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WT/DSB/M/432

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(19-6421) Page: 1/4

**Dispute Settlement Body**
**9 August 2019**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 9 AUGUST 2019

*Acting Chairman: H.E. Mr. Manuel A.J. TEEHANKEE (Philippines)*

Prior to the adoption of the Agenda, the Chairman of the TPRB, Ambassador Manuel A.J. Teehankee, welcomed delegations and said that he had the pleasure of chairing the present DSB meeting in the absence of Ambassador David Walker, the Chairman of the DSB. He said that this was in accordance with the Rules of Procedure for meetings of the DSB, which provided that: "If the DSB Chairperson was absent from any meeting or part thereof, the Chairperson of the General Council, or in the latter's absence, the Chairperson of the Trade Policy Review Body, shall perform the functions of the DSB Chairperson".

**Table of Contents**



## 1 UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA

### A. Recourse to Article 22.2 of the DSU by Korea (WT/DS488/14)

1.1. The Chairman drew attention to the communication from Korea contained in document WT/DS488/14. He then invited the representative of Korea to speak.

1.2. The representative of Korea said that his country thanked the Chairman for convening this special meeting to consider Korea's request to suspend concessions or other obligations vis-a-vis the United States for its failure to implement the DSB's recommendations and rulings in the dispute: "US – OCTG (Korea)" (DS488). Korea requested the authorization to suspend concessions or other obligations at an annual level commensurate with the level of nullification or impairment of benefits to Korea caused by the US failure to comply with the DSB's recommendations and rulings in that dispute. Based on available information, Korea estimated this amount at US$350 million annually, to be adjusted by applying the annual growth rate of the OCTG market of the United States. On 12 January 2018, the DSB had adopted the Panel Report finding that the US anti-dumping measures were inconsistent with the Anti-Dumping Agreement. At the 9 February 2018 DSB meeting, the United States had informed the DSB of its intention to implement the DSB's recommendations and rulings. Korea and the United States had agreed that the reasonable period of time for implementation would expire 12 months after the adoption of the Panel Report, i.e., on 12 January 2019. One day prior to the expiry of this deadline, Korea had agreed to extend the reasonable period of time until 12 July 2019. Korea was disappointed that the United States had failed to bring its anti-dumping measures into compliance with the DSB's recommendations and

rulings despite the lengthy implementation period. As a result of US non-compliance, Korean companies continued to be adversely affected by the US measures at issue. This had nullified and impaired benefits that would have otherwise accrued to Korea. Korea urged the United States to immediately bring its measures into compliance. Until such time, Korea requested that the DSB authorize Korea to exercise its right under Article 22.2 of the DSU to suspend concessions or other obligations in an amount equivalent to the level of nullification or impairment. Korea sought to suspend tariff concessions and related obligations in the goods sector under the GATT 1994, and would provide the DSB with a list of goods and the level of tariffs to be applied to those goods in due course.

1.3. The representative of the United States said that on 29 July 2019, Korea had requested that the DSB authorize Korea to suspend concessions and related obligations under the GATT 1994. By letter dated 8 August 2019, the United States had objected to the level of suspension of concessions or other obligations proposed by Korea. Under the terms of Article 22.6 of the DSU, the filing of such an objection automatically resulted in the matter being referred to arbitration. Article 22.6 of the DSU did not refer to any decision by the DSB, and no decision was therefore required or possible. Consequently, because of the US objection under Article 22.6, the matter already had been referred to arbitration. Nevertheless, although unnecessary, the DSB could take note of that fact and confirm that it could not therefore consider Korea's request for authorization.

1.4. The representative of Canada said that his country noted that Korea's request for the authorization to suspend concessions raised, given the absence of a sequencing agreement, certain systemic issues. Canada had heard the statements of the disputing parties during the 22 July 2019 DSB meeting, when the United States had stated having fully complied with the DSB's recommendations and rulings in this dispute and Korea had disagreed. Canada believed that disagreements about the consistency of measures taken to comply should be dealt with in proceedings initiated under Article 21.5 of the DSU, and that these compliance proceedings should precede the DSB's authorization to suspend concessions. Canada encouraged the disputing parties to cooperate to ensure that the dispute settlement system functioned in an orderly manner. To that end, inspiration could be drawn from the Practice Document contained in document JOB/DSB/1/Add.6 under the Mechanism for Developing, Documenting and Sharing Practices and Procedures in the conduct of WTO disputes. That document outlined the so-called "sequencing issue" and provided an annotated version of a sequencing agreement that had been entered into in the context of a previous dispute.

1.5. The representative of China said that on 12 January 2018, the DSB had adopted the Panel Report in the dispute: "US – OCTG (Korea)" (DS488). By finding certain US anti-dumping practices to be WTO-inconsistent, the Panel had made important clarifications on certain obligations of investigating authorities under the Anti-Dumping Agreement which included limitations in selecting sources for constructed value calculations, the proper application of the "same general category of products" and the mandatory calculation of the profit cap in accordance with Article 2.2.2(iii) of the Anti-Dumping Agreement. China shared Korea's concerns with respect to the failure of the United States to bring its WTO-inconsistent anti-dumping measures into conformity with its obligations. Regrettably, such failure of compliance had already become a US pattern especially when its problematic trade remedy measures were at issue. In those disputes, the United States had repeatedly ignored the adopted DSB's recommendations and rulings and had chosen to re-litigate well-resolved issues such as its "as such" inconsistent zeroing measures before panels and the Appellate Body, with the aim of crippling or even overturning prior rulings through future proceedings. Such behavior, which jeopardized the effectiveness and credibility of the dispute settlement system, had to be firmly opposed by the entire Membership. Against this backdrop, China respected Korea's decision to resort to Article 22.2 of the DSU as a legal recourse within the WTO context to safeguard its legitimate interests. China also called on the United States to change its course of action with respect to compliance and to faithfully implement the DSB's recommendations and rulings without further delay.

1.6. The representative of Korea said that his country's requested level of suspension reflected the level of nullification and impairment caused by US non-compliance with the DSB's recommendations and rulings as estimated based on available data. Nonetheless, Korea recognized the right of the United States under Article 22.6 of the DSU to refer the matter to arbitration if the United States objected to the proposed level of suspension.

1.7. The DSB took note of the statements and that the matter raised by the United States in document WT/DS488/15 has been referred to arbitration, as required by Article 22.6 of the DSU.

## 2 STATEMENT BY THE UNITED STATES CONCERNING TRANSPARENCY IN RELATION TO THE DISPUTE ON "UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA"

2.1. The representative of the United States , speaking under "Other Business", said that in light of the present meeting, the United States wished to make a statement relating to transparency in the dispute "US – OCTG (Korea)" (DS488) and to take this opportunity to again underscore the systemic importance of transparency in the dispute settlement system. The United States recalled that, while the DSU did not mandate or ensure transparency, it also did not prohibit decisions by Members to provide transparency. Thus, there was no DSU impediment to Members taking action to improve transparency in WTO dispute settlement by agreeing to make submissions public, and to permit observation of meetings and hearings in their disputes by all Members and the public. In the dispute "US – OCTG (Korea)" (DS488), the United States had sought to make its statements at the Panel meetings observable by other WTO Members and the public at the time those statements had been delivered. The United States was disappointed that Korea had objected to a US request for open meetings at the panel stage and, furthermore, that Korea had sought to keep US statements confidential at the time of their delivery. Korea had also sought to maintain the confidentiality of its own statements. This was surprising, given that Korea's position was contrary to its own views on transparency in other venues, including under other trade agreements. For example, Korea had agreed to make submissions public and to open panel meetings under the Korea-US Free Trade Agreement (FTA).[1] But that was not all. Korea had also committed to support transparency under other trade agreements, such as the EU-Korea FTA,[2] the Canada-Korea FTA,[3] and the Korea-New Zealand FTA.[4] The United States did not see any reason why Korea would consider that the WTO dispute settlement system should be less transparent than these other trade agreements to which Korea was a party. If an arbitration pursuant to Article 22.6 of the DSU were to become necessary, it would provide another opportunity for Korea to reaffirm the views on transparency it had expressed elsewhere in the context of WTO dispute settlement. To that end, the United States would seek Korea's agreement to promote transparency in any further proceeding in this dispute, such as an open arbitral meeting and public submissions.

2.2. The representative of Korea said that his country was quite surprised to hear the US comments on this systemic issue, i.e., the so called "DSU transparency issue", which had been raised twice in July 2019, i.e., during the 22 July 2019 DSB meeting and the 23-24 July 2019 General Council meeting, as well as once more at the present meeting, as a specific item under "Other Business". Korea placed a high value on transparency in multilateral proceedings. Korea believed that transparency was one of the most important factors contributing to building credibility and enhancing confidence in the WTO dispute settlement system. However, Korea noted that nothing in the DSU required Members to open dispute settlement proceedings to the public. Korea believed that there

[1] Free Trade Agreement between the Republic of Korea and the United States of America, Article 22.10(1) ("subject to subparagraph (f) [on protection of confidential information], any hearing before the panel shall be open to the public") ("Korea-US FTA"); id., Model Rules of Procedure, para. 41 ("[a]ll hearings of the panel shall be open for the public to observe, except that the panel shall close the hearing for the duration of any discussion of confidential information".) (footnote omitted).

[2] Free Trade Agreement between the European Union and its Member States and the Republic of Korea, Article 14.14(2) ("[a]ny hearing of the arbitration panel shall be open to the public in accordance with Annex 14-B".) ("EU-Korea FTA"); id., Annex 14-B, Article 7(7) ("[t]he hearings of the arbitration panels shall be open to the public, unless the Parties decide that the hearings shall be partially or completely closed to the public".).

[3] Canada-Korea Free Trade Agreement, Article 21.8 ("[u]nless the Parties agree otherwise, the rules of procedure of a panel shall ensure … (d) subject to subparagraph (g) [on the protection of confidential information], that hearings of the panel are open to the public[.]") ("Canada-Korea FTA").

[4] Free Trade Agreement between the Republic of Korea and New Zealand, Model Rules of Procedure for Arbitration Panels, para. 21 ("[h]earings shall be open to the public, unless the Parties otherwise agree") ("Korea-New Zealand FTA").

had to be a balance between enhancing transparency and protecting a Member's right to confidentiality in a dispute. This balance could vary depending on the circumstances of a Member or of a particular dispute and had to be examined on a case-by-case basis. Korea looked forward to continuing discussions on the issue of transparency in a constructive and balanced manner.

2.3. The DSB took note of the statements.