likelihood/not likely" criterion provided for in section 353.25(a)(2)(ii) of the DOC regulations, and otherwise conform its revocation scheme to the requirements of Article 11 of the AD Agreement.

B. United States

3.2 The **United Sates** requests the Panel to find that:

(a) Korea's claims under Articles 1, 2, 3 and 17 of the AD Agreement are inadmissible (with the exception of claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1);

(b) Korea's claims concerning the 1993 final determinations by the DOC and the ITC on *DRAMs from Korea* are inadmissible;

(c) The DOC's *Final Results Third Review* is not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;

(d) The United States anti-dumping statute and regulations are not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;

(e) The above measures do not nullify or impair benefits accruing to Korea under the AD Agreement or GATT 1994.

IV. MAIN ARGUMENTS OF THE PARTIES

A. Preliminary Objections

4.1 The **United States** raises preliminary objections concerning the admissibility of certain claims made by Korea.

4.2 **Korea** asserts that all claims are properly before the Panel, and that all of the United States' preliminary objections should be rejected.

1. Admissibility of Korea's Claims Concerning Articles 1, 2, 3, and 17 of the AD Agreement

(a) Objection of the United States

4.3 The following are the arguments of the **United States** in support of its preliminary objection:

4.4 The United States argues that the Panel must reject as inadmissible Korea's claims concerning Articles 1, 2, 3, and 17 of the AD Agreement. In its request for consultations, Korea did not identify these provisions. Therefore, claims based on these provisions did not constitute part of the "matter" for which consultations were requested under Article 17.3 of the AD Agreement. As a result, the claims based on these provisions also did not constitute part of the "matter" that, under Article 17.4 of the AD Agreement, Korea was entitled to refer to the Dispute Settlement Body ("DSB").

4.5 Article 17.3 of the AD Agreement permits a Member to request consultations concerning a "matter." Article 17.4 of the AD Agreement further permits a Member to refer "the matter" to the DSB - that is, to request the establishment of a panel. Article 17.5 directs the DSB to establish a panel to examine "the matter." In light of the language used, it is clear that the "matter" for which consultations is requested under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under

Article 17.5, is the *same* matter. These provisions constitute special or additional rules and procedures. As such, under Article 1.2 of the DSU, they prevail over any inconsistent provisions in the DSU.[9]

4.6 A "matter" as used in these provisions consists of the specific claims identified by a Member.[10] A "claim," in turn, consists of an identification of the provision of the specific agreement alleged to have been violated.[11] Accordingly, because the "matter" to be examined by a panel must be the same "matter" for which consultations were requested, a panel may only consider "claims" that were identified in the request for consultations by means of an identification of the provisions of the specific agreements alleged to have been violated.

4.7 In its request for consultations, Korea identified Article VI of GATT 1994 and Articles 6 and 11 of the AD Agreement. Korea did not identify Articles 1, 2, 3, or 17 of the AD Agreement. Therefore, claims based on these provisions did not, and could not, constitute part of the matter that Korea properly could refer to the DSB under Article 17.4, nor could claims based on these provisions properly constitute part of the matter to be examined by a panel under Article 17.5.[12]

(b) Response by Korea

4.8 In its letter dated 17 June 1998, **Korea** made the following arguments:

4.9 The U.S. objection rests, in large part, on a tortured discussion of the relationship between the terms "matter" and "claim." The United States correctly notes that a "matter" is composed of the "claim(s)" that make up that matter and that each claim consists of a challenged measure and the WTO provision the complainant claims the measure violates. But this explication, far from supporting the U.S. objection, confirms Korea's position. Between a matter and the claims that compose it, the matter is the more general. Thus, a requirement that a matter be identified is far *less* demanding than a requirement that the claims that make it up be identified. The United States attempts to obscure this truth with a circuitous ramble suggesting that since a matter is composed of claims, any requirement to identify the matter can be met only by identifying each claim it subsumes. But, had

[9] Appendix 2 to the DSU expressly identifies Articles 17.4 and 17.5 as special or additional rules. Because Article 17.3 is incorporated by reference into Article 17.4, Article 17.3 also must prevail over any inconsistent provisions in the DSU.

[10] *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, DSR 1997:I, 167, at 186 (hereinafter *"Desiccated Coconut"*).

[11] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 25 September 1997, para. 141.

[12] In this regard, it is irrelevant that Korea did not cite Article 17.4 in its request for the establishment of a panel (WT/DS99/2). A complainant cannot circumvent the requirements of the AD Agreement and the DSU by omitting in its request for a panel the provision that imposes the requirements.

Moreover, putting aside the special or additional rules of the AD Agreement, Korea's claim concerning Article 1 of the AD Agreement is inadmissible because Korea's request for the establishment of a panel did not include a claim under Article 1 (WT/DS99/2). Thus, this claim is not within the Panel's terms of reference and must be rejected.

the negotiators intended to require a complainant to identify all claims composing its as-yet undrafted complaint in its consultation request, Articles 17.3 and 17.4 would refer to "claims" not "matters." The Panel should reject this baseless attempt to equate the specific with the general, contrary to the obvious intent of the negotiators as shown in the text of the relevant provisions.

4.10 The United States cited the Appellate Body report in *Brazil-Measures Affecting Dessicated Coconut (Dessicated Coconut)* to support its objection. However, the passage from that report quoted below confirms that the panel request, not the consultation request, defines the terms of reference:

> A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[13]

4.11 Korea agrees with the approach taken in previous adopted reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.

4.12 The Panel should reject the attempt by the United States to exclude Korea's claims concerning Articles 2, 3 and 17 of the AD Agreement on the ground that Korea did not specifically identify these articles in its request for consultations. The Appellate Body and WTO panels uniformly have rejected similar attempts, declaring that the legally relevant question is whether a claim was raised in the request for establishment of a panel. That is because the panel request is the document that generally sets a panel's terms of reference. These holdings are based on the language of the Dispute Settlement Understanding (the DSU)-a request for consultations must contain merely "an indication of the legal basis for the complaint," but a panel request must provide a "summary of the legal basis of the complaint." The ordinary meaning of these terms is confirmed by the context, object and purpose of the consultation request and the panel request. As the United States itself argued in *Japan-Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*[14], a Member cannot know before consultations, when it makes its request, precisely what the scope of a Respondent's possible violations of WTO measures might be.[15] The consultative process, thus, serves two functions: it allows the complainant to

[13] WT/DS22/AB/R (21 February 1997) DSR 1997:I, 167, at 186.
[14] WT/DS44/R (22 April 1998), para. 3.14.
[15] Korea notes, however, that in this case, it raised Articles 2 and 3 of the AD Agreement during the WTO consultations with the United States. *See, e.g.*, Questions Submitted by the Republic of Korea to the United States, Questions C-9, C-9-1 and D-2. In regard to the other articles cited by the United States, the standards of Article 17 apply to this dispute as a matter of course and although Korea mentioned Article 1 in its First Submission, it advanced no argument based on that Article.