WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/113
17 December 2001

(01-6361)

Dispute Settlement Body
21 November 2001

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 November 2001

Chairman: Mr. R. Farrell (New Zealand)

Subjects discussed: Page

1. United States – Transitional safeguard measure on combed cotton yarn from Pakistan

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep 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 date of 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 5 November 2001, the DSB had adopted the Appellate Body Report in the case of "United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan" and the Panel Report on the same matter, as modified by the Appellate Body Report.

2. The representative of the United States said that her country had already implemented the DSB's recommendations and rulings in the case under consideration. Specifically, on 8 November 2001, the Committee for the Implementation of Textile Agreements, chaired by the Department of Commerce, had directed the US Customs Service to eliminate the limit on imports of combed cotton yarn from Pakistan. This action was effective from 9 November 2001. Just as the United States had responded quickly to the DSB's recommendations in this case, so it expected its trading partners to respond promptly to rulings that affected them.

3. The DSB took note of the statement and of the information provided by the United States regarding its implementation of the DSB's recommendations.

2. United States – Import prohibition of certain shrimp and shrimp products: Recourse to Article 21.5 of the DSU by Malaysia

(a) Report of the Appellate Body (WT/DS58/AB/RW) and Report of the Panel (WT/DS58/RW)

4. The Chairman recalled that at its meeting on 23 October 2000, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Malaysia concerning the US implementation of the DSB's recommendations in this case. The Report of the Panel contained in document WT/DS58/RW had been circulated on 15 June 2001. On 23 July 2001, Malaysia had notified the DSB of its intentions to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. The Report of the Appellate Body contained in document WT/DS58/AB/RW had been circulated on 22 October 2001. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He said that the Reports were before the DSB for adoption at the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Reports.

5. The representative of the United States said that her country was pleased that both the Article 21.5 Panel and the Appellate Body had found that the United States had implemented the DSB's recommendations and rulings, and that the US compliance measure was justified as a conservation measure under Article XX(g) of GATT 1994. The United States supported the adoption of both Reports and thanked the Appellate Body, the Panel, and the Secretariat for their hard work. As had been reported to the DSB during the implementation period, the United States had taken great care to address and rectify the prior measure's discriminatory aspects identified in the 1998 Appellate Body Report pertaining to the Shrimp case. It had done so in a manner that complied with its WTO obligations, increased international cooperation, and advanced sea turtle conservation. The United States was pleased that the Article 21.5 Panel and the Appellate Body had noted US compliance efforts, and had found that the United States had remedied the aspects of unfair discrimination previously identified by the Appellate Body. For these reasons, the Panel and Appellate Body had properly concluded that the application of the US measure no longer resulted in arbitrary or unjustifiable discrimination under the introductory clause of Article XX, and that the measure was justified under Article XX(g). In the view of the United States, some of the Panel's lengthy discourse on multilateral negotiations was somewhat far afield of both the text of GATT 1994 and the findings of the 1998 Appellate Body Report. The US view was confirmed by the most recent Appellate Body Report, which had not adopted the Panel's reasoning on this issue, and in fact had explicitly noted disagreement. Throughout this proceeding, Malaysia and other interested third parties had emphasized the importance they attached to the protection of endangered sea turtles. The United States appreciated this sentiment and hoped that it could build upon it to work together in addressing this critical conservation issue effectively and comprehensively.

6. The representative of Malaysia said that Article 19.1 of the DSU provided that in addition to making recommendations, the Appellate Body might suggest ways in which the Member concerned

could implement the recommendations. He noted that in paragraph 154 of its Report, the Appellate Body indicated that since it had upheld the Panel's finding that the US measure was applied in a manner that met the requirement of Article XX of GATT 1994, it had not made any recommendation to the DSB pursuant to Article 19.1 of the DSU. The Appellate Body had not suggested ways in which the United States could implement the recommendations. Similarly the Appellate Body in its 1998 Shrimp Report had recommended "that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement". However, it had not made any suggestions as to how the United States could implement the recommendations under Article 19.1 of the DSU. Notwithstanding the usage of the word "may" which implied that the Panel or Appellate Body were not mandated to suggest ways to implement recommendations, Malaysia believed that it was pertinent for a panel or the Appellate Body to explicitly state the manner in which a Member should implement their recommendations. If a Member knew what course of action should be taken in implementing the recommendations of the Panel or the Appellate Body, it could decide not to pursue further litigation under Article 21.5 of the DSU. This would ensure predictability and speedier settlement of disputes. It would also be in line with the spirit of Article 3.2 of the DSU which stated that "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system", and Article 3.3 of the DSU which provided that "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Finally, he underlined that Malaysia would not stand in the way of consensus for the adoption of the Reports.

7. The representative of Canada said that his delegation wished to make some systemic observations on the Appellate Body Report. He recalled that the Appellate Body had upheld the Panel's determination that the US measure was justified under the chapeau of Article XX as long as the conditions set out in the report remained satisfied. The key condition was the "ongoing, serious, good faith efforts" of the United States to reach a multilateral agreement. The Appellate Body had not accepted Malaysia's argument that the chapeau of Article XX required the United States not merely to negotiate, but to conclude an international agreement. In principle, Canada supported the Appellate Body's findings on this issue. In Canada's view, if an exception set out in Article XX could only be successfully invoked when a multilateral environmental agreement had been concluded, it would significantly narrow the scope of Article XX. It would mean that the ability of Members to adopt otherwise GATT-inconsistent trade measures to promote valid and possibly urgent environmental objectives would be entirely dependent on the emergence of a multilateral consensus. However, at the same time, Canada recognized that it could be a difficult task for panels in future disputes to determine whether a country had met the requirement of "ongoing, serious, good faith efforts". Canada further stated that perhaps more importantly, it might be difficult for Members themselves to determine when they had met the criteria. In Canada's view interpretive transparency and predictability were important factors in enabling Members to observe their obligations and minimize the burden on the dispute settlement system. For these reasons, Canada remained somewhat concerned that future determinations in these types of cases were essentially left to a case-by-case approach. He added that Canada continued to hold the view, as articulated in Agenda 21 of the Rio Declaration, that the most effective way to coordinate policy action to deal with global environmental problems was through MEAs, based on international consensus. Where trade measures were deemed necessary in such MEAs, Canada believed that care had to be taken to ensure that they were crafted in a manner consistent with WTO rules.

8. The representative of Hong Kong, China said that, as a third party in this case, his delegation, having some legal and systemic concerns, had made submissions to the Article 21.5 Panel and the Appellate Body. Hong Kong, China had also participated as a third party in the earlier proceedings of the Appellate Body. His delegation fully shared the objectives of sustainable development and the

protection of endangered species. Like other parties, Hong Kong, China did not question the need for conservation of sea turtles. Indeed Hong Kong, China was making considerable efforts towards achieving this goal, on its own and jointly with other economies. The case at hand concerned specific measures taken by the United States to comply with the DSB's recommendations and whether these measures constituted arbitrary or unjustifiable discrimination among Members where the same conditions prevailed. At the present meeting, Hong Kong, China wished to make some comments and observations on the Reports.

9. With regard to an appropriate legal framework for assessment, Hong Kong, China had proposed, in its submission, a legal framework to consider the question of whether the United States had implemented the Appellate Body's earlier recommendations. In the view of Hong Kong, China, a panel under Article 21.5 of the DSU should consider whether a new measure – in comparison with the original disputed one – was consistent with the WTO Agreement, and in particular with respect to the specific provisions with which the Panel or the Appellate Body had found the original measure to be WTO-inconsistent. Hong Kong, China also considered that the implementation actions had to be assessed with reference to the recommendations and rulings of the original Panel and the Appellate Body. Hong Kong, China was pleased that the Panel's deliberations, which had been endorsed by the Appellate Body, were in line with the framework it had proposed. In particular, the Panel had examined the WTO-consistency of actions taken by the United States in addressing each of the defects identified in the earlier Appellate Body Report.

10. With respect to the implication of domestic court decision, Hong Kong, China noted that, with reference to Article 27 of the Vienna Convention, it had stated that the United States could not invoke a decision of its domestic court on the interpretation of its internal law as grounds for disregarding its international/WTO obligations. Hong Kong, China observed that the Panel had chosen not to address the question of whether the United States would still be in compliance with the Appellate Body's recommendation in the eventuality that the ruling of the US Court of International Trade in the Turtle Island case was upheld after appeal. While Hong Kong, China agreed with the Appellate Body that the Panel should not indulge in speculation, this was clearly an outstanding and developing issue that merited continuous attention.

11. With regard to an assessment with reference to "cumulative effect", the United States in its panel submission had claimed that it "need not necessarily address each, one of those aspects in order to comply with the Appellate Body's findings". Hong Kong, China disagreed with the claim made on the basis that the term "cumulative effect" had been used in the Appellate Body's earlier Report. It did not consider that by the employment of such words the Appellate Body had, expressly or by implication, permitted the United States to continue with some of its previous measures that had been found to be WTO-inconsistent. In this regard, Hong Kong, China noted that the Panel had concluded, among other things, that the implementation actions taken by the United States thus far were "justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report remain satisfied". The Panel had further noted that "should any one of these conditions cease to be met in the future, the recommendations of the DSB may no longer be complied with". Similarly, the Appellate Body had upheld the Panel's findings that the US measure was applied in a manner that met the requirements of Article XX of GATT 1994. However, it was clear that should any of the conditions not be met in the future, the present conclusion of the Panel and Appellate Body would have to be revisited.

12. With regard to a review of measures after expiry of the reasonable period of time, Hong Kong, China noted that the Panel had raised a number of issues which had not been appealed but warranted attention from the systemic point of view. In this respect, Hong Kong, China wished to highlight one particular issue. That issue was whether a compliance panel should examine the facts and developments which had occurred between the end of the reasonable period of time and the establishment of the panel. Hong Kong, China did not take a position on this issue, but noted that the Panel had taken an affirmative view in the present case on the grounds that such an approach would

help "prompt settlement of the dispute". The question was whether and to what extent this prompt settlement objective in Article 3.3 of the DSU should affect the scope of the mandate of a panel. A related question was whether alternatively a more restrictive approach would provide additional incentive to Members to take the required implementation measure within the reasonable period of time. With these observations and comments, Hong Kong, China was prepared join other Members in adopting the Panel and the Appellate Body Reports.

13. The representative of Australia said that his country's participation in this dispute as a third party reflected both systemic and substantive trade interests. Australia had appreciated the positive US response to the issue of certification of shrimp exports from two Australian shrimp fisheries. Australia welcomed the efforts of the United States and other countries, including Malaysia, to address sea turtle conservation. This dispute had highlighted that genuine, multilateral cooperative efforts were preferable when transboundary or global environmental problems were at issue. While unilateral measures were not ruled out in all instances, as demonstrated by the outcome of this dispute, Australia had some concerns about the legal reasoning that had led to the conclusion that the US measure in this instance was justified by the chapeau of Article XX of GATT 1994. These concerns were described in Australia's submission to the Appellate Body. In particular, Australia believed that the Panel had incorrectly relied on whether or not the United States had engaged in ongoing serious good faith efforts to reach a multilateral agreement as a determining factor for the measure's consistency with the chapeau of Article XX of GATT 1994. The key issue should have been whether the measure itself, following the conclusion of the reasonable period of time, was justified by the chapeau. This would have required an examination of the steps taken by the United States to obviate or eliminate the unjustifiably discriminatory nature of the trade restriction – including in the design, extent and implementation of the measure. The progress of the Indian Ocean initiative on sea turtle conservation had demonstrated the existence of a viable, non-discriminatory alternative to the unilateral import restriction. The initiative provided for a wide and comprehensive range of actions to address turtle conservation, including the provision of technical expertise and genuine capacity building in country. If the United States believed that, in addition to these actions, trade restrictive measures were needed to promote sea turtle conservation, it could pursue these proposals through the Indian Ocean initiative – rather than through a unilaterally determined import restriction. This would reaffirm the importance of multilateral solutions to transboundary environmental problems.

14. The representative of the European Communities said that the EC welcomed the Appellate Body Report and considered that the Appellate Body had clarified important procedural issues regarding the scope of Article 21.5 proceedings as well as the precedential effect of the Appellate Body's rulings. The EC welcomed that the Appellate Body had further clarified the conditions set by the chapeau of Article XX of GATT 1994 on unilateral measures aiming at the protection of transboundary and global environmental problems. The EC noted that while confirming that the conclusion of a multilateral agreement was not an indispensable condition of avoiding "arbitrary and unjustifiable discrimination", the Appellate Body had recognized that a multilateral approach was strongly preferred in environmental matters. The EC considered that, in the case at issue, the Appellate Body had properly upheld the Panel's findings that the continuous and serious efforts of the United States to negotiate in good faith an international agreement provisionally and exceptionally entitled it to apply the implementing measure. The EC also supported the Appellate Body's decision to confirm the Panel's view that the compliance of the United States with the chapeau of Article XX of GATT 1994 might be reassessed at any time by an implementation panel, without having to commence new dispute settlement proceedings. Finally, the EC considered that this ruling of the Appellate Body illustrated how WTO rules could be interpreted in a manner which was supportive of Member's actions to protect the environment, while avoiding arbitrary or unjustified discrimination. The EC continued to consider that it would be appropriate for Members to build upon the rulings of the Appellate Body through a clarification of WTO rules, which further entrenched guarantees against protectionist abuse.

15. The representative of India said that his country had participated in this dispute as a third party. India noted the Appellate Body's clarification that a panel under Article 21.5 of the DSU had to examine all arguments, claims and factual circumstances relating to the new measure taken to comply with the DSB's recommendations and rulings, beyond those raised in relation to the original measure and examined by the original panel. It had also clarified that the Panel could examine even those aspects of a new measure that were part of the original measure and found to be WTO-consistent and remained unchanged (paragraphs 86-89 of the AB Report). However, an Article 21.5 panel could not address a claim that had not been made by the complaining party when requesting that the matter be referred by the DSB for an Article 21.5 proceeding (paragraph 88 of the AB Report). India was, however, disappointed at the Appellate Body's upholding of the panel's conditional ruling that as long as the conditions, in particular the ongoing serious good faith efforts to reach a multilateral agreement remained satisfied, the US measure at issue was justified.

16. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS58/AB/RW and the Panel Report contained in WT/DS58/RW, as upheld by the Appellate Body Report.

3. Mexico – Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States

(a) Report of the Appellate Body (WT/DS132/AB/RW) and Report of the Panel (WT/DS132/RW)

17. The Chairman recalled that at its meeting on 23 October 2000, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by the United States concerning Mexico's implementation of the DSB's recommendations in this case. The Report of the Panel contained in document WT/DS132/RW had been circulated on 22 June 2001. On 24 July 2001, Mexico had notified the DSB of its intentions to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. The Report of the Appellate Body contained in documents WT/DS132/AB/RW had been circulated on 22 October 2001. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. The Reports were before the DSB for adoption at the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Reports.

18. The representative of the United States said that his country was pleased that these Reports were before the DSB for adoption at the present meeting. The Reports showed that the Appellate Body and the Panel had considered the issues with care and precision. The United States wished to thank the Members of the Appellate Body, the Panel and the Secretariat for their hard work and fine product. The United States supported the adoption of these Reports, which had concluded that Mexico's revised determination imposing definitive anti-dumping duties on imports of HFCS from the United States was inconsistent with the Anti-Dumping Agreement. In the view of the United States, the Appellate Body and the Panel had appropriately found that Mexico had failed to implement the recommendation of the original Panel and the DSB to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

19. The representative of Mexico said that his country recognized that the Reports before the DSB at the present meeting would have to be adopted, and that it had no alternative, but to accept them unconditionally. However, Mexico believed that some findings of the Reports deserved comments due to systemic implications. He recalled that the Appellate Body had considered three main issues in this case: (i) the lack of consultations; (ii) the existence of an alleged "restraint agreement"; and (iii) the lack of analysis and explanation regarding Articles 3.1 and 3.4 of the Anti-Dumping Agreement. With regard to the lack of consultations, he noted that the importance of

consultations had always been recognized under the GATT system and preference had consistently been given to *consensus* over *iuris dictio*. This was reflected in the wording of Article XXIII of GATT 1994 which specified that efforts had to be made to ensure a satisfactory adjustment before a matter was referred to the Contracting Parties. He also noted that the objective of the DSU, as stipulated in Article 3.7 of the DSU, was to "secure a positive solution to a dispute" and to give preference to a solution mutually acceptable to the parties to the dispute. Furthermore, Article 4.1 of the DSU referred to Members' "resolve to strengthen and improve the effectiveness of the consultation procedures". However, the Appellate Body had ruled that this was not the case. It had made clear that consultations were not a prerequisite for the establishment of a panel, and that the procedure to hold consultations was voluntary. In order to reach that conclusion, the Appellate Body had examined some exceptions and had treated them as a general rule. These exceptions included the following: (i) Article 4.3 of the DSU, which provided that a panel might be established if the Member to which the request was made declined to enter into consultations within a period of 10 days; and (ii) Article 4.7 of the DSU, which provided that a panel might be established before the 60-day period elapsed, if both parties agreed that consultations had failed to settle the dispute. In the view of the Appellate Body, such exceptions constituted evidence that the responding party had the right to consult, and that if it did not object to the lack of consultations "the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had" (paragraph 63 of the AB Report). Mexico contended that such an affirmation was not only erroneous but also highly dangerous. Article 4.7 of the DSU did not permit Members to discard consultations but specified that such consultations should take place within 60 days. The only exception in this regard was stipulated in Article 4.3 of the DSU. However, neither this exception nor Article 4.7 of the DSU were applicable in the case at issue since the United States had never requested consultations.

20. Furthermore, the Appellate Body's findings were not restricted to Article 21.5 panels, but would apply to any dispute settlement procedure. Therefore, such reasoning might create an incentive for a complaining party to adopt an aggressive stance and to pressure a responding Member into consenting to dispense with consultations, to the detriment of the right to due process. Moreover, as a result of the Appellate Body's reasoning, DSB meetings could become a new forum for litigation since Members would have an incentive to present their procedural objections during such meetings in order to protect their interests. As a result, panels would never be established upon the first consideration of panel requests by the DSB. This demonstrated an absence of logic, in particular since panels were established in accordance with the principle of reverse consensus, and any statement in this respect would only serve to prolong DSB meetings.

21. Mexico was also concerned about the Appellate Body's discussion with regard to Article 6.2 of the DSU. Although the Appellate Body had recognized the obligation to indicate "whether consultations were held", it considered that since the lack of consultations did not deprive the panel of its authority, failure to indicate "whether consultations were held" did not invalidate its authority either. In other words, non-compliance with that obligation entailed no legal consequences. Mexico wondered whether such reasoning would apply in cases where no "specific measure at issue" had been identified or where the request was not made in writing. Under the standard interpretation of Article 6.2 of the DSU there was no distinction between these obligations, so it would be reasonable to assume that the requirements of Article 6.2 were not mandatory. Furthermore, such reasoning contradicted what the Appellate Body had established in the Banana case. Mexico noted that the Appellate Body had underscored the need for panel requests to be sufficiently clear and recognized that, since the requests were not analysed in detail by the DSB, it was for panels to examine them closely in order to determine their consistency with the letter and the spirit of Article 6.2 of the DSU.

22. He also wished to refer to the question of the "alleged restraint agreement". According to importers of HFCS from the United States, soft drink and sugar producers had signed an agreement under which the former would only use a limited quantity of HFCS. Although the fact had never been demonstrated during the investigation and was not included in the administrative record, the Mexican

authority had twice fulfilled its obligation to determine the likelihood of increased importation. Its first analysis had been based on the facts before it, and the second was an alternative analysis assuming that the "alleged restraint agreement" did exist. In both cases, the likelihood of increased importation had been determined. Both the Panel and the Appellate Body had proceeded on the basis that the agreement existed and had completely ignored the Mexican authority's main analysis. In other words, the Panel and the Appellate Body had invalidated an analysis based on the facts before the investigating authority and had ruled exclusively on the alternative analysis.

23. He drew attention to the issue of the lack of analysis and explanation regarding Articles 3.1 and 3.4 of the Anti-Dumping Agreement. This issue involved a serious violation of Mexico's procedural guarantees, and possibly those of other Member. Article 12.7 of the DSU stipulated that "the report of a panel should set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes". In spite of this, the Appellate Body had interpreted the terms "the report of a panel" in such a broad sense that it had ended up contradicting itself. Thus, in paragraph 79 of its Report, the Appellate Body had made a distinction between the original Panel Report and the Article 21.5 Panel Report pointing out that these had dealt with two different measures and that there was no reason to mix the two Reports. Nevertheless, in paragraph 124, the Appellate Body had suggested that the Article 21.5 Panel Report had to be "read together with the original panel report" in order to establish that Mexico had acted inconsistently with Article 3.1 of the Anti-Dumping Agreement. He noted with concern that the Appellate Body had recognized that the Article 21.5 Panel Report did not even contain a direct quotation from, or an explicit reference to, the reasoning set out in the original Panel Report. The reasoning with regard to Article 3.4 of the Anti-Dumping Agreement was equally weak. Although the claims by the United States were very different from those it had made initially, the Appellate Body had not hesitated to make an implicit reference to the original Panel Report or to use expressions such as "without expressly saying so, the Panel considered" (paragraph 112), "[w]hile the Panel did not itself discuss the relationship between those two provisions" (paragraph 114), and "might not reflect an exemplary degree of clarity in all respects" (paragraph 117).

24. The Appellate Body had taken this opportunity to develop interpretations of fundamental provisions of the DSU. Mexico regretted that the Appellate Body considered the rights under the DSU to be of lesser importance or substance than the rights and obligations under other covered agreements. Should the interpretation of the Appellate Body be followed in future cases, complaining parties could find it easier to secure the establishment of a panel, while responding parties would have to defend their procedural interests and engage in litigation even before a panel was established. In addition, Members who were required to bring their measures into conformity with WTO rules would be compelled to refer to other documents or to "read between the lines" in order to find out what a panel intended to say when it did not "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations".

25. The representative of the European Communities said that the EC was concerned with the finding of the Appellate Body that panels were not required to ascertain, of their own motion, whether consultations had been held before requesting a panel. The EC noted that the Appellate Body had not ruled on the question of whether or not consultations were a prerequisite for an Article 21.5 proceeding. However, the Appellate Body had reasoned that consultations were not a necessary prerequisite for the establishment of a panel, and that Members might agree to dispense with them as they saw fit. The Appellate Body had derived this interpretation from the last sentence of Article 4.3 of the DSU. However, the obvious purpose of that provision was to avoid that Members could prevent the establishment of a panel by refusing to hold consultations. It could not be inferred from that provision that Members were free to agree not to hold consultations. In fact, the first sentence of Article 4.3 made it clear that Members had a duty to enter into consultations. The Appellate Body also cited Article 4.7 of the DSU in support of its interpretation. But that provision rather supported the opposite view. If Members were free to agree to dispense with consultations, it would have been unnecessary to provide in Article 4.7 that the 60-day period might be shortened if both parties agreed,

after holding consultations, that consultations had failed to settle the dispute. The view of the Appellate Body that Members were free to agree not to hold consultations was difficult to reconcile with Article 4.1 of the DSU, which stated the objective to strengthen and improve the effectiveness of the consultations, as well as with Article 4.5 of the DSU, which stipulated that before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter. Furthermore, it undermined the overall objective of the DSU to promote mutually agreed solutions, as contained in Article 3.7 of the DSU.

26. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS132/AB/RW and the Panel Report contained in WT/DS132/RW, as upheld by the Appellate Body Report.

4. Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia

(a) Statement by the United States

27. The representative of the United States, speaking under "Other Business", stated that as had been previously announced, her country had reached a decision on 31 August 2001 to end the safeguard measure on imports of lamb meat, effective from 15 November 2001. On 14 November 2001, the United States had completed the necessary legal steps to implement this decision. By these actions, the United States considered that it had implemented the DSB's recommendations and rulings.

28. The representative of Australia said that his country welcomed the withdrawal of the WTO-inconsistent safeguard measure on lamb imports. He noted that the withdrawal had taken place almost two and a half years after the measure had been imposed and six months after the DSB had adopted the Panel and the Appellate Body Reports pertaining to this dispute. Notwithstanding this positive development, Australia continued to have concerns about the approach taken by the United States in the application of its safeguard legislation, as had been reflected in ongoing DSU cases. Australia urged the United States to apply its legislation in the future in a way that would be consistent with its WTO obligations, as clarified through this and other disputes.

29. The representative of New Zealand said that it was well-known that his country shared a number of the concerns that had been identified by Australia in respect of the present case and safeguard practice more generally. Nevertheless, New Zealand thanked the United States for its statement advising the DSB that the United States had implemented the recommendations and rulings in this case. New Zealand welcomed the US action in this regard.

30. The DSB took note of the statements.

5. United States – Section 110(5) of the US Copyright Act

(a) Statement by the European Communities

31. The representative of the European Communities, speaking under "Other Business", recalled that on 9 November 2001, the Arbitrators entrusted under Article 25 of the DSU with the task of determining the level of EC benefits that were being nullified or impaired as a result of Section 110(5)(B) of the US Copyright Act, had circulated their award to Members (WT/DS160/ARB25/1). At the present meeting, the EC and its member States wished to raise some points relating to the Arbitrators' award, in accordance with Article 25.3 of the DSU. The EC considered that the protection of intellectual property rights, as foreseen in the TRIPS Agreement, had given rise, in and of itself, to benefits for Members. Accordingly, the deficient protection of one of those rights entailed an impairment of TRIPS benefits. The level of nullification and impairment

stemming from a violation of substantive TRIPS obligations should not depend upon the level of piracy prevailing in one country. The EC and its member States were therefore disappointed with the Arbitrators' reasoning, in so far as the Arbitrators ultimately determined the level of TRIPS benefits on the basis of the rates of illegal copyright use in the United States. The Arbitrators considered that, "the European Communities could not reasonably expect that, in the United States, all users of copyright works of EC right holders would be licensed and would pay licensing royalties". This implied that, with regard to the US businesses which illegally used music for commercial purposes; i.e. engaged in acts of copyright piracy, the breach of the TRIPS Agreement had no consequences from the viewpoint of nullification or impairment. The EC believed that this conclusion was especially troublesome given the high levels of illegal use of copyright prevailing in the United States. According to some estimates presented by the United States, at least 55 per cent of all restaurants in the United States had played music without a licence before the enactment of Section 110(5)(B). Moreover, if one were to believe the United States, only a small fraction of those establishments had been actually covered by pre-existing copyright exemptions.

32. In the view of the EC and its member States the exceedingly high rates of copyright piracy in the United States were due to a long history of deficient copyright protection, not to the passivity of right holders. In this regard, the EC and its member States were especially surprised by the Arbitrators' reasoning regarding copyright enforcement. The possibility for rightholders to effectively enforce their rights depended on the substantive content of the rights as much as on administrative and judicial remedies. In any event, the EC and its member States respected the Arbitrators' decision and would honour its bilateral agreement with the United States, which had been notified to the DSB on 24 July 2001. The EC and its member States hoped that the negotiations with the United States would have a successful outcome before the end of the extended reasonable period of time. On the other hand, the EC trusted that the authorities of the United States would take all necessary steps to bring the US Copyright Act into conformity with the TRIPS Agreement in the near future. In this regard, the EC and its member States drew attention to the absence of any status report on implementation thus far, although almost sixteen months had passed after the adoption of the Panel Report and twelve months after the establishment of the reasonable period of time. The EC wished to be informed by the United States of the status of implementation of the DSB's recommendations in this case.

33. The representative of the United States said that her delegation did not intend to respond at length to the comments made by the European Communities or to discuss the Arbitrators' report. In the view of the United States that report, which had been well done, spoke for itself. However, her country took exception to the EC's accusation of "piracy" or "deficient copyright protection" in the United States. As fully discussed during the arbitration, there were sound commercial reasons for a copyright holder's choice of level and means of enforcement of these rights. The business considerations were reflected in the evidence that had been discussed by the Arbitrators. The United States had already anticipated updating Members on the status of implementation of the underlying DSB's recommendations and rulings at the DSB meeting scheduled for 18 December 2001.

34. The DSB took note of the statements.