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MINUTES OF MEETING

Held in the Centre William Rappard
on 18 December 2001

Chairman: Mr. R. Farrell (New Zealand)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities

(b) Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland: Status report by Thailand

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States

(d) United States – Anti-Dumping Act of 1916: Status report by the United States

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved".

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.24)

2. The Chairman drew attention to document WT/DS27/51/Add.24 which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that the EC welcomed the fact that the waivers from Articles I and XIII of the GATT 1994 had been granted by the Ministerial Conference. These waivers constituted the pre-requisite for the implementation by the EC of phase II of the Understandings on Bananas reached with the United States and Ecuador. In accordance with the EC's internal procedures, the Regulation implementing phase II would be adopted by the EC Council on 19 December 2001 and would enter into force on 1 January 2002. The EC thus considered that it had faithfully completed its implementation of phase I of the Understandings on Bananas.

4. The representative of Ecuador said that his country hoped that at the next meeting of the DSB, the EC would be in a position to notify the DSB that it had effectively complied with its obligations. Ecuador welcomed the optimism expressed by the EC at the present meeting that this would be the case. The new regulation should result in the implementation of the terms agreed upon in the Understandings on Bananas. Ecuador reiterated that these Understandings constituted a very good basis for a new WTO-consistent EC banana import regime. Ecuador noted that the most important commitment undertaken by the EC, as stipulated in the Understandings and in its Regulation as well as in the terms of the waiver, was to introduce from 1 January 2006 a banana import regime based only on tariffs. This substantial commitment implied that the application of the current regime was transitional until 31 December 2005. Therefore, it was expected that the EC would begin negotiations in order to determine the conditions for the application of a tariff-only regime by mid-2004 at the latest. At the present meeting, Ecuador also wished to have some explanation from the EC concerning the investigation being carried out by the EC Commission with regard to the illegal granting of import licences by one EC member State. This situation had again occurred in recent weeks and represented a failure by the EC to comply with its regulations and the Understandings on Bananas.

5. The representative of Honduras said that his country believed in the multilateral trading system and for that reason it had worked constructively towards resolving this case. At the present meeting, he did not wish to recall all the events that had happened over the past years. However, he only wished that Members should not exert pressure. They should rather work on a constructive basis

in accordance with the WTO rules. Honduras hoped that the EC would refrain from imposing prohibitive tariffs, which could have a negative impact on its economy. Honduras also hoped that the EC would implement its obligations in good faith. He recalled that his country, together with other countries, had made great efforts to accommodate the needs of the ACP countries concerning the waiver.

6. The representative of Panama said that his country welcomed the progress made with regard to this matter. Panama also wished to be informed about the problem raised by Ecuador at the present meeting concerning licences granted by one EC member State in a WTO-inconsistent manner. In particular, Panama wished to know how the EC could guarantee the proper implementation of the Understandings. This would have implications for the effective application of the rights of the countries involved. Panama also wished to be provided with a copy of the new regulation as soon as it was adopted by the EC.

7. The representative of Colombia said that his country shared the optimism expressed by the EC at the present meeting that all the problems concerning the banana case would be resolved to the benefit of all the parties involved. Colombia shared the concern expressed by Ecuador with regard to the illegal granting of licences by one EC member State. If the situation described by Ecuador had really taken place, Colombia wished to know what the EC would do to redress this. Colombia noted with satisfaction that the issue of the waiver for the ACP countries had finally been resolved. His country had done its best at Doha to successfully conclude this matter. Colombia hoped that the agreement reached with the EC in this regard would be reflected in a full application of the banana regime by 2006. Colombia also hoped that a tariff-only system would guarantee market access for the countries involved in the banana trade on an MFN basis.

8. The representative of Saint Lucia expressed her country's gratitude to Members for granting the ACP/ EC waiver requests at Doha. Saint Lucia welcomed this as providing a measure of security to its farmers. The stability of its economy depended on access to markets on a predictable basis and the granting of that waiver certainly enhanced and provided a basis for this. Since progress had been made she hoped that a debate on this matter could be avoided for at least another few years.

9. The representative of the United States said that her country was pleased that Members had approved the EC's request for waivers at Doha. The United States appreciated Members' cooperation in reaching agreement on the waivers and looked forward to final resolution of the banana dispute. The United States was continuing to work closely with the EC as well as with other Members to address any issues that might arise as a result of the EC move to a tariff-based system for bananas and its implementation of the terms of the bilateral Understandings on Bananas, including the increase of 100,000 tonnes in the quota for Latin American countries, effective as of 1 January 2002.

10. The representative of the European Communities said that his delegation had noted the statements made at the present meeting and said that once the regulation was adopted it would be made public and would be notified to Members. The EC had taken practical measures regarding the transfer of 100,000 tonnes of bananas starting from the first trimester of 2002. With regard to the point raised by Ecuador concerning import licences, the EC had taken all the necessary internal measures to resolve this matter.

11. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(b) Thailand – Anti-dumping duties on angels, shapes and sections of iron or non-alloy steel and H-beams from Poland: Status report by Thailand (WT/DS122/9)

12. The Chairman drew attention to document WT/DS122/9 which contained the status report by Thailand on progress in the implementation of the DSB's recommendations in the case concerning its

anti-dumping duties on angles, shapes and sections or iron or non-alloy steel and H-beams from Poland.

13. The representative of Thailand said that on 5 April 2001, the DSB had adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the above-mentioned case. In accordance with the findings of these Reports, it had been recommended that the DSB request Thailand to bring its anti-dumping measure, found to be inconsistent with the Agreement on the Implementation of Article VI of the GATT 1994, into conformity with its obligations under that Agreement. On 25 May 2001, in accordance with Article 21.3(b) of the DSU, the parties to the dispute had agreed that the reasonable period of time for implementation by Thailand in this case would be until 20 October 2001. He noted that in order to implement the DSB's recommendations, Thailand had undertaken a re-examination of those aspects of the injury determination found in the Panel Report to be inconsistent with the Anti-Dumping Agreement, in particular Articles 3.1, 3.2, 3.4 and 3.5 thereof. The re-examination had been limited to the original investigation period (July 1995 – June 1996) and had been based, in light of the findings of the Appellate Body, on the entire record of the proceeding, namely both the non-confidential and confidential parts thereof. In August 2001, a detailed report on the results of this re-examination had been issued to Polish authorities and producers as well as the domestic industry. Interested parties had been provided with opportunities to comment in writing and to request to be heard orally. However, no comments had been received from any interested party. On 9 October 2001, Thailand's Committee on Dumping and Subsidy had approved the report on the re-examination of injury, determining that the anti-dumping measure should be maintained. On 17 October 2001, Thailand's Department of Foreign Trade had issued an announcement reconfirming material injury to the domestic industry pursuant to Article 3 of the Anti-Dumping Agreement. Thus, Thailand considered that it had fully implemented the recommendations and rulings in this dispute. Thailand further considered that its anti-dumping measure, found in the Reports to be inconsistent with the Anti-Dumping Agreement, was in conformity with its obligations under that Agreement.

14. The representative of Poland said that after preliminary examination of the status report and its analysis of Thailand's report on "Re-Examination of Injury of the Anti-Dumping Duties on Angles Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland", his country found it difficult to accept the way in which Thailand had implemented the DSB's recommendations. Poland considered that Thailand had not rescinded or modified the measure at issue, but had only changed the justification for the imposition of the measure. For that reason, Poland wished to reserve its rights to take further steps under Article 21.5 of the DSU once it had finalized its examination of documents submitted by Thailand.

15. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18)

16. The Chairman drew attention to document WT/DS160/18 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

17. The representative of the United States said that her country had been engaged in discussions with the EC in order to find a positive and mutually acceptable resolution to the dispute. In connection with those discussions, the United States and the EC had resorted to arbitration under Article 25 of the DSU, in order to determine the level of nullification or impairment of benefits caused by Section 110(5)(B) of the US Copyright Act. In light of the award of the Arbitrators, the EC and the United States were engaged in productive discussions with a view to resolving the dispute.

She noted that the reasonable period of time for implementation would expire on the date on which the current session of the US Congress adjourned or on 31 December 2001, whichever came earlier.

18. The representative of the European Communities said that the EC and its member States considered that the resolution of this dispute required the United States to amend its WTO-inconsistent legislation. At the same time, the EC was engaged in productive discussions with the United States aiming at determining the modalities for a possible temporary arrangement. Of course, this did not dispense the United States from making all the necessary efforts towards the amendment of Section 110(5) of the US Copyright Act. The EC considered that the United States should regularly inform the DSB of the progress made in this regard. If it was not possible to conclude such an arrangement before the end of the reasonable period of time due to lack of action by Congress, the EC would have to request the authorization to suspend concessions or other obligations under Article 22.2 of the DSU.

19. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(d) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14 – WT/DS162/17)

20. The Chairman drew attention to document WT/DS136/14 – WT/DS162/17 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Anti-Dumping Act of 1916.

21. The representative of the United States said that, as indicated in the status report, the US Administration had transmitted to the US Congress on 23 July 2001 proposed legislation implementing the DSB's recommendations and rulings in this case. The proposed legislation would repeal Section 801 of the Revenue Act of 1916, with application to all actions under Section 801 pending on the date of enactment and to all actions filed after the date of enactment. Since the US Congress had not yet adjourned, the Administration continued to seek passage of such proposed legislation.

22. The representative of Japan noted that, as indicated by the United States, the reasonable period of time for implementation in this case would expire on 31 December 2001, or on the date on which the current session of the United States Congress adjourned, whichever came earlier. Japan recognized that the United States had made efforts towards implementation of the DSB's recommendations and rulings, but Japan had yet to be informed that the proposed legislation to repeal Section 801 of the Revenue Act of 1916 had been passed by the US Congress. Since not much time was left, Japan urged the United States to complete the implementation within the reasonable period of time, which had already been extended once at the request of the United States. Japan also urged the United States to ensure that all ongoing court proceedings currently pending under the Act in the US domestic courts should be terminated immediately upon passage of the proposed legislation. In the event of non-compliance by the United States by the end of the reasonable period of time, Japan intended to invoke its rights under Article 22 of the DSU.

23. The representative of the European Communities said that the EC was concerned about the current situation. He noted that the EC had done its best to facilitate the United States' compliance with the DSB's decision. He recalled that at the July 2001 DSB meeting, the EC had not opposed the US request to extend the reasonable period of time for implementation in this case. The reasonable period of time would expire in the coming days. However, the US Congress had not yet acted to adopt the necessary legislation repealing the 1916 Anti-Dumping Act and terminating pending cases. At this stage, such legislation had not even been introduced in the US Congress and, as a result, EC firms were facing judicial challenges brought on the basis of the 1916 Act. This situation was of concern to the EC and if the United States failed to comply within the required deadlines, the EC

would have no choice but to request the authorization from the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU.

24. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. Argentina – Definitive safeguard measure on imports of preserved peaches

(a) Request for the establishment of a panel by Chile (WT/DS238/2)

25. The Chairman drew attention to the communication from Chile contained in document WT/DS238/2.

26. The representative of Chile said that he wished to highlight some aspects of Argentina's safeguard measure. First, neither the records of the investigating authority (National Foreign Trade Commission) or the Technical Report indicated the existence of "unforeseen developments" (as stipulated in Article XIX.1(a) of the GATT 1994). There had been no increase in imports, in absolute or relative terms, that caused or threatened to cause serious injury. Nor had there been a demonstration that the industry had suffered serious injury. Furthermore, there were no arguments or evidence of a possible causal link between alleged increased imports and alleged injury or threat thereof. On the contrary, the record established the existence of factors other than the alleged increase in imports which might be responsible for the loss in market share claimed to be suffered by the domestic industry. However, there was no analysis of the impact of those other factors in giving rise to the alleged serious injury or threat of serious injury. Without conducting any prior causal analysis, Argentina's investigating authority had attributed all of the alleged injury or threat of injury to an alleged increase in imports. Finally, the record did not contain any statement of all of the matters of facts and law which, in accordance with Article XIX of the GATT 1994 and the Agreement on Safeguards, had to be investigated, analysed, established, found and verified. In Chile's view, all of this was contrary to Article XIX of the GATT 1994 and Articles 2, 3, 4 and 12 of the Agreement on Safeguards.

27. Second, the definitive safeguard measure imposed by Argentina corresponded to a specific duty which, in *ad valorem* terms, amounted to approximately 70 per cent. This prohibitive surcharge was much higher than what was needed to prevent or remedy the alleged serious injury or threat of injury and facilitated adjustment as required in Article 5.1 of the Agreement on Safeguards. In practice, the measure had closed Argentina's market to imports. In fact, since the introduction of the provisional measure there had been no imports of preserved peaches from Chile or from any other country. Third, the problem of the preserved peaches industry in Argentina was not the result of Chilean imports, but of subsidized imports from a European country. This had been recognized by Argentina's producers. Those had been the same European imports that had caused injury in Chile and in other markets. Consequently, the safeguard was not the proper remedy to this problem. The WTO Agreement contained other trade remedies for such cases, which did not provide that exporters legitimately wishing to compete had to pay for agricultural policies of some Members. Chile raised these points in the course of the consultations held in Geneva on 2 November 2001 which, had provided an opportunity for a better understanding of the respective positions, but had not resulted in the resolution of this case. Therefore, Chile was requesting the establishment of a panel to examine this matter. Without prejudice to this request, Chile continued to be open to seeking other solutions which, in addition to being mutually satisfactory, were consistent with the WTO Agreement.

28. The representative of Argentina said that Chile was requesting the establishment of a panel to examine a definitive safeguard measure applied by Argentina on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water (Resolution No. 348/2001). In Argentina's view the above-mentioned safeguard measure was adopted in conformity with Article XIX.1(a) of the GATT 1994 and with Articles 2, 3, 4, 5, and in particular

the notification obligations contained in Article 12 of the Agreement on Safeguards. This was justified before the Chilean authorities during the various meetings held pursuant to Article XXIII.1 of the GATT 1994, Article 4 of the DSU and Article 14 of the Agreement on Safeguards, in particular during the consultations that had taken place on 2 November 2001. Argentina regretted that Chile was requesting a panel. At the present meeting, his country wished to oppose the establishment of that panel and affirmed, as Chile had already done, its readiness to explore alternative solutions alongside these proceedings.

29. The DSB took note of the statements and agreed to revert to this matter.

3. Canada – Measures affecting the importation of milk and the exportation of dairy products: Recourse to Article 21.5 of the DSU by New Zealand and the United States

(a) Report of the Appellate Body (WT/DS103/AB/RW – WT/DS113/AB/RW) and Report of the Panel (WT/DS103/RW – WT/DS113/AB/RW)

30. The Chairman recalled that at its meeting on 1 March 2001, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by New Zealand and the United States concerning Canada's implementation of the DSB's recommendations in this case. The Report of the Panel contained in document WT/DS103/RW – WT/DS113/RW had been circulated on 11 July 2001. On 4 September 2001, Canada 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/DS103/AB/RW – WT/DS113/AB/RW had been circulated on 3 December 2001. The Chairman recalled that 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 now before the DSB at the request of Canada. He noted that the adoption procedure was without prejudice to the right of Members to express their views on the Reports.

31. The representative of Canada recalled that in the beginning of 2001, an Article 21.5 panel had found that the supply of commercial export milk by domestic milk producers to domestic dairy processors was inconsistent with Canada's export subsidy commitments under the Agreement on Agriculture. Subsequently on 3 December 2001, the Appellate Body had reversed this finding. Consequently, the finding of WTO-inconsistency, which had been erroneously made by the Panel had no legal force or effect. Canada was pleased with this determination of the Appellate Body. In close cooperation with its provincial governments and dairy industry, Canada had put forward a strong case. For Canadian dairy exports, it remained business as usual. Canada thanked the Appellate Body, the Panel, and the Secretariat for their work, and was pleased to join in the consensus to adopt the Reports. However, Canada was disappointed that the complaining parties were seeking an immediate second recourse to Article 21.5 of the DSU. He said that he would revert to this point under the next agenda item.

32. The representative of the United States said that her country was disappointed that the Appellate Body had not resolved this dispute by affirming the findings of the Panel under Article 21.5 of the DSU pertaining to this case. The Panel had made its findings in this dispute after a long, extensive and thorough analysis of the facts and relevant legal provisions. In particular, the United States thanked the panelists who had agreed to serve again in this phase of the dispute, and regretted that this case had not yet been concluded. Instead, the Appellate Body had developed a new definition of "payment". Subsequently, based on this new definition, the Appellate Body had reversed the Panel's findings that Canada had failed to comply with the recommendations and had found that it was unable to complete the analysis because of an inadequate factual record. The Appellate Body had specifically stated that it was not making a finding regarding the consistency or inconsistency of Canada's measures. As a result of this Report, a disagreement between Canada and the complaining

parties in this case remained with regard to Canada's implementation. As evidenced by the US request for the establishment of a second panel pursuant to Article 21.5 of the DSU, the United States was still of the view that Canada continued to be out of compliance with the DSB's recommendations and rulings in this case.

33. The United States did not intend to re-argue the case at the present meeting. The United States recognized that, like most disputes involving agricultural measures, the parties had presented the Panel and the Appellate Body with a complicated factual and legal situation. Her country appreciated the time and effort devoted to the dispute by the Panel, the Secretariat, and the Appellate Body. However, there were several aspects of the analysis in the Appellate Body Report that the United States was compelled to comment upon, and at least some of these should be of concern to other Members from a systemic standpoint. First, and most disturbing, was the new test that the Appellate Body had read into the text of the Agreement on Agriculture for purposes of determining whether a "payment" existed under Article 9.1(c) of that Agreement. The Appellate Body had stated that to determine whether a "payment" existed, one had to compare the price of the good to the "proper value" of the good, and for the Appellate Body, "proper value" meant the cost of production of the good. Cost of production appeared nowhere in the text of the Agreement on Agriculture, nor was it clear why "proper value", which itself was a term that did not appear in the Agreement on Agriculture equated to cost of production. There were several questions raised by the Appellate Body's reliance on the cost of production. Cost of production was not a general benchmark under the WTO. The Appellate Body had rejected the use of any market price as representing the proper value of a good. It was odd that the WTO would not consider the market as being a good indicator of the value of goods.

34. It was also odd that items such as profit were not considered to be included in the proper value of goods. Furthermore, cost of production was a specific and detailed standard. Normally, the negotiators of an agreement would have spent a long and difficult negotiation in reaching agreement on such a particular standard and they certainly would be expected to reflect it in the text itself. There was nothing in the Agreement on Agriculture to suggest that Members had agreed that the cost of production for a private party, not even a government entity, would be relevant in determining whether another private party was receiving a "payment" under Article 9.1(c) of the Agreement on Agriculture. Just as a practical matter, it struck the United States as a particularly unworkable standard given that most Members would not have access to a private party's cost of production data. The Appellate Body had relied upon two paragraphs of the Illustrative List in Annex I to the SCM Agreement which explicitly provided that the cost to the government (not a private party) was the standard for determining whether a subsidy had been granted. Neither of these two items dealt with the cost of production. Rather they referred to financing costs. Moreover, in relying upon these two paragraphs, the Appellate Body had never explained why the "benefit to recipient" standard which applied to the general definition of subsidy in Article 1 of the SCM Agreement did not provide the appropriate context.

35. She noted that the Appellate Body had stated that a payment occurred when a producer sold its product to a processor at a price that was less than the cost of production, which would tend to imply that each sale would have to be examined to determine if there was a payment, but then the Appellate Body had concluded that it would be appropriate to compare average prices against the average cost of production. Under this approach, sales at below the cost of production could be offset against sales at above the cost of production, so that while there would be a "payment" for some sales, it would be "excused" based on unrelated sales by other producers. The Appellate Body had departed from its first Report, which had been adopted and had, therefore, been unconditionally accepted by the parties to this dispute in adopting the "cost of production" standard. In its first Report, the Appellate Body had used the test of "below market rates". It was not clear why market rates were relevant for the Appellate Body in the first Report but were no longer relevant for this second Report in the same dispute.

36. In paragraph 76 of its Report, the Appellate Body stated that "it is necessary to scrutinize carefully the facts and circumstances of a disputed measure, ... to determine the appropriate basis for comparison in assessing whether the measure involves "payments" under Article 9.1(c)." It was not clear what the Appellate Body meant by this statement. For example, it was not clear whether the Appellate Body intended to suggest that it had found that the cost of production was only relevant for this dispute and that some other standard would be applied in other disputes, based on the facts of those disputes. Imputing a different legal standard that depended upon the facts of the particular dispute at hand would not be supported by the text of Article 9.1(c) nor any other provision of the Agriculture Agreement. There was nothing in Article 9.1(c) to suggest that Members had agreed that the standard would vary depending upon the facts of the case, or that this particular standard would apply under these facts. Indeed, the United States were not aware of any other provision in any agreement where Members had consented to an unknown legal standard that would depend upon the facts of the particular case.

37. Furthermore, as a general matter, an approach of varying the legal standard according to the facts of the dispute would undermine the security and predictability which the dispute settlement system should provide. In order to conform their measures to their WTO obligations, Members had to know the rules. With a "floating" legal standard which changed depending upon the facts of the case, there was no way for a Member to know, when it adopted a measure, whether that measure conformed to its obligations. Finally, putting aside for the moment the merits of the new legal standard developed by the Appellate Body, the United States was concerned that in this case the legal standard had never been the subject of discussion during the Appellate Body's proceeding. The standard appeared for the first time in the final Report. The United States believed that under the circumstances it was critical that the Appellate Body had the benefit of the views of the parties and third parties on the issues involved prior to deciding to adopt such a new standard.

38. With respect to the issue of whether any payments under Canada's new measures would be financed by virtue of government action, the United States first noted and appreciated that the Appellate Body had not made findings on the issue. However, the United States was unclear as to the purpose of the somewhat lengthy discussion of an issue on which the Appellate Body had acknowledged it did not need to reach a decision. One aspect of that discussion was particularly confusing to the United States. In paragraph 117 of its Report, the Appellate Body appeared to conclude that since producers were not obliged to produce milk above their quota amount, then it was difficult to see how they were obliged to sell over-quota milk for export. The United States did not see how this conclusion followed. The Appellate Body appeared to be confusing two very different issues. There was no real disagreement that once a producer, for whatever reason, has produced over-quota milk, then the producer had no real choice but to sell it for export.

39. The representative of New Zealand said that, in a perfect world, the adoption of the Panel and the Appellate Body Reports in this case would bring this long-standing dispute with Canada over its export subsidy practices for dairy products to a close. Unfortunately, this was not a perfect world and, under the next agenda item, these two Reports would in no way be the final word on this dispute. This unfortunate lack of closure was the result of the Appellate Body's inability to complete the analysis of the claims that had been brought before it by New Zealand and the United States. In paragraph 103 of its Report the Appellate Body stated that: "... we are unable to complete the analysis by determining whether the supply of CEM [commercial export milk] involves 'payments' under Article 9.1(c) of the Agreement on Agriculture. Yet, we do not wish to be understood as holding that the supply of CEM does not involve 'payments' under Article 9.1(c). We are simply not in a position to make a ruling on this issue". The Appellate Body had further gone on to underline this in paragraph 104 of the report where it stated that its rejection of the Panel's approach to certain issues "does not amount to a finding that the measure at issue is WTO consistent". The inconclusive ruling of the Appellate Body had left New Zealand with no other option than to pursue further dispute settlement proceedings under Article 21.5 of the DSU to address further the Canadian measures which New Zealand continued to consider to be inconsistent with Canada's WTO obligations. This issue

would be taken up as the next agenda item. At this stage, however, New Zealand wished to take the opportunity to make some observations, of both a procedural and substantive nature, on the Appellate Body Report. First, in the absence of any definitive ruling, New Zealand had been forced to seek a second recourse to Article 21.5 of the DSU. This form of dispute settlement "ping-pong" was hardly the most efficient or timely way to secure settlement of disputes. The Appellate Body Report had, accordingly, highlighted the need for the issue of "remand" to be addressed in the context of the DSU review process. In the view of New Zealand, providing for such a "remand" function would enable Members to avoid the initiation of further Article 21.5 proceedings in a situation like the one before the DSB at the present meeting.

40. Second, some of the key conclusions that the Appellate Body arrived at in its Report were surprising, given that they had not been the subject of any exploration with any of the parties at the hearing. Nor had they been the subject of follow-up in any questions posed by the Appellate Body to the parties after the hearing. New Zealand recognized that this was not the first occasion on which this issue had come up. It also recognized that it was unrealistic to expect the Appellate Body to provide the parties with an opportunity to comment on every aspect of the reasoning that they were developing. However, it should be incumbent on the Appellate Body, as the WTO court of last resort, to provide adequate opportunity for the parties to comment at least on key ideas or arguments that ended up forming an essential part of its ultimate Report. This would help to ensure procedural fairness, and also to contribute to the goal of "satisfactory settlement" of disputes emphasized in Article 3.4 of the DSU.

41. With regard to the substance of the Report, the core findings were focused upon the question of "payments", as found in Article 9.1(c) of the Agreement on Agriculture. Some of the statements made by the Appellate Body on this issue tended to sit uneasily with statements it had made in their earlier report on the Canada-Dairy dispute. For example, the Appellate Body had reiterated its earlier statements that there could be "payments" under Article 9.1(c) where products were sold at "reduced rates (that is, at *below market-rates*)" (paragraph 73 of the Appellate Body Report). However, the Appellate Body had then rejected the Panel's use of the price at which milk was sold by producers in the domestic market: i.e. the domestic market price as the appropriate benchmark in this case (paragraph 81 of the AB Report). Instead the Appellate Body equated its earlier statement that payments could be made under Article 9.1(c) when products were sold at below market rates, with a new proposition that "payments" were made "when the price charged by the producer of the milk was less than the milk's proper value to the producer" (paragraph 73 of the AB Report).

42. With respect to this "proper value to the producer" determination, the Appellate Body stated that: "Where the alleged payment is made by an independent economic operator and where the domestic price is administered, the average total cost of production represents the appropriate standard for determining whether sales of CEM involve 'payments' under Article 9.1(c) of the Agreement on Agriculture. The average total cost of production would be determined by dividing the fixed and variable costs of producing all milk, whether destined for domestic or export markets, by the total number of units of milk produced for both these markets" (paragraph 96 of the AB Report).

43. In New Zealand's view, the Appellate Body did not adequately explain how this new standard for Article 9.1(c) for determining a "payment" squared with the approach they had adopted to the concept and interpretation of "payment" in the original Appellate Body proceedings. Nor did the Appellate Body adequately explain why "proper value" equated to "cost of production". As indicated previously, the Appellate Body had not completed its analysis of the disputed measures on the basis of the new "costs of production" standard as there were no factual findings in the Panel Report that would assist their analysis in this regard. As noted previously, given the significance of this issue in the context of the Report, New Zealand believed it would have been useful for the Appellate Body to explore the views of the parties in this regard during or after the Appellate Body's hearing. Finally, New Zealand wished to note that the Appellate Body had made it clear that its test of the average total cost of production was limited to those instances where the "alleged payment is made by an

independent economic operator and where the domestic price is administered" (paragraph 96 of the AB Report) and that it had not decided that the domestic price was an unwarranted benchmark in other situations. This suggested that in the Appellate Body's view this standard would only apply in specific circumstances. Yet it was by no means clear on what basis the Appellate Body was seeking to differentiate between different standards or benchmarks in Article 9 of the Agreement on Agriculture and this area would need clarification in the future.

44. The Appellate Body Report also raised a number of questions about the nature of the agricultural disciplines, not only in relation to export subsidy practices, but also domestic support. At the present meeting, he did not wish to dwell at length on the relationship between the domestic support and export subsidies disciplines, as suggested by the Appellate Body. However, he believed that a number of Members would be interested to consider the implications of paragraphs 90 and 91 of the Report. The suggestion seemed to be that Members with administered domestic prices and, unfortunately many Members had such prices, would wish to look carefully to ensure their domestic support measures did not result in export subsidisation. He noted that New Zealand had taken careful note of the Appellate Body's views on the requisite standard for Article 9.1(c) and would be pursuing this further in its second recourse to Article 21.5 of the DSU. New Zealand believed that, on the basis of both the new standard articulated by the Appellate Body, as well as the earlier standard, the Canadian measures constituted export subsidies under Article 9.1(c) of the Agreement on Agriculture.

45. The representative of Australia said that, as a third party with an interest in this case, his country had serious concerns with the conclusions reached by the Appellate Body. Australia had both systemic and commercial interests in this case in ensuring that the export subsidy commitments arising from the Uruguay Round were fully implemented. Australia noted that this issue had been a long-standing one, the effect of which was the continuing utilization of export subsidies on dairy products by Canada above its commitment levels. His delegation noted the statements made by New Zealand and the United States at the present meeting and had considerable sympathy for the observations and comments they had made about the Appellate Body Report. Australia was of the view that the Agriculture Agreement commitments in relation to domestic support and export subsidies are to be assessed in terms of their trade and production-distorting effects. This was clear from the ordinary meaning and text of the Agriculture Agreement, its negotiating history and its relationship to the Agreement on Subsidies and Countervailing Measures. The Appellate Body noted in paragraph 89 of its Report the potential for "spill over" effects of domestic support to provide certain benefits to export production. It also acknowledged that the domestic support and export subsidy disciplines would be eroded if a Member was entitled to use domestic support, without limit, to provide support for exports of agricultural products. Australia had concerns that the Appellate Body had considered that, in this dispute, the appropriate benchmark or standard to determine the existence of "payments" was the "average total cost of production". In other words, the Appellate Body's approach appeared to require an examination of payments against a benchmark based on the cost of making and selling the product, but failed to take into account the existence or effect of a subsidy on the cost of production. In Australia's view, this approach ignored the fact that the administered price which was subsidized by the Canadian Government had an effect on the cost of production. The subsidy provided to domestic production through administered prices might also have a cross-subsidization effect for product intended for export. These aspects needed to be examined on a case-by-case basis. As New Zealand had stated, Australia also noted that the Appellate Body's reasoning appeared to be at odds with its previous examination on the existence of "payments", namely that "where milk is sold at *reduce*d rates (that is, at *below market-rates*), 'payments' were, in effect, made to the recipient of the portion of the price that is not charged." The Appellate Body supported its approach on the benchmark to be applied by an interpretation of item (j) of the Illustrative List of the SCM Agreement. It interpreted this as an example that the standard was the "overall cost to the government". Australia wished to recall the findings of the Appellate Body in the Canada – Aircraft case relating to export subsidies and, in particular, the analysis of the definition of a subsidy and the interpretation of "benefit". In that case, the Appellate Body had determined that benefit was not "cost to government". The Appellate Body in paragraph 84 of its Report in the Dairy

products case, noted that the crucial question was "whether Canadian export production has been given an advantage". There was clearly an apparent inconsistency in the approach adopted. Notwithstanding its reservations about the rulings given by the Appellate Body, and taking account of concerns expressed by others, Australia would be prepared to join in a consensus in adopting the Reports in deference to the Panel, and to the institutions of the Appellate Body and the DSB. In conclusion, the representative of Australia referred to the agreement reached in Doha to eliminate all forms of agricultural export subsidies. He said that a success in this area, which Members intend to achieve, might avoid similar disputes in the future.

46. The representative of the European Communities said that the EC considered that the Appellate Body had again produced an admirable Report. The Appellate Body had been faced with intricate legal issues regarding the precise reach of the export subsidy disciplines in the Agreement on Agriculture and their relationship to the domestic support commitments. The specific question raised by the Appellate Body was whether the new Canadian measure constituted "payments on the export of an agricultural product that are financed by virtue of governmental action" within the meaning of Article 9.1(c) of the Agreement on Agriculture. At the outset, the EC wished to make clear that it continued to be of the view that the term 'payments" in Article 9.1(c) exclusively referred to the transfer of money. Only because the Appellate Body had upheld the Panel's finding that this term covered also "payments-in-kind", was it then faced with the problem of determining the correct benchmark price. The EC strongly supported the Appellate Body where it had reversed the Panel's use of the administered domestic market price as a benchmark. The Appellate Body had not only acknowledged the clear distinction between domestic support and export subsidies, but had also clarified that the right to provide domestic support within the limits of the commitments could not be eviscerated by an overly broad interpretation of the export subsidy disciplines.

47. However, the EC was somewhat perplexed by the new "below average total production cost standard" developed by the Appellate Body which focused on producer motivations. First, the EC failed to see any legal foundation for such benchmark. Second, the EC wondered how this new standard could operate in practice. Third, the EC noted with concern that the new benchmark had been developed by the Appellate Body without it having been argued by any party or been subject to comments by them during the proceedings. The EC expected that the Appellate Body would have an opportunity to consider more closely the implications of this question when the matter was referred to it again in the review proceeding. Overall, the EC was still examining the ramifications of the new test and reserved its position on that issue.

48. With regard to the second element of Article 9.1(c), the EC welcomed the Appellate Body Report, where it reversed the overly broad "cause and effects" test applied by the Panel. In particular, the Appellate Body gave some meaning to the term "financed" by clarifying that a regulatory framework merely enabling a third person to freely make and finance "payments " was insufficient for the payments to be regarded as "financed by virtue of governmental action". The EC fully agreed with the Appellate Body where it failed to see how producers in the situation at hand were "obliged or driven" to produce additional milk for export sale. It was regrettable that the Appellate Body considered that it could not complete the analysis on this point and had cut off its analysis somewhat abruptly. The findings and conclusions of the Appellate Body left the dispute unresolved and in effect "remanded" to the Panel. The EC would specifically comment on the procedural issues resulting from this new situation later in its statement in relation to the request by the United States and New Zealand for a second panel, pursuant to Article 2.15 of the DSU.

49. The representative of Argentina said that although his country had neither participated as a party or a third party in the proceedings of this case, it wished to express its systemic concerns with regard to the Report of the Appellate Body. Argentina was concerned that the Appellate Body had refrained from taking a position on the claim under Article 10.1 of the Agreement on Agriculture because it considered that, although it could not be determined that the challenged measures constituted an export subsidy listed in Article 9.1(c) of the Agreement, the possibility existed that this

was the case. In Argentina's view, the fact that it was impossible to classify precisely an export subsidy as falling under Article 9.1 should not prevent an analysis being made, subsidiarily, as to whether it was applied in a manner that constituted or threatened to constitute circumvention of commitments regarding export subsidies. Argentina did not see why an export subsidy which might perhaps not comply with the commitments adopted in this area, but which could not be precisely defined should be in a better position than the export subsidies which could be reliably determined as being listed, or not listed, under Article 9.1 of the Agreement. Thus, Argentina did not understand how this conclusion by the Appellate Body was compatible with the "residual character" which the Appellate Body recognized for the standard contained in Article 10.1 of the Agreement in paragraph 121 of its Report. Argentina hoped that the case under consideration would not be a precedent for future cases involving an analysis of compatibility with the rules of the Agreement on Agriculture in the case of export subsidies which could be precisely defined as falling under Article 9.1.

50. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS103/AB/RW – WT/DS113/AB/RW and the Panel Report contained in WT/DS103/RW – WT/DS113/RW, as reversed by the Appellate Body Report.

4. Canada – Measures affecting the importation of milk and the exportation of dairy products: Second recourse to Article 21.5 of the DSU by New Zealand and the United States

(a) Request for the establishment of a panel by New Zealand (WT/DS113/23)

(b) Request for the establishment of a panel by the United States (WT/DS103/23)

51. The Chairman proposed that the DSB take up these two sub-items together since they pertained to the same matter. First, he drew attention to the communication from New Zealand contained in document WT/DS113/23.

52. The representative of New Zealand said that the background to this request had been discussed earlier in the context of the consideration of the Appellate Body and Panel Reports arising from the original Article 21.5 proceedings. New Zealand continued to consider that Canada had failed to comply with the original DSB's recommendations and rulings. As highlighted previously – on more than one occasion – in substitution for the dairy export measures that had been ruled in contravention of Canada's WTO commitments, Canada had put in place "new measures" for the export of dairy products. In New Zealand's view, these new measures, which were comprised in new provincial schemes that were designed to provide ongoing support to Canadian dairy exports, equally involved the provision of export subsidies within the meaning of Article 9.1(c) or Article 10.1 of the Agreement on Agriculture. The effect of these schemes was that Canada was exporting subsidised dairy products without counting these against its export subsidy reduction commitment levels. As a result, Canada continued to be in violation of its obligations under Articles 3.3, 8, 9.1(c), 10.1 and 10.3 of the Agreement on Agriculture. The Appellate Body's Report in relation to the earlier Article 21.5 proceedings had reversed some of the Article 21.5 Panel's findings, but the Appellate Body had declined to rule on the consistency of the measure in question. Instead the Appellate Body had concluded that, in light of the factual findings made by the Panel and the uncontested facts in the Panel record, it was unable to complete the analysis of the claims made by New Zealand under Articles 9.1(c) and 10.1 of the Agreement on Agriculture. In its Report, the Appellate Body made it clear that its ruling "does not amount to a finding that the measure at issue is WTO-consistent, but simply that the Panel's findings were vitiated by error of law" (paragraph 104 of the AB Report).

53. Accordingly, there continued to be "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between Canada and New Zealand, within the terms of Article 21.5 of the DSU. New Zealand

therefore requested, pursuant to Article 21.5 of the DSU, that the matter be referred to the original Panel. Despite the fact that the dispute between New Zealand and Canada, as well as between the United States and Canada remained unresolved, New Zealand welcomed the recent constructive cooperation between the three principal parties which had resulted in agreement being reached on the terms of additional procedures that would apply to the further actions being pursued under Article 21.5 and 22.6 in this matter. The additional understandings reached by the parties in this regard were being circulated to Members.

54. The Chairman drew attention to the communication from the United States contained in document WT/DS103/23.

55. The representative of the United States said that in its decision on 3 December 2001, the Appellate Body had declined to make a ruling regarding the consistency of Canada's replacement export measures with Canada's obligations under the Agreement on Agriculture or the Agreement on Subsidies and Countervailing Measures. The Appellate Body stated that its ruling "does not amount to a finding that the measure at issue is WTO-consistent" and that "it remained possible that the measure as such was an export subsidy". As previously noted by the United States in its comments on the adoption of the Article 21.5 Reports, the Appellate Body had disagreed with some aspects of the Panel's legal analysis but had concluded that the Panel had not made sufficient findings of facts to enable it to come to a decision. Because the Appellate Body had not reached a conclusion regarding the consistency of the Canadian measures, there continued to be a disagreement between the United States and Canada regarding the consistency of the measures taken to comply with the DSB's recommendations and rulings. Accordingly, the United States was requesting the establishment of a second panel pursuant to Article 21.5 of the DSU.

56. The representative of Canada said that, as previously indicated, his country was displeased and disappointed that New Zealand and the United States had chosen to continue their challenges of Canada's commercial export milk mechanisms. Canada had made extensive changes to its approach to dairy exports after the adoption of the original Panel and the Appellate Body Reports in this case, to ensure full conformity with its WTO obligations. The United States and New Zealand were well aware of this, as there was an unprecedented level of engagements with complainants throughout the implementation process. He said that Canada had implemented the DSB's rulings fully and in good faith. At present, contracts were negotiated between producers and processors with no government intervention (including by marketing boards) on quantities, prices, products or export markets. Marketing boards and government agencies were confined to the operation of the domestic supply managed system as well as to ensuring health and sanitary standards, functions that were routine among agencies of other WTO governments, and which were fully consistent with its WTO-obligations. Despite Canada's full compliance with the DSB's rulings, and the decision of the Appellate Body, the complainants continued to pursue further litigation on this issue. In Canada's view, these issues were best dealt with in the current agriculture negotiations. This situation of "double jeopardy" reflected a serious flaw in the DSU rules that, Canada believed, needed to be corrected. He recalled that it was a former US trade representative who had coined the phrase "endless loop of litigation". Clearly, Members were now facing such an "endless loop" in this dispute.

57. Canada believed that this situation should be of systemic concern to all Members. The complainants had failed to win before the Appellate Body. The DSB had adopted that Report and yet, the United States and New Zealand were back hoping for better luck this time around. He then raised the following questions: (i) If they were to lose again, would they be seeking a third recourse to Article 21.5? (ii) Would there be a fourth recourse as well? (iii) When would this end? There had to be finality to WTO dispute settlement. It could not be an endless situation of "better luck next time". In addition, he noted that the United States had extensively criticized, under the previous agenda item, the Appellate Body's use of cost of production as being the appropriate benchmark for Article 9.1(c) cases. Canada was puzzled by the US statement given the fact that the United States had first

introduced that concept of cost of production before the Panel. It was, therefore, difficult to see how one could have it both ways. The commercial uncertainty created by these requests might well serve the interests of the co-complainants, but was extremely harmful to those of Canada. Over the past few days, Canada had been engaged in discussions to try and resolve its differences in a constructive spirit. Canada had put forward suggestions that could have ended these challenges. Unfortunately, Canada's suggestions had not been accepted. Accordingly, Canada would pursue this case on the merits before the second Article 21.5 panel. Canada was confident of its case, and expected another successful outcome. In earlier disputes, in which Canada was a complaining party, it had expressed its view to the DSB that the clear intent of the drafters of Article 21.5 was to provide a rapid determination of the WTO-consistency of implementing measures. That remained Canada's view. Therefore, Canada accepted the first request of the complainants for an Article 21.5 panel, and made no attempt to block it. He also wished to inform the DSB that an extension and modification of the trilateral sequencing agreement between the parties to the dispute had been reached. A copy had been provided to the Secretariat for circulation to Members.

58. The representative of the European Communities said that the EC noted with concern that, contrary to the requirement contained in Article 6.2 of the DSU, the request for the establishment of a second 21.5 Article panel did not mention whether consultations had been held between the parties. The EC had repeatedly emphasized that the procedural step of holding consultations was of fundamental importance for the dispute settlement system. The EC would not repeat this point again, but noted that the Appellate Body in a recent case had clearly emphasized the importance of consultations before having recourse to a panel pursuant to Article 21.5 of the DSU. The Appellate Body emphasized that "through consultations parties exchange information, assess the strength and weaknesses of their respective cases, and narrow the scope of the differences between them". These considerations applied equally to a "remand" situation arising in the case at hand. Consultations between Canada, the United States and New Zealand could help to clarify certain new facts, which had not been looked at in the panel's proceedings and would, therefore, accelerate the final resolution of this dispute.

59. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by New Zealand in document WT/DS113/23 and the matter raised by the United States in document WT/DS103/23. The Panel would have standard terms of reference.

60. The representatives of Australia and the European Communities reserved their third-party rights to participate in the Panel's proceedings.

5. Review of the Dispute Settlement Understanding

(a) Statement by the Chairman

61. The Chairman said that at the outset he wished to note that, under this agenda item, he had used the term "the DSU Review" only for convenience. He recalled that much work had been done in 1998 and 1999 in the general review of the DSU. This was very useful work, but one should not repeat the exercise. Instead, Members had a specific mandate to negotiate improvements and clarifications of the DSU. It seemed that these negotiations should be launched on this occasion, consistent with the Doha Ministerial Declaration. He drew attention to the text of the mandate contained in the Doha Declaration on the DSU negotiations, which read as follows: "We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."

62. It was clear that the Declaration focused on: (i) improvements and clarifications of the DSU; (ii) the work done thus far; (iii) additional proposals to be submitted by Members; (iv) a deadline for completion of the negotiations no later than May 2003; and (v) the results entering into force as soon as possible. He believed that it was not for him to prescribe the process or the substance of the negotiations, but he wished to outline a few options for proceedings. In light of all the hard work already done, along with further ideas expressed by delegations, he was confident that one could achieve satisfactory results in these negotiations. However, this would only be possible if one found the best, most efficient process and ensured that the submission of proposals by delegations was well organized. He recalled that in some of the informal consultations which had been held before the Doha Ministerial, there were suggestions that there should be a consensus reached, at some desirable point, on specifying which were the improvements and clarifications that had to be focussed on, so that further progress could be made.

63. He wished to suggest some elements which Members might like to contemplate in terms of the process. He would invite delegations to comment on both this and the substance, if they wished to do so at the present meeting. However, the discussion might naturally need to spill over to other meetings. First there was the question of who should chair the DSU negotiations. There was a range of options: (i) the Chair of the DSB could convene both formal and informal sessions; (ii) or a Vice-Chair could do the same; (iii) or a permanent Chair for the duration of the negotiations could be appointed so as to provide continuity; (iv) clearly, however, occasional reporting back to the DSB would be necessary and the DSB would presumably take the eventual decisions; (v) at the same time it might be proper and advisable to separate the negotiations from the ongoing work of the DSB; (vi) it might also be the case that informal consultations would provide the best way of proceeding initially, with proposals being submitted informally as job numbers by delegations. All Members would then have the opportunity to debate proposals on all submitted issues; (vii) the Chair could submit framework papers at various points which would provide summaries of the proposals put forward, and summaries of the discussions; (viii) at informal sessions, delegations would strive to achieve consensus on which specific items to pursue; (ix) at the final stage of the process the Chair could propose a Chairman's draft of actual amendments and, if appropriate, interpretative language; and (x) this would be reported back to the DSB for decision.

64. These were just some preliminary thoughts to consider in relation to the process. He noted that in the informal discussions prior to the Doha Ministerial, most delegations expressed an interest in defining the scope of the negotiations. Perhaps it would be useful for delegations to consider before the next regular meeting of the DSB how best the scope of the negotiations should be defined. At the present meeting he wished to invite any thoughts from delegations at this point, in particular on the issues of: (i) the institutional set-up of the negotiations; and, (ii) the issue of the Chairmanship. Any initial comments regarding the scope of the negotiations would also be welcome. Subsequently, at the next regular meeting of the DSB, this agenda item could be returned to with a view to deciding on the process and procedure. If necessary, informal consultations could also be held on this question in order to facilitate reaching a consensus decision in the DSB on the way ahead. He understood that it was a little early for delegations to make statements on this subject at the present meeting and that informal consultations might be useful. Finally, he wished to propose that the DSB agree at the present meeting to launch the negotiations on improvements and clarifications of the DSU. He would return to this point once delegations made their comments, if they so wished.

65. The representative of the European Communities said that it was premature to discuss the elements outlined by the Chairman at this stage in the DSB. Improvements and clarifications of the DSU were part of the Doha Development Agenda. They were part of the negotiating agenda and in this respect they would be part of the overall discussions in the context of the TNC preparations for the 28 January meeting. It would not be a good procedure to have a piece-meal type of negotiations.

66. The representative of Canada said that in response to the Chairman's statement his delegation wished to make some preliminary comments. Canada believed that some answers to the questions

raised by the Chairman would have to be discussed in subsequent meetings of the DSB or in informal consultations. First, Canada believed that given the importance of the mandate and the fact that many Members attached importance to this matter, substantive DSU negotiations should begin as soon as possible. Second, successful DSU negotiations within the specified time-frame would demand that agreement on the scope and the issues for negotiations should emerge shortly. Third, Canada believed that there was a need to focus on core matters and that Members should not be timid to revisit fundamental elements of the dispute settlement system. In this regard, Canada intended to make written proposals and looked forward to playing an active and constructive role in these negotiations. Canada was in favour of having the negotiations chaired by an individual who could guide the process until at least the Fifth Ministerial Conference. This continuity would be important for the overall success. This would point to a designated chair for the negotiations, rather than the Chair or Vice-Chair of the DSB. In this regard, Canada wished to hear comments from other delegations.

67. The representative of Japan said that his delegation wished to make some preliminary comments on how the DSU negotiations should be organized. Japan believed that one could use the working methods that had proved to be effective during the pre-Seattle period. That meant the combination of a formal process under the DSB chairperson and an informal process that could be chaired either by the DSB chairperson or another individual. Since the DSB and its chairperson might be asked to handle difficult cases at any time, it would be practical to separate the DSU negotiations from the regular DSB process. However, since the DSU negotiations were not part of the single undertaking and should be concluded within a shorter time-period, instead of establishing a separate track, they should be carried out under the DSB process. He noted that it might not be possible to decide on the scope at the beginning of the process. However, at some stage, there was a need to have a clear "universe" that could form a basis for consensus. The DSB could meet a couple of times at the early stage, in dedicated sessions, to have a general discussion and to allow Members to table their proposals. These proposals could then be discussed in informal mode in order to arrive at a reasonable "universe". At a later stage, this matter should be taken up again more formally in the DSB for transparency purposes as well as to formalize the result of the substantive work by the informal process.

68. The representative of the United States welcomed the Chairman's initiative to raise these issues for reflection now and in the beginning of January. However, she sought clarification from the Chairman as to what had been meant by the phase: "launching the negotiations today". The United States believed that the scope of the DSU review had to track the mandate provided in paragraph 30 of the Doha Ministerial Declaration, which provided, *inter alia*, that "… negotiations should be based on the work done thus far as well as any additional proposals by Members". For organizational purposes, it would be reasonable to set a deadline for Members to present their proposals for inclusion on the negotiating agenda. Based on the mandate set out in paragraph 30, there was, however, no basis for limiting the substantive scope of the issues that Members might request to be included on the agenda.

69. The representative of Norway said that, like the EC, his country believed that it was too early at this stage to go into details on how to organize the process of the DSU negotiations. Norway welcomed the Chairman's initiative to start thinking about the process. However, all the negotiations, whether part of the single undertaking or not, should be considered in the context of the TNC preparations. On the other hand, like Japan, Norway also considered that, at this stage, it seemed most productive for the process to be closely linked to the DSB. However, his delegation was not sure whether the process should be organized as outlined by Japan, but the statement provided a logical sequence to how this should be done. Norway believed that some time was required and that informal consultations should be held so that in early February, when a new DSB Chairperson would be appointed, Members would have some views on how the work should be organized.

70. The representative of Australia stated that, like previous speakers, his country appreciated the fact that this matter had been placed on the agenda of the present meeting and welcomed the statement

made by the Chairman. He noted that complaints about transparency were often made and that too much of the discussion about procedure and how to move forward was not raised in open fora. Thus, a discussion at the present meeting was helpful. Like previous speakers, Australia was in two minds as to how quickly one should proceed to launch the work agreed by Ministers at Doha. However, he was mindful of the fact that it was back in November 2001 that Ministers had reached agreement, and if one were to leave this matter until the end of January, one would move into an uncomfortable situation which would make it very difficult to achieve the objective set by Ministers. Therefore, Australia wished that the process would move forward as soon as possible. This was not only with regard to the DSU review, but the whole process of the work programme that had been adopted at Doha. Therefore, one could begin the process of thinking on how to proceed. However, some informal work on how to move forward would be required. With regard to the process, like others, Australia believed that it should come under the jurisdiction of the DSB, but as stated by Canada, a separate chairperson would be necessary to see through this process. It was very important that in this review as well as in other areas of the work programme adopted at Doha there was a chairperson who could see the process through in a committed way as it was only through that process that the deadline could be met. As far as scope was concerned, the terms of reference had been determined by the Ministers, but there should be an opportunity for further discussion on this matter. It was important not to limit the scope. At the same time, effectiveness and productivity might lead Members to conclude later on that they should focus on particular areas. A substantive review of the DSU should not be limited. It would be very helpful to continue this discussion and Australia welcomed the opportunity to do this at the present meeting.

71. The representative of New Zealand said that it was useful and timely for the Chairman to raise these issues at the present meeting, which had been illustrated by the very useful and interesting observations made by a number of delegations. However, further time to give thought to the issues raised was required. New Zealand was flexible on the question of the Chairmanship of the review process. However, it was attracted to the idea of a permanent chairperson who could see the process through and was committed to the review process as a whole. New Zealand also recognized and had noted other views that this question would probably need to wait for some of the more horizontal organizational questions to be resolved by the TNC. With regard to the scope of negotiations, New Zealand agreed with other speakers that the Ministers at Doha had essentially given the parameters for the scope of this review. Of course, it would be up to the Members to provide the specifics and the priorities. Finally, the Chairman had raised a few issues about the format and nature of the discussions in the DSB. He noted that New Zealand was entirely flexible in that regard, but believed that as progress was made and further work was being done, any discussions on this matter should be as transparent as possible.

72. The representative of Mexico said that his country welcomed the fact that this matter had been raised by the Chairman. However, in Mexico's view, it was premature to take this matter at the present meeting. It was useful to raise this issue, but it might be a good idea to reflect, during the holiday period, on how to approach this matter. At the present meeting, he wished to make some comments. First, the negotiations should be separate from the whole negotiating process of the Doha agenda and should be organized by the DSB under a different chairmanship. Second, with regard to the scope, it should be at the outset unlimited, but there should be a deadline for inclusion of new issues. Otherwise one would be faced with a situation where new issues for negotiation would make the process too complicated and Members would not be able to meet the deadlines set by Ministers.

73. The representative of Thailand said that his delegation welcomed the Chairman's statement on the question of the process. Thailand believed that the negotiations on this matter should be conducted in an informal setting under a separate chairperson from the DSB, but with some kind of link to the formal process through the DSB. With regard to the scope, it was Thailand's understanding of the Doha mandate that the phrase "work done thus far" should include all formal proposals made by Members up to Doha.

74. The representative of Chile said that his delegation welcomed the statement made by the Chairman. Although no decision would be taken at the present meeting, it was necessary to start thinking about this subject. In terms of the process, one should examine what had been done thus far and begin to draw conclusions in order to be able to organize the next review process mandated at Doha. At this stage, Chile was not sure about the scope or coverage of the review, but did not wish the scope to be limited. He recalled that New Zealand had raised an important point about priority on the way coverage should be approached and this stemmed from the Doha mandate. There was one issue which required to be carefully examined, namely, the lack of coherence regarding French, English and Spanish versions of the DSU text and its implication on a modified version of the DSU.

75. The representative of the European Communities said that his delegation wished to make some additional comments. The EC considered that the mandate in paragraph 30 of the Doha Declaration was a new mandate. Therefore, proposals by Members should be on an equal footing. In this regard, he noted that the EC would table such proposals and welcomed the fact that Canada would do the same. However, it was clear that at a certain moment a time-limit within which Members could table proposals would have to be established because this exercise had to be terminated by May 2003. Second, the EC was in favour of a separate track with a separate chairman until May 2003. With regard to the scope of the work to be done, the EC welcomed the fact that many delegations considered that the scope should be large enough to include all substantive contributions which might be put forward.

76. The Chairman thanked delegations for their preliminary thoughts and comments. As had been mentioned, this subject was not part of a single undertaking and it was his understanding that the DSB had authority on this matter. He was aware that there was no full consensus on this matter at the present meeting. However, one could launch the DSB negotiations on a conceptual basis at the present meeting on the understanding that further consultations would be held in the beginning of 2002. He thus sought confirmation as to whether the European Communities was totally tied to the TNC as against a notion that this was perhaps a quite separate negotiation. There was a need to have a consensus on this, otherwise one would have to move forward next year.

77. The representative of the European Communities said that, as indicated by the Chairman, there was no consensus on this matter at the present meeting.

78. The Chairman said that there was no consensus on this matter but delegations had had a useful discussion. He proposed that the DSB revert to this matter in the beginning of 2002.

79. The DSB took note of the statements and agreed to revert to this matter.

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/179)

80. The Chairman drew attention to document WT/DSB/W/179 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. Unless there was any objection, he proposed that the DSB approve the names contained in document WT/DSB/W/179.

81. The DSB so agreed

7. Chairmanship of the DSB

82. The Chairman said that due to his imminent departure from Geneva he had consulted the Chairman of the General Council who had held consultations with delegations on the question of a future Chairperson of the DSB in order to serve out his remaining term of office. In light of these consultations, he wished to propose that the DSB agree to designate Mr Kåre Bryn (Norway) as

Chairperson of the DSB to serve out the remaining term of office pending the election of a new Chairperson. He said that Mr Bryn was a person with considerable expertise and knowledge of the DSB. He proposed that the DSB agree to designate Mr Bryn to chair the DSB on an interim basis.

83. The DSB so agreed.

8. Turkey – Restrictions on imports of textiles and clothing products

(a) Statement by India

84. The representative of India, speaking under "Other Business", recalled that her country had reached a mutually satisfactory solution with Turkey with regard to its implementation of the DSB's recommendations in the above-mentioned dispute. Based on an exchange of letters, dated 6 July 2001, Turkey and India had agreed that, as compensation, Turkey would remove quantitative restrictions on textile categories 24 and 27 on imports from India by 30 June 2001, pending its compliance with the DSB's recommendations. In addition, Turkey had also agreed to carry out tariff reductions on the applied rate basis in respect of certain products by 30 September 2001. India was concerned that Turkey had not yet notified its tariff reductions, due to be implemented by 30 September 2001. On previous occasions, Turkey had delayed the notification regarding removal of quantitative restrictions on textiles categories 24 and 27 on imports from India by more than three months. Thus, India was requesting Turkey to comply immediately, as had been agreed in the exchange of letters of 6 July 2001. Undue delay by Turkey in notifying the measures taken for compensation had adversely affected trade interests of her country, and had created considerable uncertainty regarding the implementation of the mutually agreed solution.

85. The representative of Turkey said that his delegation had noted the statement made by India at the present meeting and would convey this statement to his authorities. He added that Turkey was in the process of completing its work in this area. In this regard, the new legislation would come into force on 1 January 2002.

86. The DSB took note of the statements.