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16 – 18 December 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 16 – 18 December 2002

Chairman: Mr. Péter Balás (Hungary)

Prior to the adoption of the agenda, the Chairman stated that this was the seventh meeting of the Special Session of the Dispute Settlement Body (DSB), the last one of the year. He stated that since the last meeting, two new proposals had been tabled, one by Chinese Taipei – this proposal had already been circulated informally at the last meeting – and also by Ecuador. He said that he intended to give the proponents of the proposals the opportunity to present them formally and later to give participants the chance to react to these new proposals and any of the previously tabled proposals. He also added that he had just been informed that some participants wished informally to present a new proposal and to have an initial discussion during the meeting. He proposed that the authors of the new proposal be allowed to present it during the present meeting and that participants be given a chance to comment on it the following day. He recalled that as from the first meeting in January 2003, there would no longer be the possibility of presenting new conceptual proposals. Turning to address the future work of the Special Session, he recalled that the Session had been working for nearly a year and said that he would like to thank participants for their hard work and dedication during this period. The level of engagement was a positive testimony both to the importance attached by delegations to preserving the effectiveness and efficiency of the WTO's dispute settlement system and to the mandate given to agree on clarifications and improvements to the DSU. He continued that, as he had recently reported to the TNC, the work carried out during the year had been significant in achieving two important results: firstly, a "critical mass" of proposals had been put forward reflecting a very broad range of perspectives and addressing aspects relating to virtually all aspects of the dispute settlement proceedings; secondly, the discussions of the negotiating issues had enabled all concerned to better understand the details and implications of the proposals and helped convey a clearer sense of what was at stake under the various proposed improvements and clarifications to the DSU. He noted that he had found it particularly useful to be able to consult informally with delegations, both individually, and in various groups and formats, and that this was something he hoped to be able to continue next year. He pointed out that there now remained less than six months in which to reach an agreed text; he then suggested proceeding to outline informally, the approach he proposed following in January, and that, if as a result of informal discussions, certain elements could be agreed, he would then formally confirm them.

He proposed that from the January meeting there be a switch from the issues-based discussion to a discussion based on draft legal texts of possible clarifications and improvements. This discussion would be based on the text of proposals to be put forward by delegations. Second, this work would be conducted on the basis of the compilation of proposed texts which would be prepared by the Secretariat reflecting various submissions. He noted that contrary to the compilation that had been worked on so far, this new working document would reflect specific draft texts of proposed amendments, decisions, or other forms of texts for clarification and improvement. Similar to the earlier working document, this compilation could be updated as new proposals or changes of proposals were submitted. He noted that some of the contributions submitted so far already contained such specific draft legal texts. These could remain unchanged in the compilation, if the proponents so

wished. He urged those delegations who had so far submitted proposals of a more conceptual nature, without providing specific legal language, and those delegations who wished to resubmit their earlier proposed legal texts, to do so by Wednesday, 15 January 2003, so that they could be included in the compilation to be circulated to participants before the meeting at the end of January. He added that it was to be understood that the discussion by any delegation of draft legal texts did not prejudge that delegation's position with respect to the acceptance of the underlying concept. He concluded by stating that he hoped that he had been able to reflect the direction of the discussions. The Chairman's approach was agreed to by participants.

The representative of Australia asked that given the absence of a number of developing countries who had made proposals, but who were absent from the room, that the assistance of the Secretariat be enlisted in bringing to their attention the decision that had just been agreed.

The Chairman agreed that this was a useful proposal and said that he would try to circulate this information as a letter. He recalled that there were some important parallel informal consultations taking place which were particularly pertinent for developing countries. He also recalled that he had undertaken to find out in what way interested developing countries could get technical assistance to draft their specific legal texts. He then confirmed the meeting dates for next year as follows: 28-30 January; 17-18 February; 10-11 March; 10-11 April; and 19, 21-22 May. He said that these dates might not be enough and that he was discussing with the Secretariat the possibility of scheduling further meetings. Assuming a consensus was reached, a further meeting had to be scheduled in late May 2003 to adopt the agreement reached by participants. He proposed reverting to this at a future meeting and then invited the representative of Chinese Taipei to present its proposal.[1]

1. Discussion of proposals submitted by participants

1. The representative of Chinese Taipei recalled that its proposal comprised two major parts. The first was related to the issue of transparency. She gave in that context full support to the United States proposal on timely circulation of final reports, as it could facilitate the implementation of the recommendations and rulings of the DSB, consistently with the time-frame set out in Article 20 of the DSU. She said, however, that that her delegation had some reservations against the proposals of the United States relating to public access to submissions, the opening up of meetings to the general public, and "*amicus curiae*" submissions. With regard to the latter, she recalled that Chinese Taipei was asked by some participants to clarify its position at the sixth meeting of the Special Session. As regards the panel stage, she said that her delegation had made it clear that a combined reading of Articles 12 and 13 of the DSU made it clear that panels had the discretionary authority to seek information and technical advice from any individual or body it deemed appropriate. In relation to the Appellate Body stage, she said that her delegation had questioned the need for creating guideline procedures for the handling of *amicus curiae* submissions, believing this to be already covered by precedents from past cases, which the Appellate Body could follow. She identified two distinct approaches on the issue of *amicus curiae* submissions. The first was to prohibit the acceptance of such briefs and, the second, was to facilitate their acceptance in the process. Each of these alternatives had its own flaws; the former option would put the Appellate Body in a straitjacket and prevent it from consulting individual experts and relevant bodies for their opinions, while the latter option would put Members with least resources at a disadvantage. In view of these shortcomings, Chinese Taipei favoured maintaining the status quo.

2. She said that the second component of the Chinese Taipei's proposal dealt with third-party rights, which her delegation wanted to see enhanced, although not at the expense of rights of the parties to the dispute. It should not make the procedures for the settlement of disputes more complex and give third parties undue influence over panel and Appellate Body decisions. In this context, she said that Chinese Taipei supported the granting of the following rights to third parties: making

[1] See document TN/DS/W/25.

available all documents to third parties, with the exception of those containing business confidential information; allowing them to attend all relevant meetings; and giving them access to final reports at the same time as the parties to the dispute. She said, however, that her delegation had reservations against the reflection of the arguments of third parties in panel reports and giving third parties the right to comment on the descriptive part of the report, other than their own submission, and the interim ruling of the panel.

3. The representative of Ecuador thanked participants for their comments on its proposal, particularly in relation to the appropriate time for determining the level of nullification and impairment, and said that he would like to offer some comments on Article 21 of the DSU and on its proposed amendments - Articles 21.3*bis* and 21.3*ter*. He said that in the spirit of moving forward the negotiations given the May 2003 deadline and taking into account the views expressed by participants, Ecuador would like to supplement the wording contained in WT/MIN(01)/W/6, which was reflected in the proposal by Japan. He said that it was Ecuador's considered view that the timely determination of the level of nullification and impairment was essential in ensuring compliance with the recommendations and rulings of the DSB. To that end, the complaining Member should be able to choose the opportune time to request arbitration to determine the level of nullification or impairment. In the event of prompt compliance not being possible, the parties' negotiations on compensation would be facilitated by the knowledge of the level of nullification and impairment. He said that it was clear from Ecuador's proposal that the level of nullification and impairment determined by the arbitrator under the proposed Article 21*bis* by Japan (TN/DS/W/22) could be adjusted to take account of the ruling or findings of the compliance panel. It was possible for concurrent findings to be made on the issue of compliance with the recommendations and rulings of the DSB and that on the level of nullification and impairment. He noted that Ecuador's proposal as regards the relationship between Articles 21 and 22 of the DSU was based on other texts which had been presented with a view to assisting and ensuring that there was greater convergence and consideration of the various views. Ecuador hoped to be able to present a legal text as regards its initial proposal in relation to Article 22 of the DSU.

4. The representative of Costa Rica welcomed the presentations by Ecuador and Chinese Taipei and said that his delegation was grateful for the support of its proposal on third-party rights by Chinese Taipei. With respect to the proposal by Chinese Taipei, he stated that Costa Rica shared some of their ideas in relation to public participation in the dispute settlement processes, access to submissions and *amicus curiae* submissions. He further said that Costa Rica was also of the opinion that these measures would have a negative effect on the intergovernmental nature of the WTO dispute settlement system and would place a heavy burden on Members, in particular on developing countries with meagre resources. Giving greater access opportunities to the so-called "civil society" would not help to strengthen the dispute settlement system, rather the opposite; it would politicise discussions, reduce the space for seeking prompt solutions to trade conflicts and favour the participation and influence of powerful lobbies from industrialized countries in such processes. With regard to third-party rights, Costa Rica welcomed Chinese Taipei's endorsement of several elements in its proposal, in particular the need to establish a deadline for a third party to express an interest in participating in panel proceedings and strengthening the rights of third parties by guaranteeing their access both to all documentation and to all meetings. Costa Rica noted that it would like to address two points made by Chinese Taipei in relation to its proposal. Firstly, with regard to consultations, he said that the purpose of its proposal was to prevent the discriminatory rejection of the participation of other Members as third parties at that stage of the dispute settlement process. Costa Rica was conscious that at this stage, the parties might attempt to have a negotiated settlement to their dispute. However, the rights of other Members could be affected during these consultations. It was therefore important for a balance to be struck between the current political process, which allowed governments a certain amount of room for manoeuvre, and protection of third-party rights. It was for this reason that Costa Rica was only proposing an amendment to Article 4 for disputes under Article XXII of the GATT, with the procedures under Article XXIII of the GATT being maintained as the intrinsically political process. Costa Rica noted that Article 4 did not clearly establish how the claim "substantial trade

interest" could be proved; he wondered, for example, how should cases be resolved where such substantial trade interest had not yet been able to develop precisely because of the measures under discussion. Costa Rica added that the Member to which the request for consultations was addressed had the power to decide unilaterally whether "the claim of substantial interest is well-founded". There was a contradiction between the provisions of this Article and Article 10.2 of the DSU which merely mentioned a "substantial interest". The proposal by Costa Rica's aimed to give the DSU coherence in this aspect and to avoid discriminatory rejection of third-party participation at the consultation stage.

5. Costa Rica welcomed the clarification by Chinese Taipei, in relation to its comments with regard to third-party arguments being reflected in panel reports and the possibility of their being able to comment on the interim report. Costa Rica proposed that these arguments, in addition to being included in the report, should also be taken into consideration by the panel, provided that they are limited to the terms of reference established by the parties to the dispute. A third party, he suggested, might contribute different arguments and points of view in relation to some of the points under discussion and the panel should take such arguments into consideration.

6. The representative of Thailand expressed its appreciation to Chinese Taipei for its contribution to the discussions. He said that Thailand shared thoughts and arguments similar to those illustrated in the contribution itself. He took the opportunity to highlight two points among others with which Thailand agreed: (i) third-party rights should be enhanced to include all three elements contained in subparagraph (c); and (ii) also the need to set a deadline as contained in subparagraph (b) on page 3 of the contribution. Thailand also welcomed the point made regarding timely circulation of the final report. With regard to the proposal by Ecuador, he welcomed it and said that his delegation would offer some comments after it had studied the proposal and that of Japan. As an initial comment, he wondered whether it was necessary to retain the second part of the last sentence of paragraph 3*ter* considering that the parties would have to accept the decision as definitive.

7. The representative of Israel expressed her thanks to the delegations of Chinese Taipei and Ecuador for their valuable contributions. As regards the proposal by Chinese Taipei, she said that Israel shared several of the points raised in that submission, in particular, the enhancement of third party's rights – a view shared by Costa Rica, the EU and Jamaica – this was a topic that, in the view of Israel, warranted discussion in this review. In the panel stage, those rights should include entitlement to receive all information and documents except, of course, for confidential business information, and to be present at all meetings with the Panel. In addition, this should encompass the right to receive the final report at the same time as the parties to the dispute. In respect of suggestions that had been made relating to other rights, such as the one to comment on the interim report, Israel was still reflecting further on them. It was, however, necessary to maintain a balance between the rights of third parties and that of the parties to the dispute. With respect to Ecuador's proposal, she said that Israel was encouraged to learn that the comments of participants had been taken into account in its formulation. By way of a preliminary comment, she said that Israel was generally in support of an early determination of the level of nullification and impairment in the context of Article 21 of the DSU. She also said that Israel appreciated the intent to deal with the issue of sequencing between Articles 21 and 22 of the DSU, by specifying that the determination of the level of nullification or impairment should be done before the authorization for suspension of concessions was requested.

8. The representative of Mexico welcomed the contributions of Chinese Taipei and Ecuador. As regards the text from Chinese Taipei, he said that Mexico would like to make four comments. First, in relation to the United States proposal relating to the timely distribution of documentation, he said that the WTO should make available more resources for translation in order to ensure the timely circulation of reports of panels and the Appellate Body in all three official languages. Secondly, he said that his delegation was in agreement with the views expressed by Chinese Taipei regarding public access to meetings and to reports. It was imperative for the inter-governmental nature of the WTO to be preserved. Thirdly, he said that Mexico was in agreement with Chinese Taipei that it was not necessary to establish guidelines for handling *amicus curiae* submissions, as guidance had already

been provided by the Appellate Body. He added, however, that this statement should not be taken to mean that Mexico approved of the approach adopted by the Appellate Body. Fourthly, he noted that Mexico had been a third-party in several disputes and was in support of the enhancement of third-party rights. With respect to the proposal from Ecuador concerning the determination of the level of nullification and impairment, he welcomed the submission of a legal text by Ecuador and said that the underlying concerns of the proposal were quite similar to that of Mexico's proposal. Both countries saw a need for the early determination of the level of nullification and impairment. However, the two proposals were likely to produce different results. The proposal by Mexico had the advantage of giving immediate effect to the determination.

9. The representative of India welcomed the legal text submitted by Ecuador and said that his delegation would offer some comments when the meeting switched to an informal mode. As regards the proposal by Chinese Taipei, he said that India agreed with the views of Chinese Taipei on the proposal by United States to open up panel and Appellate Body proceedings to the general public. He said that India, however, had some concerns with the position adopted by Chinese Taipei on the timely circulation of final reports. He recalled that at the previous meeting of the Special Session, a number of participants, including Malaysia had stated that the need for a time-gap between the time when reports are made available to Members and the general public. This was necessary to enable delegations to prepare reports on the cases for the authorities in their respective capitals. consideration. With reference to *amicus curiae* briefs, he said that India did not agree with the view that the matter had been settled by the Appellate Body. While the Appellate Body had laid down some guidelines, this had been done without regard to the relevant provisions of the WTO Agreement. With respect to third-party rights, he said that India saw some merit in the proposal by Chinese Taipei's proposal and also agreed with the position adopted by Costa Rica and the EU. However, it disagreed with Chinese Taipei that Members still needed to demonstrate that they had a "substantial trade interest" in a matter before they could participate in consultations under Article 4.11 of the DSU. He said that India was in agreement with the position of Costa Rica on this issue and urged Chinese Taipei to re-consider its position. Regarding the reservation expressed in the submission against the reflection of third-party arguments in panel reports, he asked what would be the benefit, if the views of third parties were not to be reflected in panel reports.

10. The representative of Hong Kong, China thanked both the delegations of Chinese Taipei and Ecuador for their contributions. On the submission of Chinese Taipei, he said that like other participants, Hong Kong, China was in agreement with most of the views expressed in the proposal. On the issue of *amicus curiae* submissions, he said that his delegation did not agree with the position adopted by Chinese Taipei and that it agreed with Mexico and India that the Appellate Body had exceeded its mandate when it laid down guidelines for the handling of such submissions. On third-party rights and the right to be joined in consultations under Article 4.11 of the DSU, he said that his delegation favoured the more inclusive criterion of "substantial interest", as had been proposed by Costa Rica. While Hong Kong, China was generally in agreement with the proposal to grant third parties greater access to meetings, it had some hesitation about third-party participation at the interim review stage. With respect to the proposal by Ecuador, he said that his delegation was still reviewing it, and as a preliminary comment, he would like to observe that it might be premature to determine the level of nullification and impairment before the expiry of the reasonable period of time for the implementation of the recommendations and rulings. The level determined by the arbitrator would have to be adjusted, if the non-conforming Member were to partially implement the recommendations and rulings of the DSB. It would be helpful if Ecuador could indicate whether it had taken this point into account.

11. The representative of Cuba thanked Chinese Taipei and Ecuador for their contributions and said that in relation to the proposal by Chinese Taipei, her comments would focus on third-party rights, as they had already provided their comments on transparency and *amicus curiae* submissions at the previous meeting of the Special Session. Regarding transparency, she said that Cuba did not share the view of Chinese Taipei regarding the need to maintain the requirement of substantial trade interest, as

a pre-requisite to the participation of third parties in consultations. In that context, she said that her delegation was in agreement with the views of Costa Rica on this issue. She further said that her delegation was in support of the proposal by Jamaica regarding the need for the elaboration of guidelines in order to avoid the arbitrary rejection of third parties' requests for consultations. Cuba supported all proposals which would have the effect of strengthening third-party rights. With regard to Ecuador's proposal, she stated that Cuba was still examining it and would provide its comments at a future meeting.

12. The representative of Korea thanked Chinese Taipei and Ecuador for their contributions. Regarding the proposal by Chinese Taipei, he recalled the comments of his delegation at the previous meeting of the Special Session and reiterated its support for most of its elements. With respect to the proposal from Ecuador, he said that Korea had examined it closely when considering the appropriate time to determine the level of nullification or impairment. In Korea's view, the answer to this question was tied to the remedy structure in force at the WTO. If it had been possible to obtain a retrospective remedy under the current system, it would have made sense for the level to be determined by the original panel, as had been suggested by Mexico. Given that under the current system, remedies were of a prospective nature, the appropriate time to determine the level of nullification and impairment appeared to be some time after the ruling of the compliance panel.

13. The representative of Chinese Taipei said that she would like to react to some of the comments made by participants. In relation to the participation of third parties in the consultations phase when the DSB was yet to exercise its adjudicatory functions, she said that it was necessary to maintain the requirement of "substantial trade interest", as the parties should be given enough space to explore the possibility of finding a mutually satisfactory solution to their dispute. The involvement of all third parties in the consultations could complicate the process and make it harder for an agreement to be reached. She said that Chinese Taipei could agree to Jamaica's proposal that guidelines should be elaborated in order to prevent the arbitrary refusal of third-party requests for consultations. She further said that in the interests of judicial economy, panels and the Appellate Body should not be required to take into account the views and arguments of third parties in their reports. They only needed to address those claims necessary to resolve the dispute between the parties. A primary objective of Chinese Taipei's proposal on transparency was to increase the access of third parties to relevant documentation and to increase generally their knowledge about the dispute settlement process. She said that Chinese Taipei would take into consideration the views expressed by participants when drafting its legal text for the consideration of the Special Session.

14. The representative of Ecuador thanked participants for their comments on its proposal and said that his delegation was willing to discuss it further with any interested participant. In relation to the comment by Korea on the sequencing issue, he said that it was imperative for there to be a multilateral determination on non-compliance before steps could be taken to suspend concessions. There were several advantages in determining early in the process the level of nullification and impairment. Firstly, it was an incentive to ensure compliance; secondly, it could facilitate compensatory negotiations in the event of non-compliance; and thirdly, it would inform the parties as to the nature of trade interests at stake and assist the Member which wanted to suspend equivalent concessions in the event of non-compliance and lack of agreement on compensation. He distinguished the proposal by Ecuador from that of Mexico and said that its proposal would not have retroactive effect. With respect to the question from Thailand, and the last sentence of paragraph 3*ter* in its proposed legal text, he said that the sentence was necessary because Ecuador was advancing the possibility of an initial arbitration to determine the level of nullification and impairment and that arbitration could be readjusted as a result of a determination of partial compliance. Until this partial compliance determination had been made, the level determined could not be readjusted or appealed against by the parties. With respect to the question raised by Hong Kong, China in relation to the appropriateness of determining the level of nullification and impairment before the expiry of the reasonable period of time, he said that Ecuador's proposal would not bring about a dramatic change in the present system; the effect of its proposal would be a few days, perhaps one month before the

expiry of the reasonable period of time, at which time the defendant would have already informed the DSB about its inability to comply immediately, and that therefore, as from that time, it would no longer be in compliance with the recommendations and rulings of the DSB. Since there would now be a situation of non-compliance, negotiations could commence in order to determine the reasonable period of time. This could also be the appropriate moment to determine the level of nullification and impairment.

15. The representative of the United States expressed his appreciation for having been given the opportunity to present the joint submission by Chile and the United States on improving flexibility and Member control in dispute settlement proceedings. He said that a number of participants had emphasized in their interventions that the central objective of the dispute settlement system was the prompt resolution of disputes between parties. For that reason, participants had emphasized both the importance of ensuring that dispute settlement procedures facilitated resolution of a dispute and, as part of this approach, the need for flexibility in the system to allow parties to resolve disputes in a prompt manner. While Members had acknowledged the general effectiveness of the DSU, there had been concerns that some limitations in the current procedures might have resulted, in some cases, in an interpretative approach, or in legal reasoning being applied by WTO adjudicative bodies that could have benefited from additional Member review. In addition, the reasoning and findings of reports might at times go beyond what the parties considered necessary to resolve the dispute, or, in some circumstances, might even be counterproductive to resolving the dispute. At present, there was little that parties or Members could do about this. Dispute settlement reports were a "take it or leave it" proposition, where Members must accept or reject the reports in their entirety, without modification. It was the belief of the United States that these negotiations offered an opportunity to change this, and to introduce greater Member control and input into the dispute settlement system. The advantages of having flexibility in the system had been alluded to by a number of Members.

16. The United States believed that these negotiations offered an opportunity to build upon the flexibility that was already there to ensure that the system itself did not pose obstacles to Members' efforts to find a solution to their disputes. The joint submission set forth several options on how this might be accomplished. One option would be to provide for interim reports at the Appellate Body stage, as was currently provided for at the panel stage. Inasmuch as there was no appeal from Appellate Body reports, it was particularly important that parties had an opportunity to address the reasoning in these reports and, through their comments, ensure that they were of the highest quality and credibility. Another option would be to provide a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that were not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference. Again, the purpose of the dispute settlement system was to resolve disputes. Unnecessary or unhelpful findings did not serve that purpose. A third option would be to provide for some form of a "partial adoption" procedure, in which the DSB would decline to adopt certain parts of reports, while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute. In effect, adoption by negative consensus would be applicable not simply to the report as a whole, but to its parts. If there was a consensus that part of a report should not be adopted, it would not be. A fourth option would be to provide the parties with a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue working on resolving the dispute. Currently there was no provision for suspending Appellate Body proceedings once commenced, and panel proceedings could only be suspended if the panel accepted the request of the complaining party. If Members wished to seek the preferred result of a mutually agreed solution, the dispute settlement process should not be so rigid as to stand in the way. A fifth option would be to ensure that members of panels had appropriate expertise to appreciate the issues presented in a dispute. Experience to date had shown that it could be helpful for the panelists to have the appropriate expertise concerning the particular issues in a dispute, although the current agreement did not address this issue. Finally, another option would be to provide some form of additional guidance to WTO adjudicative bodies on the scope and nature of the task presented to them.

17. The United States said that, in the view of the co-sponsors, through elaboration and adoption of these options, Members could strengthen their ability to ensure that the dispute settlement system served them in their efforts to resolve disputes, and to ensure high quality reports which enjoyed the highest level of credibility and support. The co-sponsors looked forward to discussing their joint submission on greater Member control and greater flexibility at the present meeting and in future sessions. The representative of the United States said that the co-sponsors welcomed input on how to structure the options in the joint submission and said that the co-sponsors were willing to work with participants in developing the particular details for each option and on other means by which Members could improve the operation of the DSU.

18. The representative of Chile said that its joint proposal with the United States was inspired by one of the fundamental objectives of the dispute settlement system – the prompt settlement of disputes. For this objective to be realised, it was necessary for the parties not only to have control over the process, but also the requisite flexibility to negotiate mutually agreed solutions. He said that in Chile's experience, it had not always been possible for the parties to achieve this objective, particularly at the Appellate Body stage. He said that Chile was willing to support proposals aimed at expanding third-party rights, but cautioned that increased rights meant increased responsibilities. increased third-party rights but emphasized that it must be borne in mind that along with such rights go obligations.

19. The representative of Costa Rica thanked Chile and the United States for their proposals. He also thanked Mexico for its proposal which was aimed at addressing one of the major problems confronting the dispute settlement system. He said that the DSU had proved to be an extremely useful tool for all Members, particularly smaller countries such as Costa Rica which had limited political and economic power and had to rely on international law to protect their rights. The dispute settlement system had undeniably fulfilled this objective and Costa Rica could attest to its benefits. However, it should be recognized that the current dispute settlement system did not differ very much from the previous GATT system, particularly in relation to the remedies that could be obtained by the complaining Member. Like the GATT system, remedies under the DSU were prospective in character; past wrongs were not rectified even if it could be established that they had damaging effects on the economy of a Member. It was in this context that the proposal by Mexico was very instructive. As regards the proposal relating to the retroactive determination and application of nullification and impairment, he said that while it might appear to be very revolutionary, this concept was not unknown under general international law. The rules of the International Court of Justice required the elimination of all consequences of the illegal act and the re-establishment of the situation which had existed previously. The WTO Agreements on Anti-Dumping and Subsidies and Countervailing Measures had elements of retroactivity. To prevent the abuse of this remedy, it would be essential to determine as from which date the level of nullification and impairment should be calculated. It would not be proper, for example, to allow a Member to seek redress if it had not taken any steps to assert its rights which had been violated for a considerable period of time by the responding Member. As regards preventive measures, he said that this remedy was not unknown in most domestic and international legal systems. While it could safeguard the rights of Members, it could also pose serious challenges for countries with small economies were their exports subjected to such measures. Steps must be taken to avoid the gross abuse of this remedy. He urged participants to consider seriously the proposal by Mexico, as it could strengthen the dispute settlement system for the benefit of each Member.

20. The representative of India welcomed the proposal by Mexico and said that it had identified one of the major problems facing the dispute settlement system. Currently, it was possible for a measure which had been found to be WTO-inconsistent to remain in force for at least three years without any consequence. With respect to the proposal on early determination and application of nullification and impairment, he said that it was India's understanding that the determination made by the panel in respect of the level of nullification and impairment could subsequently be modified by the Appellate Body, and that suspension of concessions and compensation would be effective from the

date of adoption of the panel/Appellate Body reports by the DSB. It had also been stated by Mexico that its proposal would result in fewer arbitrations to determine the reasonable period of time. Given these statements, he queried whether the concept of reasonable period of time would have any relevance in the dispute settlement system if the proposals of Mexico were adopted. He added that according to the Mexican proposal, if there was any disagreement between the parties regarding the measures taken in compliance with the DSB's recommendations and rulings, the suspension of concessions and compensation would not be lifted until the findings of the compliance panel. Such a result would amount to penalizing the losing party, if the measure was subsequently found to be WTO-consistent. He urged Mexico to re-consider this aspect of its proposal. With respect to retroactive determination and application of nullification or impairment, he said that it required careful consideration and that his delegation would provide detailed comments at a future meeting of the Special Session. He said that as an interim comment, India was of the view that if the remedy was going to be available from the date of imposition of the measure, it could raise certain technical problems comparable to those experienced in cases involving quantitative restrictions taken for balance-of-payments reasons. Such measures would be consistent when first adopted, but could be found later to be WTO-inconsistent. He said that if panels were required to determine the consistency or otherwise of a measure from the date of the panel request and/or from the date of imposition of the measure, there could be considerable difficulties in fulfilling this requirement. Given these considerations, India was a little hesitant about supporting this proposal. With regard to preventive measures, he said that unless detailed conditions were agreed upon, this measure could be abused easily by Members. It was necessary for there to be a definition of the circumstances that would amount to "damage that would be difficult to repair". He referred to the statement made by Costa Rica and said that while it was true that the remedy was available in a number of domestic jurisdictions, there were detailed rules governing when it could be awarded in a dispute. The absence of detailed rules at the WTO meant that the issue had to be approached with maximum care. He said that there was the possibility that the introduction of this remedy would undermine the effectiveness of trade remedy measures. It could be envisaged that some countries might take the view that irreparable damage would be caused should their exports be subjected to trade remedy measures, such as anti-dumping duties. He inquired whether the responding Member would be required to suspend the application of the questioned measure only against the complaining Member or against all other Members. With respect to negotiable remedies, he said that the concept could give rise to certain practical problems related to implementation and needed careful scrutiny. It had been demonstrated that suspension of concessions might not be a viable alternative in disputes involving developing countries. It was because of this practical limitation that India had advocated that developing countries should be given the right to cross-retaliate in its joint proposal with a number of developing countries. Since retaliation was also likely to hurt the complaining Member, it might be difficult to get countries that would be willing to purchase the right to subject its own economic operators to higher levels of duty and other forms of retaliatory measures.

21. The representative of Australia welcomed the joint proposal by Chile and the United States and said that it contained important ideas that deserved the close attention of Members. He also thanked Mexico for its innovative and interesting proposal which addressed one of the key problems confronting the WTO dispute settlement system, namely the possibility for an inconsistent measure to remain in place for a considerable time without any consequences. He said that Australia was broadly supportive of the thrust of the proposal and believed that there was scope for improvement of the system in order to induce prompt and effective compliance. With regard to the specifics, he said that Australia had some reservations against the proposals relating to preventive measures and negotiable remedies. It was, however, open to the proposal relating to the early termination and application of nullification and impairment and was assessing the implications of making this determination retroactively. He said that the overall shortening of the current DSU time-frames was in a way consistent with the objective of the Mexican proposal, which was to ensure prompt and effective compliance. Simple time-saving measures effectively reduced the amount of time a WTO-inconsistent measure could remain in place. In this context, he said that the Australian proposal,

which suggested accelerated procedures for disputes involving safeguard measures and other simple time-saving measures, shared the same objective as the Mexican proposal.

22. The representative of Mexico recalled the discussion that took place on its proposal at the November Special Session and said that his delegation was pleased with the attention being given to it by participants. He further said that Mexico was also encouraged by the acknowledgement of participants in the negotiations that the one of the major problems facing the dispute settlement system was the ability of a Member to maintain an inconsistent measure for a considerable period of time without any consequences. He said that given the fast approaching deadline, it was imperative that participants start exploring the possibility of reaching consensus on the proposals. On its part, Mexico was willing to take into account the comments on its proposal and work with any interested participant in further refining its elements. He said that he would attempt to provide responses to some of the questions posed by participants concerning its proposal. As a general comment, he said that Mexico's proposal was practical in that it intended to address one of the major problems facing the dispute settlement system. It was not revolutionary as had been labelled by some participants; the essence was to try to incorporate recognised concepts in domestic and international legal systems in the dispute settlement system.

23. With respect to question posed by Thailand and Norway concerning the early determination and application of nullification and impairment, he said that the proposal by Mexico that the award should be kept confidential until the adoption of the Appellate Body report was defensible. He recalled in that connection that in its proposal Mexico had suggested: (a) giving Members the right to appeal arbitration awards; or (b) having the Panel/arbitrator modify its award in light of the findings of the Appellate Body. Confidentiality was only relevant for the second option. Procedures under Article 21.5 would essentially involve a parallel exercise of a Panel and an arbitrator, in which the arbitrator would not circulate its award before a final decision was either made by the panel or Appellate Body. He said that this idea had been incorporated into the proposal, partially because of Members' familiarity with it. He said that Mexico was willing to explore different approaches to this matter. With respect to the question raised by Norway regarding whether the determination of the level of nullification or impairment was a question of law to be resolved by the Appellate Body, he said that Mexico did not have a definite answer at this moment and would reflect further on it. He said that should Members consider that it was not a question of law, they could modify Article 17 of the DSU to allow the Appellate Body to take up this issue. With respect to the question posed by Hong Kong, China regarding what would happen if the Appellate Body were to modify the findings of the panel, he said that if the first option was selected, the level of nullification and impairment determined by the panel would not be reviewed by the Appellate Body, but the arbitrator would have the opportunity to modify its confidential preliminary ruling in light of the findings by the Appellate Body's finding. If the second option was selected, the Appellate Body itself could modify the level of nullification and impairment determined by the panel. In both cases, however, the authorization to suspend concessions would be based on a final award. With respect to the question by Norway whether they would be a system of daily fines on a progressive scale, he said that this was not part of Mexico's proposal, but given its potential to induce compliance with the recommendations and rulings of the DSB, Mexico had an open mind on it. With respect to the questions posed by Argentina, Brazil, Canada, Chile and Cuba concerning the importance of awards being made only after final decisions had been either made by the panel or the Appellate Body, he said that while an award could be made on the basis of provisional findings, ultimately what mattered was that an authorization to suspend concessions had to be based on a final DSB decision (*res judicata*). He said that even if the right was not created for the DSB to adjust the level of nullification or impairment, the level, as determined by the Panel/arbitrator, would have to reflect the findings made by the Appellate Body. The reason why Mexico had proposed that the level of nullification or impairment be decided by the original panel was that it would concentrate the minds of Members on the actual level of nullification or impairment before they decided to initiate a case. It would also encourage parties to negotiate which could invariably result in lesser appeals.

24. With respect to the questions posed by Canada, India and Malaysia concerning whether Members would no longer have a reasonable period of time to implement the recommendations and rulings of the DSB, he said that it was not the intention of Mexico to abrogate this right of Members. However, by permitting the suspension of concessions from the day of the adoption of the panel/Appellate Body report, Mexico was attempting to give meaning to Article 21.3 of the DSU, which obliged Members to promptly comply with the recommendations and rulings of the DSU, unless it was impracticable to do so. The incentives created by the suspension itself would induce Members into complying "in the shortest period possible within their legal system". It was unfair to expect the complaining Member to bear the brunt of slow compliance, in addition to the costs it would have already suffered as a result of the maintenance of the illegal measure by the responding member before and during the dispute settlement proceedings. The representative of Canada expressed doubts about whether knowledge of the level of nullification or impairment would actually induce Members' compliance with the recommendations and rulings of the DSB. The representative of Mexico said that while knowledge of the level of nullification or impairment might not modify Members' conduct in all cases, knowledge of the economic realities, including the amount at stake could certainly prove to be relevant in some cases. One possible advantage was that it could reduce the number of actions initiated under the DSU. The representative of Canada said that the Mexican proposal could make compliance less enticing, (e.g., by creating domestic pressure to "just pay for it"). The representative of Mexico accepted the truth of this statement and said that this proposal was, in any event, an improvement of the current system, which allowed Members to violate their obligations without even attempting to "just pay for it". He said that Mexico would reflect on the suggestions by some participants that the early determination and application of nullification or impairment should not be made mandatory. The representative of Brazil recalled that the elimination of the interim report at the Panel phase had already been proposed, and said that it this was to be accepted, then an opportune time had to be found to trigger this procedure. He said that Brazil was convinced that the concept of an early determination and application of nullification or impairment would be an important improvement of the current system, no matter what the precise moment was determined to be in order to activate the arbitration. He further suggested that the complaining Member should be made to request the level of nullification or impairment of its benefits, presumably in its first submission. The representative of Argentina queried whether this would not result in a parallel litigation on the validity and the level of nullification or impairment. The representative of the EC asked whether the panel could resolve the two issues at the same time. The representative of the Mexico said that it would be better if parties were to start talking about the level of nullification or impairment, once all their substantive arguments had been considered (at least at the Panel stage). He noted that in some judicial systems, it was possible for the substance of the violation to be argued together with the level of damage.

25. The representative of Argentina had inquired if it was possible that a measure that had been modified and later condemned in an Article 21.5 process could cause a level of nullification or impairment different to the one caused by the original measure. He referred to Article 22.4 of the DSU which provided that "[t]he level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment". Bearing in mind that Article 21.5 referred to "recourse to these dispute settlement procedures", he said that it was the expectation of Argentina that an Article 21.5 panel would rule that the new level of nullification or impairment should conform with the requirements of Article 22.4. The representative of the Philippines observed that the Mexican proposal appeared to have introduced a new element in the injury analysis. The representative of Mexico stated in response that it was not the objective of the Mexican proposal to introduce a new concept, but to bring forward the time when the level of nullification or impairment was determined and when authorization to suspend concessions was granted. With these new elements, the current DSU rules would apply.

26. With respect to the question posed by Thailand whether Mexico's proposal on retroactive determination and application of nullification and impairment was similar to the common law principle of *restitution in integrum*, the representative of Mexico said that the aim of its proposal was

to rebalance concessions upset by the WTO-inconsistent measure being maintained by the responding Member. With respect to the other question posed by Thailand concerning whether the date of the retroactivity could be determined by the panel or Appellate Body, the representative of Mexico stated that this was not foreseen in the proposal. However, should Members agree on the appropriate moment, it could be applied in all cases. He inquired whether Members would want this determination to be made by the adjudicative bodies. The representative of Chile observed that this concept could be more easily implemented in trade remedies cases such as anti-dumping. The representative of Mexico concurred with this statement and said that retroactive determination had been made in some cases. That an important percentage of disputes in the WTO related to trade remedies underscored the potential benefit of this proposal. He continued by saying that so long as a determination of the level of nullification or impairment was feasible (and experience had shown that even SPS measures and TRIPS obligations could be measured), applying it retrospectively was only a mathematical process. In any event, he said Mexico failed to see why a *de facto* waiver should be permitted in other agreements.

27. The representative of Chile had asked whether the determination would take into account both the static and dynamic effects. The representative of Mexico said in response that his delegation was still working on some guidelines, but had not proposed any particular methodology. He said that Mexico was interested in working with all participants to develop the guidelines, particularly those which had been involved in arbitrations. The representative of Argentina asked Mexico whether it was possible for agreement to be reached on its proposal before the May 2003 deadline. The representative of Mexico reiterated the willingness of his delegation to work closely with participants with a view to refining the elements of its proposals with a view to getting agreement on it before the May 2003 deadline. The representative of Korea asked whether the introduction of a retroactive remedy regime would also necessitate a fundamental change in the current DSU, for example, to Article 19.1. The representative of Mexico agreed that in order to introduce such a regime, Article 19 had to be amended. The representative of the EC raised the issue of the overlap between preventive and retroactive remedies, stating that they dealt with similar issues. He inquired about how they could be combined effectively. The representative of Mexico stated in response that the amount of preventive measures could be deducted from the final determination of nullification or impairment. Preventive measures served to bring a timely relief before a particular industry was severely damaged, something that retroactivity might not be able to achieve in due time. If the final level of nullification or impairment turned out to be smaller than that of the preventive measures authorized (either because the measure was considered not to be WTO-inconsistent or because the level of a certain inconsistency was lesser than what originally was expected), the responding Member should be able to receive compensation for such excessive application of preventive measures, therefore restoring the balance of rights and concessions.

28. The representative of the Philippines had stated that compensation was only effective if actually given. The right to suspend concessions had more apparent than real benefits. The representative of Mexico stated that it was not the objective of its proposal to create an obligation to compensate retroactively, but rather to give more leverage to complaining Members in compensation negotiations. With respect to suspension of concessions, he said that retroactive determination and application would enhance the negotiating position of complaining Members and induce compliance by responding Members. He admitted that in certain cases, it would be difficult for some Members to suspend concessions prospectively let alone retroactively. The representative of the Philippines asked what would happen to old measures such as 1916 Anti-dumping Act of the United States. The representative of Mexico responded that any amendments agreed to in the negotiations could only be applied prospectively.

29. With regard to the proposal on preventive measures, the representative of Korea stated that it might conflict with Article 7 of the DSU, which set out the standard terms of reference of panels and Article 11 which defined their functions, as well as the principle that the recommendations and rulings of the DSB could not add to, or diminish the rights and obligations provided in the covered

agreements (Articles 3.2 and 19.2 of the DSU). The representative of Mexico said that since its proposal would have the effect of rebalancing concessions granted by Members, it would allocate better the rights and obligations of Members, therefore giving effect to the relevant provisions of the DSU. He further added that a timely authorization to tackle the negative effects of a potentially illegal measure would effectively preserve the rights acquired by the complaining Member under the WTO Agreement. If preventive measures were incorporated into the DSU, they would become an integral part of the rights and obligations of the covered agreements. Therefore, its exercise would be consistent with Articles 3.2 and 19.2 of the DSU. The representative of Thailand inquired how the proposal would work in practice. The representative of Mexico responded that Mexico was proposing a two-step system: (i) the panel could, in exceptional circumstances, request the responding Member to suspend the application of the challenged measure (or rather, its harmful effects) for a certain period of time; and (ii) if this suspension was not achievable or done within a short period, then the panel might be able to authorize the complaining Member to take measures to prevent the damage that would be difficult to repair. The representative of Canada asked whether Mexico was proposing to insert a unilateral determination into the process. The representative of Mexico said that was not the case and that the provisional determination would be made by the Panel. The representative of Chile stated that the proposal by Mexico would invariably result in the prejudging of the substantive issue between the parties. The representative of Mexico responded that the panel would be required to make a pre-assessment of a number of elements, including the validity of the measure and the nature of the irreparable damages that were likely to occur should the measure be maintained, before authorising recourse to this remedy.

30. The representative of Thailand had asked whether Mexico would consider inserting punitive damages into the system. The representative of Mexico reiterated his statement that it was not the objective of its proposal to create new obligations, but rather to restore the balance of rights and obligations under the WTO Agreement. Against this background, it was not the intention of Mexico to introduce such a concept into the system, as it would create a new obligation. The representatives of Norway and the EC asked Mexico to give an indication of the type of cases where this remedy could be invoked. The representative of Mexico gave the following example: "Assuming Member "A" has recently imposed anti-dumping duties on goods from Member "B". Member "B" is of the view that the measure is unjustified and requests the establishment of a panel and seeks authorisation to impose a preventive measure. The panel, after making a pre-assessment of the relevant elements and analysing the specific situation of the domestic industry in "B", concludes that irreparable damage would be caused, if the challenged measure were to remain in force and as such requests "A" to suspend the measure or its harmful effects. To continue exporting to country "A", country "B" offers to post a bond covering the duties to be paid on its exports to A. However, "A" argues, that its internal legislation does not allow it to accept the bond. In the circumstances, the panel allows "B" to provide loans to exporters to pay those anti-dumping duties in order to avoid the irreparable damage."

31. The representative of Hong Kong, China had asked what these irreparable damages might be. The representative of Norway asked whether this remedy could be introduced with a high threshold for its utilization, such as used in the International Court of Justice and other international bodies. The representative of Brazil queried how one could establish a well-founded right and the damage that might ensue I there was a delay. The representative of Argentina asked whether a panel report would be needed and how potential abuses could be limited. The representative of Mexico replied that it would be necessary to develop clear criteria in respect of which circumstances could be regarded as serious enough to justify immediate action in order to prevent irreparable damage from occurring. He emphasized that each case was different and every situation had its own particularities that needed to be taken into account. He said in that connection that the rules, customs and practices of other international adjudicatory bodies could be useful in that regard. Given the nature of this remedy, it should be resorted to sparingly.

32. The representative of Canada had asked what measures the defending Member could apply during the suspension of the challenged measure. The representative of Mexico agreed with Canada

that, in some situations applying no measure at all might be a feasible option, but in other situations some type of interim measure might be essential. The measures taken by the defending Member might well vary from case to case. The representative of Canada inquired whether in all cases the Member could apply the new measure immediately. The representative of Chile questioned how it would work with respect to legislative measures. The representative of Mexico replied that there might be various scenarios in which the immediate suspension of the measure was not necessarily feasible, for example, in the case of legislation. He added, however, that an important feature of Mexico's proposal was that it created the legal means for a Member to suspend a measure, or at least its harmful application, something that at the moment did not exist. The representative of Canada also asked if there would be any control in the selection of the measures that would be applied. The representative of Mexico stated that preventive measures could be applied only to the extent authorized by the Panel and should not affect the interests of third-country Members. While the complaining party would be free to choose the measure to be taken, that measure should be aimed exclusively at reducing the damage that its domestic industry was suffering; so, in practice, this might reduce the scope to a limited set of actions.

33. The representative of Chile had asked if the new measure was going to be adopted by the DSB and whether it could be appealed. The representative of Mexico replied that they had not taken a definitive position on whether the section on preventive measures had to be adopted before the rest of the panel report, and that it was still considering this point. He recalled that currently, panels made preliminary determinations on various issues, which were only adopted together with the full report. Inasmuch as this authorization was an issue of law or a legal interpretation, it might be subject to an appeal. The representative of Brazil asked whether Mexico considered applying these remedies in all cases or only in areas such as trade remedies. The representative of Mexico said in response that it was probably easier to apply this concept to cases involving trade remedies. He said, however, that the intention of Mexico was to implement preventive remedies for all WTO cases. The representative of the Philippines asked if Mexico considered that a game of creditors and debtors would be created, if the measure was found to be WTO-inconsistent. The representative of Mexico responded that to some extent this game of creditors and debtors already existed. It existed even without respecting the rights of third Members. A Member that needed to react to a measure taken by another one would do whatever was necessary to protect its domestic industry, regardless of the long-term consequences. What Mexico was proposing was having the opportunity of legally and transparently avoiding the irreparable damages. Moreover, the boundaries of the measures would be effectively regulated and limited. The representative of the Philippines asked who would determine whether the harmful effects of the challenged measure had been mitigated. The representative of Mexico responded that the complaining Member had an interest in seeing to the mitigation of the effects of the challenged measures.

34. With respect to negotiable remedies, the representative of Ecuador asked how this would work in practice and whether it could be created in the light of other proposals. The representative of Argentina asked how the negotiation could take place. The representatives of Argentina and Canada asked how the transfer of the right could be implemented so as to be compatible with the disciplines of the WTO. The representative of Mexico answered that the system would not need any substantial change, to implement negotiable remedies. Once a Member had received an authorization to suspend benefits, that Member would have the legitimate right to take measures which would otherwise be WTO-illegal up to a certain amount. The concept of negotiable remedies would only require a change of name of the Member enjoying such a benefit, which could be made through a simple joint notification or a monitoring system. Mexico did not see what principle of WTO law would be infringed, if negotiable remedies were to be implemented. The representative of Norway asked whether this proposal would still be necessary if compensation was made stronger or more binding. In response, the representative of Mexico asserted that the mere idea that a third-country Member might be able to acquire the right to suspend concessions might, in turn, provide the incentives for the losing party to buy that right, thus enhancing compensation. By knowing there was an effective threat of retaliation, the losing party would be inclined to negotiate with the complaining party on a more

suitable compensation. He said that strengthening the provisions relating to compensation alone had an obvious limitation – in cases where the responding Member adopted an uncooperative attitude. The responding Member was likely to ignore any mandatory compensation awarded in that regard. The threat of suspension of concessions would induce it to negotiate seriously with the complaining Member on an acceptable compensation package.

35. The representatives of Hong Kong, China and Cuba had asked if this proposal would not make the WTO system more political. The representative of Mexico responded by saying that the imposition of an illegal measure, in and of itself, already involved many political considerations, both domestic and external. The concept of suspension of benefits itself had the object of permitting the imposition of illegal measures for a certain time and up to a certain amount, as a response to an illegal measure of another Member. The concept of negotiable remedies had the mere object of granting this right to a Member, other than the complaining Member. The representative of Canada asked how the establishment of a market of restrictive trade measures could be avoided. The representatives of the Philippines, Poland and Uruguay added that it would create a clearing-house. The representative of Mexico noted that Article 22 of the DSU already allowed for the adoption of these restrictive measures in the form of suspension of benefits. He did, however, agree that Mexico's proposal would create a market for the suspension of benefits. The objective was to make suspension of concessions more efficient, while ensuring that this remedy was not abused by Members. Where a Member was unable to suspend concessions and negotiate that right away to a Member willing and capable of suspending concessions towards the responding Member, the complaining Member would obtain a tangible benefit from the third country which, in turn, would be given a right to suspend concessions consistently with WTO rules. The representative of Chile asked if there could be any guarantees that this remedy would not be abused by Members. The representative of the Philippines noted that some Members might initiate disputes merely for the benefit of accumulating these rights. The representative of the European Communities sought assurances that a lucrative door would not be opened with the introduction of such measures. The representative of Mexico stated that it was only fair for a Member whose rights had been infringed upon by another Member to be compensated. The entitlement would only be limited to the level of nullification or impairment caused by the violating measure. Who suspends the concessions towards the responding Member was not as important as compensating the complaining Member for the injuries that it had sustained. The representatives of Argentina and Hong Kong, China asked why would a Member acquire from the complaining Member the right to suspend concessions towards the responding Member. The representative of Mexico stated that it could well be that the acquiring Member would be responding to pressures from its domestic industry to take action against products originating in the responding Member. The possibility of being able to do that legitimately might appeal to that country. The purchase price was likely to be attractive to the acquiring Member and it could even pay for it in kind. An undertaking to invest in the complaining Member or provide it with technical assistance could be envisaged.

36. The representative of Poland had observed that the right of suspension of concessions was a right to be exercised by the complaining Member and that transferring it to another Member would not be appropriate. He suggested that the implementation of such a measure could increase protectionism. The representative of Mexico argued in response that protectionist behaviour had existed since the creation of trade, thousands of years ago. He said that while Mexico accepted that its proposal was ambitious, it could not agree with the view that it would create protectionist pressures. He reiterated his statement that Article 22 of the DSU already authorised the adoption of restrictive measures in response to the adoption of an inconsistent WTO measure. Contrary to the view expressed, the Mexican proposal would create incentives for compliance with the recommendations and rulings of the DSB. It also proved that the long held view that suspension of concessions was anathema to trade creation was wrong. Suspension of concessions could be trade creating depending on how it was applied. The view that some Members owing to their economic and trade conditions could apply or benefit from suspension of concessions had also been disproved. By being able to negotiate its right to another Member in exchange for a benefit, suspension of concessions could benefit any Member who had been authorized to take such an action.

37. The representative of Chile noted that Chile had not always held the same views as the United States in the WTO, especially in these DSU negotiations. However, they did share common interests and concerns on some key issues in the multilateral trading system, including on agriculture. The joint proposal by the United States and Chile was intended to address the systemic concerns of both countries over the evolution of the jurisprudence and practices of the Appellate Body. He said that Chile had been observing with growing concern, certain decisions by panels and the Appellate Body that had disregarded the context, object and history of the negotiations of the Uruguay Round Agreements. Those conclusions were re-shaping the history and re-writing the results of the negotiations, thereby altering the balance of rights and obligations of Members. He recalled that Chile had repeatedly emphasized that the WTO dispute settlement mechanism was not a judicial system *per se* and that it had been designed in such a way as to assist Members to resolve their trade disputes. This was how the DSU came into being, as a delicate balance between the inherently bilateral nature of any dispute and the fact that such a mechanism unquestionably formed part of a multilateral framework that conferred rights and obligations on all WTO Members, including when they were not party to a particular dispute. He stressed that a central objective of the dispute settlement system was the prompt settlement of disputes between the parties in a manner that was consistent with the WTO Agreement. To achieve such a settlement, Chile believed that there must be room for manoeuvre, allowing the parties involved to negotiate mutually agreed solutions, including in the later stage of the process. Panels and the Appellate Body could not be viewed as courts of law and their procedures should be adapted to the requirements of the parties involved, granting them the flexibility they needed to work towards negotiated settlements.

38. The reports of panels and the Appellate Body allowed the parties to the dispute to gain a clearer insight into what was at stake and constituted a basis for dispute settlement. They were not enforceable rulings, as in national legal systems. It was in this context that the parties should retain control over reports issued by panels and the Appellate Body, until such time that they were adopted by the DSB. Conferring power on the parties did not mean denying the multilateral nature of the DSU. This was why Chile supported some proposals that reaffirmed this multilateral character, such as those aimed at enhancing the rights of third parties. He stressed, however, that the rights of third parties should not equal or exceed those of the parties to the dispute. It was in the same vein that Chile would not accept proposals that envisaged a larger role akin to those of courts of law for panels and the Appellate Body. Turning to the joint proposal, he said that the United States and Chile were conscious that some of its elements needed further elaboration and that they were ready to work with interested participants with a view to refining these elements.

39. The representative of Colombia thanked Chile and the United States for their proposal which added a new dimension to the negotiations. Giving parties tighter control over the dispute settlement mechanism and making it more flexible were indeed objectives which clearly formed part of the mandate conferred by the ministers at Doha. She agreed with the view that Members were frequently resorting to the dispute settlement system to fill in gaps in the multilateral trade agreements left by the negotiators. For the proper functioning of the system, it was essential for the parties to exercise greater control over the dispute settlement process. Greater control would entail greater responsibility on the part of users of the dispute settlement mechanism. The need to improve the chances of a successful outcome had, in some cases, led some Members to call for decisions and interpretations which went beyond the real capabilities of the system. Turning to the options identified by the proponents, she said that Colombia could support the elements relating to the introduction of an interim review at the Appellate Body stage, partial adoption of reports and flexibility as regards the suspension of panel and Appellate Body proceedings. She sought further details on the proponents' ideas on ensuring that panel members had the appropriate expertise and on the guidelines for the interpretation of the WTO Agreements. Regarding the latter, she made reference to the proposal by Jamaica concerning the need to kept an accurate record of the negotiating history of these negotiations.

40. The representative of Norway said that his delegation found the joint proposal quite intriguing. For its part, Norway was satisfied with the rulings of panels and the Appellate Body, even though

some cases had gone against it. The move from positive consensus to negative consensus in the dispute settlement system was a major step forward that should not be undermined. Turning to the specifics of the proposal, he said that the proposal raised a number of questions which he would like to highlight. With respect to the proposal relating to the introduction of interim reports at the Appellate Body stage, he said that given the proposal by some participants that they were unnecessary and should be discarded at the panel stage, as they did not serve any useful purpose, other than to give an opportunity to the parties to correct factual errors of panels and not influence legal interpretations or findings, he wondered why the proponents were proposing that they should be introduced at the Appellate Body stage. With respect to the proposal which would allow the parties to delete by mutual agreement certain parts of reports, he expressed doubts as to how it would work in practice. His own experience with the dispute settlement mechanism indicated that it would be difficult to get agreement of the parties to delete certain portions of a report. He wondered if there was any link between this proposal and the issue of non-compliance with the recommendations and rulings of the DSB. It was not certain if this proposal would lead to full compliance or partial compliance with reports and whether it would facilitate agreement between the parties on how the legislation of the responding Member should be changed. With respect to subparagraph (c) regarding partial adoption of reports, he again expressed doubts about how it would work in practice. Under the current system, positive consensus was required if a report was not to be adopted by the DSB. He wondered whether the proponents wish this to be changed. He also asked whether positive consensus would be required to delete certain portions of reports. It would be a retrograde step if Members were to return the practice of decision-making under the GATT in dispute settlement cases. With reference to subparagraph (d), he requested the proponents to provide further explanation as to how the suspension of panel and Appellate Body proceedings would actually work in practice. On subparagraph (e), he agreed with the proponents that panelists should always have the appropriate expertise, but questioned if the problem was not exacerbated by the requirement that panelists should not be nationals of the disputing or interested countries. He said that this proposal might fit in with the proposal by the European Communities on permanent panelists, thus ensuring that persons with the requisite expertise would always be available. With reference to subparagraph (f), and specifically as regards the rules of interpretation of WTO agreements, he stated that there were already rules of interpretation in public international law, based on the Vienna Convention and also on the rules of procedure of the International Court of Justice that had been applied by panels and the Appellate Body. These had been agreed amongst all countries in the world and had never been challenged to the best of his knowledge. He inquired as to what sort of rules of interpretation the parties would like to see apply specifically to trade agreements that would be different from the ones applied in other agreements. He referred to the issue of judicial economy and said that in appeals one or both of the parties might complain against the exercise of judicial economy and the extent to which it should be applied. The answer would clearly depend on the case at hand and it was doubtful if any particular guidance could be given in advance on how it should be exercised. He asked the proponents if they foresaw any guidelines on judicial economy under their proposal.

41. The representative of Malaysia stated that this was a proposal with which Malaysia would like to align itself. To that end, Malaysia was considering whether to be a co-sponsor of the proposal. It should be borne in mind that the dispute settlement body was not a court of law, but rather a forum in which to settle trade disputes between Members. It was important, given the recent history of what many Members had experienced and were still experiencing, that they gained control of the dispute settlement process. There were many interesting points in the paper which he looked forward to discussing with other participants. Some elements needed further elaboration and he hoped this would be provided in due course. As regards the introduction of interim reports at the Appellate Body stage, he said that Malaysia was convinced about its value to the dispute settlement process and that the time that would be lost could be compensated by the reduction of the time-frame in other stages of the process. With regard to partial adoption, he said that it was an interesting proposal which deserved further consideration. With regard to the expertise of panelists, he said that this could be achieved independently of the proposal by the EC on permanent panelists. With regard to rules of

interpretation of WTO Agreements, he said it was Malaysia's expectation that the rules would provide guidance in respect of the substantive decisions of the panels and Appellate Body.

42. The representative of Costa Rica thanked the delegations of Chile and the United States for their proposal and said that it was currently being studied by his authorities in San José after which he hoped to provide substantive comments on it. He, however, had some preliminary questions which he would like to put to the parties. With respect to the proposal relating to the ability of the parties to the dispute to delete by mutual agreement certain parts of reports, he said that this might be in contradiction with the terms of Article 7.3 of the DSU, which gave the authority to the DSB to approve the terms of reference of panels. He further noted that where the parties agree on special terms of reference, it was within the right of every Member to pose questions and seek clarifications. This demonstrated the multilateral involvement in the setting up of terms of reference. It would therefore seem inappropriate to give the parties the authority to delete certain parts of reports by mutual agreement. The fact that Article 7.2 of the DSU provided that "panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute was no justification that they could also delete certain parts of the reports. He stated that this proposal could not be reconciled with the objective of making the dispute settlement process more transparent, as access to the expunged parts would be denied to other Members and the general public. He stated that the value of case law in the WTO system went well beyond the cases themselves. Findings in previous cases were an excellent tool for shaping the multilateral trading system of the future and helping all Members to learn more about the operation of the Agreements. Allowing parties to delete certain elements of the Panel report would undermine the contribution which the dispute settlement system made to the multilateral trading system as a whole. He inquired further information from the proponents as to how their proposal would impact on the interests of third parties.

43. The representative of Australia thanked Chile and the United States for their proposal which was aimed at improving flexibility and Member control in the WTO dispute settlement. He said that the proposal raised a number of important issues which warranted further reflection by the membership. Australia saw merit in options (a), (b) and (d) of the proposal (i.e. provision of interim reports at the Appellate Body stage; mechanism for parties to delete findings in a panel or Appellate Body report; right to suspend panel and Appellate Body procedures to allow parties to resolve the dispute). Australia believed that these options would enhance Member control over the dispute settlement process. He sought clarification from the co-sponsors on the other elements of the proposal. In relation to element (c) (partial adoption procedure), he welcomed comments from the co-sponsors on possible modalities for this issue. In relation to element (e) (ensuring that panel members have the appropriate expertise), he asked if the co-sponsors envisaged an enlargement of the expertise of panellists in the context of paragraphs 1, 2 and 7 of Article 8 of the DSU, or whether they had other ideas on this point. In relation to element (f) (provision of guidance to the WTO adjudicative bodies), he said that Australia was unclear on the rationale and modalities of this element of the proposal. In particular, he sought clarification from the co-sponsors on how this element would be developed; would it be the parties to a dispute or the WTO membership who would offer this guidance. He also wondered what form would the "guidance" would take, and under what provision of the WTO agreement would such guidance be given. He asked whether the co-sponsors envisaged a structured debate taking place in the DSB prior to the adoption of reports. He said that Australia was willing to work with the proponents with a view to further refining the elements of the proposal.

44. The representative of Hong Kong, China thanked the United States and Chile for their paper and said that his authorities in Hong Kong, China were currently analysing it. He said that in the meantime he would like to offer some preliminary comments about some elements of the proposal. Generally, while giving control of the dispute settlement system to the parties had some benefits, including ensuring that panels and the Appellate Body did not deviate from their terms of reference and stray into rule-making or "filling the gaps", such as in the case of *amicus* briefs, it could also compromise the effectiveness of the dispute settlement mechanism, as the parties could delete whichever parts of the reports that they did not like, even if they were not controversial and based on

solid legal reasoning. Turning to the specifics, he said that proposal (a) did not seem to have any adverse effects, but it would prolong the Appellate Body process. He inquired from the proponents, whether they had any ideas regarding how to make up the time that would be lost. With respect to proposal (b), he said that under the current rules and procedures, parties could just make a request to "review the precise aspects of the interim report" at the panel stage, and the final panel report needed only to "include a discussion of the arguments made at the interim review stage". Thus, the proposal appeared to go much further than what was contemplated under Article 15 of the DSU. Nothing was mentioned about the power of the parties to delete anything from the interim panel report. He expressed some doubts on how this proposal would work in practice, assuming that it was accepted by participants. He said that it could be a long and difficult process for the parties concerned to agree to deleting anything from an "interim Appellate Body report", especially in cases which involved a number of co-complainants. With respect to proposal (c), he said that it was unclear who, and on what criteria would be used to decide which part(s) of the report should be adopted. It was not clear whether it would be by positive consensus or by negative consensus. If the DSB as a whole were to take this decision, it would be a retrograde step as it would invariably mean returning to the decision-making process under the GATT. With regard to proposal (d), he said that Hong Kong, China did not have much difficulty with this proposal *per se*, as suspension of panel or Appellate Body procedures were not uncommon. With respect to proposal (e), he said that Hong Kong, China was generally supportive of it, but would appreciate receiving further information as to how this could be achieved. He asked whether the proponents were considering a system or permanent panelists or a hybrid system. With regard to proposal (f), he said that Hong Kong, China shared the concerns raised by Australia.

45. The representative of Canada thanked the United States and Chile for their proposal and said that he would like to offer some preliminary comments. He said Canada shared the view that the dispute settlement system of the WTO was a central element in guaranteeing security and predictability in the multilateral trading system. Since coming into force, the DSU had demonstrated its effectiveness to the satisfaction of Members. A central objective was the clarification of the rights and obligations of Members under the agreements for all Members. In this respect too, it was only right that Members would want a DSU and DSU jurisprudence that was coherent and not subject to the individual views of some Members. Turning to the specifics of the proposal, he said that Canada found proposal (c) relating to partial adoption, an intriguing proposition. He asked how this proposal would operate in practice. With respect to proposal (d), he said that Canada saw merit in giving the parties to the dispute further opportunities to explore the possibility of reaching a mutually agreed solution to their dispute. With respect to proposal (e), he said that Canada fully shared the view that adjudicators needed to have the appropriate expertise. He said that Canada did not, however, have the same enthusiasm for the other proposals. With respect to proposal (b) regarding the possibility of the parties to the dispute to delete certain portions of reports, he said that that it raised a number of issues which had to be analysed critically. With respect to proposal (f), he said that it also raised a number of issues that needed to be clarified further by the proponents. It was unclear what sort of guidance should be provided and the role of the DSB in formulating such guidelines. He concluded by saying that Canada was willing to engage the proponents with a view to further refining some of the elements in the proposal.

46. The representative of Switzerland thanked the delegations of Chile and the United States for their contribution and said that she would like to make some general observations. She noted that the two stated objectives of the proposal were to improve flexibility and to strengthen Member control over the dispute settlement process. She said that while Switzerland appreciated the need for flexibility in the dispute settlement system to allow the parties to explore the possibility of reaching mutually agreed solutions, it did have some hesitations regarding the second objective. She said that Switzerland agreed that with the proponents that the WTO dispute settlement system was "almost unique". The independence of panels and the Appellate Body were crucial to the effective functioning of the dispute settlement system. The principle of negative consensus had ensured the smooth operation of the system by removing the power of Members to interfere in the process. This

had resulted in cases being decided on legal considerations, as opposed to political considerations. Against this background, she said that Switzerland was hesitant to support the second objective of the proposal, as it would invariably undermine the effectiveness of panels and the Appellate Body. She added that while Switzerland had been displeased with some of the jurisprudence of the Appellate Body, particularly its controversial interpretation of Article 13 of the DSU relating to *amicus curiae* briefs, it still was of the firm view that its independence should not be compromised. Turning to address the specifics of some elements of the proposal, she said that it was unclear whether the parties to the dispute could comment only on the factual aspects of the report of the Appellate Body or also the legal findings under item (a) of the proposal. With respect to proposal (e), she asked whether it was being implied that in the past, panelists did not have the requisite qualifications and experience. She asked whether the proponents had any specific ideas on how this objective could be achieved and whether they were inclined to support the proposal by the EC relating to the system of permanent panelists. She wondered whether the proposal would impact on the rights of third parties; it was not clear whether they would be allowed to comment on the interim report.

47. The representative of Japan thanked the delegations of Chile and the United States for their proposal and said that she would like to offer some preliminary comments. She said that Japan was in agreement with the proponents that the DSU had worked quite will since its entry into force in 1995. With respect to the proposal relating to the interim review of Appellate Body reports, she said that her delegation would appreciate some clarifications on the scope of review to be undertaken by the parties. Would it only be limited to the factual aspects of the report or also cover the legal reasoning as well. She said that her delegation was also concerned about the impact this proposal would have on the overall time-frame for settling disputes, especially considering the short time-frame within which reports of the Appellate Body had to be finalised. With respect to giving the parties to the dispute the possibility to delete certain parts of the report, she said that this procedure could be abused by parties and asked if there were any guarantees against such potential abuses. With respect to partial adoption, s said that her delegation shared the concerns expressed by other delegations as to how this would work in practice. On the suspension of proceedings, she welcomed the underlying reason but asked at what stage of the procedure would the parties be able to exercise this right. She asked in that connection whether there would be any time-frames for resuming the suspended proceedings. She wondered whether the decision rested solely with the parties or whether panels and the Appellate Body would have any role. With respect to the qualifications and expertise of panelists, she said that Japan was supportive of this proposal and asked whether the proponents had any ideas as to how this objective would be fulfilled. With respect to providing guidance to adjudicative bodies, she wondered whether the proponents intended the development of general or specific guidelines.

48. The representative of Ecuador thanked the delegations of Chile and the United States for their proposal and said that he would like to offer some preliminary comments. He recalled that Ecuador had also in its earlier statement proposed the need for the parties to be given control over the dispute settlement process. He said, however, that the approach being advocated by it was different from that being advanced by the proponents. He said that certain aspects of the joint proposal were not clear and needed to be clarified. It was, however, doubtful if this could be accomplished before the end of May. A distinction needed to be drawn between giving the parties control over the case in which they were involved and the dispute settlement process itself. It was imperative for the independence of panels and the Appellate Body to be guaranteed. A close examination of the proposal by Chile and the United States revealed that it would not compromise the independence of panels and the Appellate Body. It was, however, not clear if giving total control over the dispute settlement process would in some way affect the orientation of reports of panels and the Appellate Body.

49. The representative of Israel thanked the delegations of Chile and the United States for their contribution and said that Israel was supportive of the proposal to give the parties to the dispute the flexibility to negotiate mutually agreed solutions to their dispute. She said, however, that Israel would be interested in getting more information about how the proposal would work in practice. She emphasized a particular interest in the clarification of the issue (f) relating to the provision of

additional guidance to the adjudicative bodies. She said in that context that her delegation was in agreement with the views expressed by Australia, Hong Kong, China and Canada.

50. The representative of Egypt thanked the United States and Chile for their proposal and asked whether the proponents could clarify certain aspects of their proposal, particular the elements relating to partial adoption under item (c) and additional guidance to adjudicative bodies under item (f). He also asked whether the proposed modifications to current dispute settlement system would not affect its neutrality and compromise the security and predictability offered by it.

51. The representative of Argentina thanked the United States and Chile for their proposal and said that he would like to make a preliminary observation. While the proposal contained some interesting elements, it also contained some controversial aspects which needed to be examined carefully. He said that Argentina was generally in agreement with the views expressed by previous participants, particularly Norway and Australia. He further said that Argentina was open to considering any clarifications that might be provided by the proponents on the controversial aspects of their proposal. Turning to the specifics of the proposal starting with item (b) which would authorise the parties to delete certain parts of the report by mutual agreement, he said that Argentina was not clear how it would operate in practice. He also asked whether third parties would have any role to play in issues which might be of systemic interest to them. He observed that the implementation of this proposal might possibly diminish the role of the reports of the panel and the Appellate Body to a certain degree. That would mean that the total impact over the system might not necessarily be positive. Regarding item (c) concerning the partial adoption of reports, he queried how this would be put into effect. He said that this proposal might affect the way in which reports were currently adopted. The principle of negative consensus which was used in adopting reports was one of the most significant achievements of the Uruguay Round and it should not be compromised. He further said that while Argentina was in agreement with the view that the parties should be able to request panels and Appellate Body to suspend their work, it was also of the view that the provisions of Article 12.12 could be adapted to give effect to the intention of the proponents. As regards item (e), he asked how it could be ensured that panelists had the requisite knowledge and expertise in any given case. With regard to item (f), he inquired whether the proponents were of the view that additional rules were required to supplement Articles 31 and 32 of the Vienna Convention.

52. The representative of the European Communities thanked the United States and Chile for their proposal and said that he would like to give a preliminary reaction to it, as the views of the member states of the European Union had not been sought. As the proposal stood, it was still in the form of objectives and it did not enable the reader to have full knowledge of the precise intent and consequences of such a proposal. Before turning to comment on the proposal, he said that he would like to make two general observations: An objective of the dispute settlement system was the prompt settlement of disputes between the parties. This implied that the bilateral character of the dispute settlement system should be preserved. It should be also borne in mind that according to Article 3.2 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". It was further stated in this article that "Members recognize that it serves to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". As rightly observed by Canada, apart from its function of settling disputes directly between Members, the dispute settlement system also played a vital role through its clarification of the existing agreements, thus ensuring security and predictability in the multilateral trading system. He said that in the joint proposal, the proponents envisaged the situation where the WTO Agreement would not contain a specific provision to address a situation and a panel would attempt to fill this gap through its ruling. In such a situation, they contended that the Panel might add to or diminish Members' rights and obligations under that particular agreement. While this might happen, it was not in the view of the EC something which could be said to affect the actual operation of the DSU. He asked if the United States could provide a list of cases where such situations might have happened. He said that it so happened to be the case that usually the prevailing party would in most cases be satisfied with the rulings of the Panel and the

Appellate Body and the losing party would have strong reservations against the adoption of the reports.

53. Turning to the proposal starting with item (a) concerning interim reports at the Appellate Body stage, he asked whether the report would be circulated only to the parties or whether it would be circulated also to third parties, the entire WTO membership and also to the general public. Given the view of the United States that disputes should be settled promptly, she wondered whether the introduction of this new phase would not lengthen the time-frame for the settlement of disputes. He wondered whether the United States had any suggestions regarding where time-savings could be made in the dispute settlement process to compensate for the extra-time that would be added as a result of its proposal. With regard to item (b) concerning giving the parties to the dispute the possibility to delete certain parts of the report by mutual agreement, he queried how this would work in practice. He wondered whether the rest of the membership would see the contents of the reports before the deletion of those parts by the parties or whether the report would be restricted only to the parties. Given the commitment of the US to transparency in the dispute settlement system, he wondered how that objective could be reconciled with this proposal. He further asked about the procedure that would be followed by the parties in such situations and whether they needed the consent of the Panel or the Appellate Body before exercising the right to delete those portions of the report they regarded as unhelpful to the resolution of the dispute between themselves. He asked the US to confirm if the objective of this proposal was indeed to give the parties to the dispute "the ability to reject specific aspects of the report that hinder settlement or do not accurately reflect the obligations that were agreed on by the negotiators", as reported in a recent bulletin issued by the USTR. With regard to item (c) concerning the partial adoption of reports, he asked whether consensus would be needed for the partial adoption of the reports. He also asked the proponents if their proposal would not affect the value that Members attached to panel and Appellate Body reports. If a Member had been found to have violated five obligations under different WTO Agreements, he wondered whether the report could still be adopted if the parties had agreed that implementation was only required in the case of only one agreement. He stressed that a primary objective of the dispute settlement system was to ensure full consistency and wondered how this objective could be reconciled with the proposal by the proponents. He also said it might be difficult to reconcile this proposal with the commitment of the US to transparency in the dispute settlement system, as apart from the parties, no one will know the rulings of the panel or the Appellate Body on the other claims initiated by the complaining Member. With respect to item (d) concerning the suspension of Appellate Body proceedings, he said that the EC was willing to consider it, as it was of the view that the parties should be given adequate opportunities to explore the possibility of finding a mutually satisfactory solution to their dispute. It was, however, concerned about the impact it would have on the time-frame for the settlement of disputes. With respect to item (e), he wondered whether the proponents were proposing a different version of a system of permanent panelists advocated by the EC. He also requested the proponents to clarify their proposal relating to providing additional guidance to the WTO adjudicative bodies.

54. The representative of Brazil thanked Chile and the US for their proposal and said that Brazil shared the view expressed by other delegations, including Norway that the dispute settlement system had worked satisfactorily over the years. He recalled that Brazil had on numerous occasions stated that it was necessary for the Special Session to focus on issues on which it was possible likely to reach consensus given the May 2003 deadline. He stated that this would help Members reflect better on the tension that existed between the legitimate interests of the parties to have on the one hand, some kind of influence over the process and on the other hand, the systemic interests of the all Members to have impartial panels and an efficient system of adjudication. He said that as compared to other proposals on the table, the proposal by the United States and Chile was very different in that it would transform the present system of adjudication by an independent body of panels/Appellate Body into a bilateral exercise of adjudication in the presence of panels/Appellate Body, where their role would be limited to only assisting the parties to find a solution to their dispute. Turning to address the specifics of the proposal starting with item (a) concerning the introduction of an interim phase at the Appellate Body stage, he said that the purpose of interim reports at the panel and the Appellate Body stages would not

necessarily be the same. He said that his delegation was willing to seriously consider this proposal, as it would afford an opportunity to the parties to comment on the legal findings of the Appellate Body. With regard to item (c) concerning partial adoption of reports, he said that for this proposal to function effectively, it would need to satisfy the following elements: first, there needed to be consensus among the parties to the dispute before the procedure for partial adoption could be invoked; second, the report must be adopted by negative consensus and it would be necessary to have at least two meetings of the DSB for that purpose. At the first meeting, Members could be informed that the parties would like to have recourse to the procedures for partial adoption in their case and at the second meeting, the report could be considered for adoption. With respect to item (d) concerning the suspension of Appellate Body proceedings, he said that his delegation was willing to consider it and asked whether this right could be exercised after the issuance of the interim report to the parties. Regarding item (e), he said that one way of ensuring that panellists possessed the right qualifications and expertise was to improve the existing indicative list of panelists being maintained by the Secretariat.

55. The representative of India thanked Chile and the United States for their proposal and stated that he would like to make some preliminary comments. With regard to the introduction of an interim phase at the Appellate Body stage, he said that his delegation was supportive of it, as it would afford an opportunity to the parties to point out any errors or inconsistencies. With regard to the proposal which would allow the parties to delete certain parts of the report by mutual agreement, he said that his delegation had some strong reservations. With respect to the possibility of partial adoption of reports, he recalled that India had recently argued before the DSB that certain parts of the Panel report in the Indian automotive sector case should not be adopted, as the Panel had exceeded its terms of reference. With regard to the instant proposal, however, he said that India had some doubts as to how it would operate in practice. There were a number of unanswered questions, including who would decide on the request; he also wondered whether it would be the parties, or whether the DSB would have any role in it. He said that India was in support of the statement made by Brazil concerning the need to hold at least two DSB meetings before the adoption of the report. He said that his delegation would later provide further comments on this proposal. In relation to the proposal concerning the suspension of Appellate Body proceedings, he said that his delegation was prepared to seriously consider it, as it could give the parties more possibilities for exploring a mutually satisfactory solution to their dispute. The proposal would, however, lengthen the time-frame for the settlement of disputes. With regard to the proposal on appropriate expertise of panelists, he said that his delegation was generally in support of it, although it had some questions regarding how it would be operationalized. He wondered whether the existing indicative list would be modified, or whether new selection criteria would be drawn up. With respect to the proposal concerning providing additional guidance to the WTO adjudicative bodies, he said that India had the same concerns as other delegations, including Norway. By way of a general comment, he noted that one of the most significant results of the Uruguay Round was the creation of a semi-automatic dispute settlement system under which the independence of panels and the Appellate Body was guaranteed. Giving too much control over the dispute settlement system to the parties would appear to be a retrograde step and undo the improvements which were made to the GATT dispute settlement system.

56. The representative of Singapore thanked the United States and Chile for their proposal and said that her delegation shared the assessment made by Brazil concerning the tensions between the interests of the actual parties to the disputes and the systemic interest of all Members in having an independent and effective dispute settlement mechanism. She further stated that there was some contradiction between some of the elements proposed and the objective of having an expeditious settlement of the dispute between the parties. With respect to item (a) of the proposal concerning the introduction of an interim phase in Appellate Body proceedings, she stated that her delegation could support it, as it could facilitate the implementation of the DSB's recommendations and rulings. Regarding item (b) of the proposal, she said that Singapore shared the same concerns as Hong Kong, China and had some hesitation about the proposal relating to allowing the parties to delete certain parts of the report by mutual agreement. It would appear that this proposal was inconsistent with the

key principles of transparency and security and predictability. It was not clear who would decide which parts of the report were unnecessary or unhelpful in resolving the dispute. She also suggested that it might take quite some time to achieve mutual agreement as to which parts of the report were to be deleted. Regarding item (c) concerning partial adoption, she said that her delegation was willing to consider it further. With respect to items (d), (e) and (f), she said that her delegation shared some of the concerns previously expressed by other participants.

57. The representative of Korea thanked Chile and United States for their proposal. He said that Korea viewed this proposal in the same vein as Mexico's proposal, as they both sought to make fundamental changes to the DSU. He said that Korea would be interested in seeing how the ideas contained in the paper would be transformed into concrete legal texts. With regard to proposal (c) concerning partial adoption, he said that Korea shared the views expressed by Norway and other participants that the proposal would weaken the dispute settlement system and make it comparable to the GATT's dispute settlement system. With regard to item (f) concerning additional guidance to the WTO adjudicative bodies, he said that this proposal might compromise the independence of panels and the Appellate Body.

58. The representative of the United States thanked participants for their thoughtful comments and suggestions on the proposal from the United States and Chile. He noted that the United States and Chile would be happy to respond to the preliminary questions that had been raised when the meeting moved into informal mode. He stated that the proponents looked forward to working with all delegations in further refining the proposal and developing appropriate legal texts.

59. The representative of Chile thanked participants for their comments on their proposal and said that the proposal was formulated on the basis of their experiences with the dispute settlement mechanism.

60. The representative of the United States expressed his appreciation for the comments and questions from participants. He said that Chile and the United States were conscious of the need for further work on their proposal. The previous day's discussion was a good beginning for the work that needed to be done. The United States looked forward to working with other delegations in developing further the elements contained in the proposal and in putting the proposal into legal text. He assured delegations that the proposal was not intended to affect either the independence of panels and the Appellate Body or what had been described as the "automaticity" of the WTO dispute settlement system. Rather, he suggested that the proposals all built on elements of the existing DSU; they continued the approach of allowing parties to have flexibility in the process and Members to ultimately control the process. As most of the questions revolved around the particular options set out in the joint submission, the co-sponsors had tried to group their responses to the questions by each option.

- Making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report

61. In response to assertions that interim review at the panel stage was only for the purpose of correcting factual findings. The representative of the United States responded that interim review was currently not limited in scope, and parties had submitted comments on both the factual and legal aspects of interim reports. Panels have sometimes refined, corrected and improved reports in response to comments in both areas. It was true that an appeal was limited to issues of law and legal interpretation, so naturally comments would be likely to concentrate on the legal aspects. However, it was just as important that the facts were accurately presented in an Appellate Body report. Perhaps one of the largest benefits of interim review at the appellate stage would be that it would offer the Appellate Body an opportunity to receive parties' views on issues that had never been commented on by the parties.

62. With respect to questions about the overall effect on the time-frame and whether the proponents had in mind time savings from other parts of the process, the representative of the United States stated that there would be no effect on the time-frame if the interim report were moved from the panel to the Appellate Body phase. If the interim review process were to be retained at the panel stage and introduced at the Appellate Body phase, that could add three weeks or so to the process. He suggested that there might be an opportunity to find an offsetting time saving elsewhere in the process.

63. Regarding whether interim report would be circulated only to the parties to the dispute, or whether third parties and the entire membership would also be eligible to receive it, the representative of the United States responded that it was envisaged that the interim review stage at the Appellate Body phase would operate in the same manner as at the panel stage.

- Providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that were not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference

64. In response to questions concerning the decision on which findings should be deleted, the representative of the United States reiterated that any decision to delete findings would have to be by the agreement of both the parties. The parties would need to work out between them which, if any, findings were not necessary or not helpful to resolve the dispute. He noted that the opportunity to suspend the proceedings - which was also part of the proposal - could be helpful in this regard since it would allow parties to agree to suspend the proceedings while they worked on finalizing an agreement to delete findings.

65. In replying to queries about the effect on transparency, he replied that the co-sponsors would be interested in hearing Members' views on this, in particular whether this aspect of the interim review should be treated differently from other aspects.

66. With respect to questions about the proposal's effect on the dispute settlement system generally, he stated that the purpose of the proposal was to facilitate a resolution of the dispute between the parties by deleting findings that were not necessary or helpful to a resolution. Parties were in the best position to know which findings would help them resolve a dispute, and which might be counterproductive. The co-sponsors were of the view that there should not be situations in which the dispute settlement system hindered settlement of disputes. He also noted in this respect the direction in Article 3.7 of the DSU, that mutually acceptable solutions were to be preferred under the WTO dispute settlement system. The co-sponsors saw the proposal as operating in a manner similar to that of Article 12.7 of the DSU. Article 12.7 provided that if the parties reached an agreement, the report was to be confined to reporting that a solution had been reached. He noted that this provision had been employed a number of times, including after the interim report had been provided to the parties, in which case all of the findings contained in the report were deleted. Under this proposal, there would actually be more transparency and jurisprudence since those findings that helped to resolve the dispute would be retained and made available to the DSB for its consideration and adoption. At the same time, the proponents did not see that findings that were not necessary or not helpful to resolving the dispute would be findings that the DSB would want to consider for adoption. If those findings would not aid in settling the dispute, then what was their purpose in the report? Panels and the Appellate Body did not have the job of providing an interpretation of a provision outside of the context of resolving a dispute. The Marrakesh Agreement explicitly provided Members with the exclusive authority to provide interpretations of the provisions of the WTO agreement. If Members wished a particular provision to be clarified just for the sake of clarification, then they always had the ability to provide an authoritative interpretation of that provision.

67. Regarding the effect of this proposal on full compliance, he stated that the proposal would not diminish full compliance and could in fact enhance it, since it would facilitate the prompt resolution of disputes. The obligation of compliance applied only to the recommendations and rulings of the

DSB. If a finding was not adopted by the DSB, then there was noting with which to comply. If a Member complied with all the DSB's recommendations and rulings, then there was full compliance. In response to questions about whether this proposal would allow a pick and choose approach to the findings, he said that the proposal was designed to allow parties to choose to delete findings that were not necessary or helpful to resolving the dispute between them. With respect to whether the Appellate Body or panel would first be consulted before the parties agreed on which findings to delete, he stated that the proposal concerned those findings the parties agreed were not necessary or helpful to resolving the dispute between them. The parties were in the best position to make this determination. The co-sponsors did not see that it would be necessary or productive for the parties to consult a panel or the Appellate Body on this question.

- Making provision for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute

68. In response to questions about who would make the partial adoption decision, the representative of the United States stated that the co-sponsors expected this decision to be taken by DSB Members as a whole. Currently a report was adopted unless there was a consensus against adoption. A logical extension of this principle would be that a particular finding would be adopted unless there was a consensus against it. In practice, this would mean that the two parties would have to agree that the finding should not be adopted, plus the rest of the DSB would have to agree. With respect to whether two DSB meetings would be required to take the decision on partial adoption, he stated that the United States and Chile expected that Members would need sufficient time to consider a proposed decision not to adopt a particular finding and that they would welcome others' ideas on how in practice to present the proposed decision and provide the necessary time to consider it.

- Providing the parties with a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute

69. In response to queries as to the stages at which this would be possible, the representative of the United States said that the co-sponsors saw no reason to limit the ability to suspend the proceedings at any time prior to circulation of the report. With respect to questions regarding the effect on the time-frame, he noted that Article 12.12 of the DSU currently provided that if the proceedings were suspended, then the time during which the proceedings were suspended did not count against the time-frames. The proponents saw the proposal as being an extension of this provision. In other words, the time-frames would also be suspended while the proceedings were suspended. Regarding whether the authority of the panel should lapse during such suspension, he noted that Article 12.12 currently also provided that the authority for a panel shall lapse if the proceedings were suspended for more than 12 months. He wondered if it would make sense to take the same approach if the parties had agreed on a on a date certain when the suspension would end. However, the proponents would be interested in hearing Members' views on whether it would make sense to extend the approach in Article 12.12 to a suspension of the proceedings by agreement of the parties. Concerning whether this proposal was different from Article 12.12, he confirmed that it was indeed different from the current Article 12.12 in that Article 12.12 permitted a suspension of the proceedings only in the case of panels and only if the complaining party requested it and the panel agreed. Under the joint proposal, the proceedings of a panel or the Appellate Body could be suspended if both parties agreed. On the issue of deadlines, he stated that in the first instance the co-sponsors thought it should be up to the parties to decide whether they wished to agree to a specific deadline for the resumption of the proceedings. However, they would be interested in hearing other delegations' views.

- Ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute

70. Responding to questions about whether this objective could be achieved by improving the indicative list of panelists or by having a standing panel body and whether this could be done in the context of Articles 8.1, 8.2, and 8.7 of the DSU, the representative of the United States said that there were a number of different ways to ensure that panel members had appropriate expertise. In this context, he noted that Article 8.2 of the DSU did not specifically mention this as a criterion for panel selection and said that the co-sponsors were interested in hearing the views of Members on how best to provided this assurance.

- Providing some form of additional guidance to WTO adjudicative bodies concerning: (i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and (ii) rules of interpretation of the WTO agreements

71. In response to a question about how this proposal related to Jamaica's proposal to develop an agreed negotiating history, the representative of the United States replied that the co-sponsors' proposal concerned guidance to adjudicative bodies in carrying out the tasks assigned to them. The co-sponsors did not see this as related to Jamaica's proposal to develop an agreed negotiating history, which was focused on the actions of Members in connection with negotiations.

72. With respect to comments concerning potential overlap with the Vienna Convention, the representative of the United States stated that the proposal was not designed to replace the customary rules of interpretation of public international law, which were reflected in the Vienna Convention on the Law of Treaties. However, in applying those rules to the WTO agreements, there was room for additional guidance by the Members. He noted that the customary rules of interpretation were developed in the relations among sovereign nations, the vast majority of whom were WTO Members. There was no reason to assume that the Members could not contribute to a better understanding of these customary rules. In response to questions about whether the proposal was related to other proposals on the table, he confirmed that it was not and stated that the guidance contemplated here was not to be confused with any suggestion of guidelines in other contexts. He further stated that the proposal listed as item (f) referred to guidance in general provided by the WTO Members as a whole, and did not refer to the parties or to individual disputes. He noted that the joint proposal would not in any way compromise the ability of parties and other Members to present their views in the course of individual disputes and said that other elements of the proposal were designed to facilitate that process. One opportunity under the current system for the Members to provide their views on a particular dispute was a debate in the DSB at the time the reports were under consideration for adoption. The proposal would not in any way diminish this opportunity and other elements would enhance it.