WORLD TRADE ORGANIZATION

RESTRICTED

TN/DS/M/14
20 April 2004

(04-1773)

Special Session of the Dispute Settlement Body
13 -14 November 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 13-14 November 2003

Chairman: Mr. Péter Balás (Hungary)

Prior to the adoption of the agenda, the Chairman welcomed participants to the fourteenth formal meeting of the Special Session and said that this was the first meeting of the Special Session since the Cancún Ministerial Conference. He recalled that the General Council had agreed on 24 July 2003 that the time-frame for completion of the work was to be extended by one year, until May 2004 and that further work should build on the Chairman's text of 28 May 2003 and proposals put forward by Members. It was also agreed that the first reconvened meeting of the Special Session should be devoted to a discussion of conceptual issues. He further recalled that at the informal meeting held on 16 October 2003, Members had agreed to hold the present current meeting – its first meeting in this phase of the negotiations. Members had agreed at that meeting to complement the conceptual discussion mandated by the General Council, if time permitted, with a general issue-by-issue discussion on the work done thus far. He said that in response to the requests by some participants at the informal meeting, he had circulated a list of questions to assist the discussion informally, or at least to start the discussion which would follow the stages of the dispute settlement process starting with the panel phase. He drew participants' attention to the agenda of the meeting and said that it was his understanding that Malaysia might be presenting a proposal at this meeting.

The representative of Malaysia said that the proposal was in the process of being finalized and that they hoped to present it at the next meeting of the Special Session.

The Chairman proposed the deletion of the item relating to the submission of a proposal by Malaysia from the agenda and asked if any delegation wished to raise any issue under "Other Business". He said that he would address the issue of further work. As there was no request from the floor, the agenda of the meeting was adopted, as modified.

I. DISCUSSION OF CONCEPTUAL ISSUES

1. The Chairman recalled the decision of the General Council which mandated that the first meeting of the Special Session should be devoted to a discussion of conceptual issues and said that Mexico had circulated a paper (Job (03)/208) intended to facilitate the discussion. He asked whether any delegation wished to make a general intervention of a conceptual nature. The representative of the EC stated that they intended to make an intervention after the presentation by Mexico.

2. The Chairman proposed to break up the discussion under agenda item 1 to have a full discussion of the Mexican paper and listen to reactions, and thereafter have a presentation by the European Communities on conceptual ideas, which could also be commented upon by participants. Before giving the floor to Mexico, the Chairman acknowledged and thanked Mexico for the hard

work and effort that had gone into the preparation of its document and for the active interest Mexico had shown in moving the process forward. On the content of the paper, the Chairman said Mexico had stated in its view, the "lack of focus ha[d] been the prevalent element in our failure to reach consensus". Given that participants had different interpretations of the mandate and the purpose of the negotiating exercise, it was to be expected that achieving a convergence of views was going to be extremely difficult. If the current contribution by Mexico – and more generally other contributions and the discussion held today and possibly tomorrow – could help delegations find more convergence or "focus" towards a successful outcome to the work, this would be a very good start to this second phase of Members' work.

3. The representative of Mexico welcomed delegations present at the meeting that did not have Permanent Missions in Geneva and said Members were fortunate to have them around, as it was important for Geneva-based Members to exchange views and ideas with them on a regular basis. He said that his presentation would revolve around four themes, namely, (i) the starting point; (ii) how Mexico approached the task; (iii) the findings of its document; and (iv) the way forward – reflecting where Members should go from here. As a starting point, he said that it should be recognized that this was an extremely difficult exercise. Reform of the DSU had been on the agenda since 1998. There had been three Ministerial Conferences and seven Chairpersons in the intervening period, and countless hours of discussions in the Special Session of the DSU, in the General Council, and at various missions. Referring to the Chairman's text, he said that Mexico did not see any agreement in sight because of conceptual difficulties that a number of delegations had with some elements. There were technical divergences and a basic disagreement over proposals that should be included in the text. Instead of focusing on the whole universe of problems confronting the DSU, Members were looking at different parts of the problem making it difficult to devise a comprehensive solution that would improve and clarify the DSU. To present a clearer picture, Mexico had approached the task at hand as follows: It had proposed to look at the DSU's functions in an unbiased manner; to cover the whole range of problems and to attempt to depoliticize the analysis. It had started with a backward methodology by analyzing proposals that had been tabled and establishing which problems they were intended to resolve. Mexico had focused on its own experiences with the dispute settlement system since its creation eight and half years ago and used hard statistical evidence instead of anecdotes. It had decided to delve into the hard facts to make a diagnosis of the DSU's problems.

4. While the document was quite comprehensive, it did not incorporate qualitative analysis or astrology for that matter. It did not make any definitive judgments on any of the problems nor did it rank problems or provide conclusions. Mexico had decided that faced with the facts, participants could make their own assessments and draw the relevant conclusions. The document did not also analyze the effectiveness of submitted proposals. That task was best left to the proponents of such proposals. The document, however, provided statistical data to objectively assess dimensional problems and to facilitate informed discussions about the functioning of the DSU. This had been a bottom-up approach encompassing proposal-by-proposal. Problems had been defined, as the document was not meant to be about proposals. The classification was not meant to serve any purpose, other than to facilitate the understanding of the document to the reader. It had been decided to organize the discussion under three headings, namely access to the system, compliance and procedural issues. Each section dealt with a variety of issues. The section on access to the system covered access of least-developed and developing countries, internal transparency and external transparency. The compliance section covered the limitations of present remedies and enhancement of compliance with DSB's recommendations and rulings, while the procedural section covered professionalizing the panel system, time-frames, alternative means, control of disputes and other miscellaneous elements. Given time considerations, he said that he would not go into the details of all these elements, but would go over the first basket as an example.

5. One of the main problems that had been found was the non-usage of the system by least-developed countries (LDCs). This was striking because of the relative importance of trade to these

countries. The share of trade in the GDP of LDC Group and also the African Group exceeded that of many countries, including the United States and the European Union. The United States' share of trade was around 30 per cent of GDP, the European Union – aside from the internal trade between the 15 member states – was 25 per cent of GDP, Brazil was 18 per cent, India was 25 per cent and Mexico's was around 60 per cent. The corresponding shares of trade to the GDP for the African Group and the LDC Group were 72 per cent and 63 per cent, respectively. It could perhaps be attributed to high litigation costs. After checking, it had been determined that a case of 240 hours of work at a rate of US$25 per hour – a rate charged by the advisory centre – was US$6,000. It would be up to delegations to draw the necessary conclusions if the non-participation could be attributed to legal costs or there were other reasons involved. With respect to internal transparency, while it was true that third parties had access to essential information, their views were not necessarily taken into account. Third parties had participated in at least 90 per cent of WTO cases. The rules for joining consultations, for instance, at the pre-panel stage were not clear. They did not establish standards and deadlines for acceptance or rejection of requests and this had generated uncertainty in some of the 493 requests registered so far. Regarding external transparency, *amicus curiae* briefs had been submitted in just 9 per cent of all cases – 15 times – but in 13 of these cases, Members had expressed concerns at DSB meetings.

6. This document did not purport to be definitive. It basically espoused some ideas which could analyzed further by Members. The exercise of diagnosing the DSU's problems had to be completed and thoroughly analyzed by Members, who should seek to establish the underlying reasons for these problems. This task should be undertaken collectively by Members. Once the analysis of the problems had been made, Members should discuss the solutions. It would be advisable for Members to discuss alternatives and employ a scientific methodology to deal with the DSU amendment exercise. Members should have a clear diagnosis of the problems and then focus on the proposals most likely to deal with those problems. This approach was likely to deliver a meaningful result in the shortest possible time.

7. The representative of Chile said his delegation was sure that there was valid and legitimate interest in giving these negotiations a different direction and it shared this vision. If Members wished to achieve a successful result, they had to change their working methodology and he thought this was a good point of departure. Mexico's presentation should have been done a long time ago before starting the discussions on the basis of specific proposals. Members had to identify the problems affecting the dispute settlement mechanism and without that diagnosis, one could not truly assess the most suitable remedies. The analysis that had been carried out by Ambassador of Mexico fell short in the sense that it did not conclude or judge whether the remedies proposed by Members during the negotiations were appropriate to solve the existing problems of the mechanism. In addition, behind the figures and statistics that Mexico had analyzed, there were political decisions that had to be made. There were market features and structural problems that could not always be measured with figures. From that perspective, the analysis of these figures should be approached with a certain amount of care. However, Mexico had given Members the basis to carry out this analysis and to draw conclusions. It was still premature to make any conclusions, but there were certain things that could be highlighted in the document. At first sight, many proposals appeared to deal with specific problems that some Members had encountered. The question might be asked whether it was worthwhile discussing a proposal or an idea that did not appear to be a priority for Members in general and whose contribution to improving the functioning of the DSU was not very obvious. It was also apparent that some of the specific problems that Members were trying to solve were internal problems and not problems that affected the dispute settlement understanding. A persuasive case could be made for re-evaluating the strategy and methodology followed thus far. The DSU was not like other WTO Agreements. Consequently, it could not be the subject of trade-offs with other areas. If that was the intention, it would be better to do nothing as it could negatively affect the DSU. There was the need to critically examine all the proposals on the table to establish the contribution they could make to the proper functioning of the dispute settlement system. Some of the proposals were

designed to solve problems which had been encountered in the past. These included some elements of the Mexican proposal, the EC proposal on permanent panelists and the joint Chile/US proposal on giving greater control over the process to the parties. It was perhaps in these areas where Members should concentrate discussions over the next few months, before venturing to submit specific proposals without knowing whether or not they would meet the set objectives.

8. Basically, Members were discussing the kind of DSU that they wanted: either a judicial system that was regulated in detail or a mechanism which through a flexible process brought together the parties with the aim of finding a negotiated solution to a dispute including through the conclusions of the reports of panels and the Appellate Body. Without being quite clear about what system Members wanted, Members would never be in a position to decide whether these areas were problematic and needed resolving or even whether the solution proposed was the correct one. He said that Chile was prepared to engage in a serious and detailed discussion on this issue and that the Mexican contribution was a good starting point. It was important to hear the opinions, not only of the delegations, but of others who had valuable opinions such as the Secretariat, the Appellate Body, the ex-members of the Appellate Body, academics, lawyers and other people well placed to make substantive contributions. While Chile was conscious of the opposition of certain Members to involving outside persons and institutions in the negotiations, it believed that the discussions would be enriched by their participation given the breadth of their experience and ability to approach issues from a dispassionate point of view. Government representatives tend to be influenced by national interests on the specific issues being dealt with in the negotiations. There were two ways of doing this: either delegations met together and held brain-storming sessions outside the organization, trying to enrich Members' vision with the contributions of others, or Members could negotiate in-house, in a structured and well ordered and transparent way so that all could benefit. For example, this could be done through a seminar that might be organized on the subject over the next few months to have valuable contributions of others on the subject. The Mexican document was an interesting contribution that not only reflected hard work, research and dedication, but a legitimate interest in changing the course of these negotiations. Chile shared the view that if Members were to achieve a successful result, the work methodology should change.

9. The Chairman thanked Chile for its thoughtful comments and added comments of his own on current and future work. Concerning Chile's remark about the possible involvement of outside experts, besides official delegations, he said that he had raised the possibility of inviting Appellate Body members to share their views and experiences, but this was strongly opposed by some Members. He said that outside experts could be involved if there was a consensus on this issue among Members. As regards the comment by Mexico that it would have been more productive if Members had established their objectives prior to detailed discussions of specific proposals, he said that at least four sessions were devoted to the scope of the negotiations but consensus could not be achieved. He said that as Chairman, his role was quite limited. It was up to Members to decide what they wanted and provide strategic guidance so that the Chairman could assist them in attaining those set objectives. On Chile's last remark about the organization of future work, he suggested that the discussion take place under "Other Business". He said that it was his hope that there would be a fruitful discussion and a common understanding reached as to how to proceed in the future.

10. The representative of Djibouti asked why a number of countries, particularly least-developed and African countries were not making use of the dispute settlement system; was it because of the lack of interest or the lack of expertise? If it was the latter, more had to be done to facilitate their use of the system.

11. The Chairman said that both the African Group and the LDC Group had been quite active in the negotiations, notwithstanding their lack of resources. The proposals submitted by these two groups underscored the importance which they attached to the dispute settlement system.

12. The representative of Thailand noted that his country had been active in the negotiations underscoring the importance it attached to the dispute settlement system. He recalled that Thailand had tabled proposals on the composition of the Appellate Body and the so-called "carousel" issue. Thailand had continued its effort to promote a better panel system by also proposing some amendments to Article 8 of the DSU and would remain engaged in the negotiations. He said that Thailand shared the view that it would be more productive to have a thorough discussion of the objectives sought to be achieved in the negotiations before entering into a detailed discussion of the various proposals. It would be better if these discussions took place in an informal mode, so that Members would feel free to exchange views. He recalled that Thailand had suggested before the extension of the mandate of the Special Session by the General Council that the Chairman's text should be left intact and that efforts should be concentrated on proposals not reflected in the text. Some of these proposals had attracted broad support during the discussions, but because of the lack of time, they could not be pursued further. It would be better if there were no new proposals, as they would lengthen the time-frame for the conclusion of the negotiations. It would, however, be preferable if proponents of similar proposals could get together and agree on a common text. He further said that it was imperative that the negotiations be concluded on time, given that the time-frame had been extended once and bearing in mind that the DSU negotiations were outside the single undertaking. Given the need or transparency and inclusiveness, meetings of the Special Session should be scheduled so as to allow the participation of small delegations.

13. He welcomed the conceptual ideas presented by Mexico and said that they would make a substantive contribution to the negotiations. From the point of view of a practitioner-cum-negotiator, all of the proposals on the table could be categorized into three groups as proposed with a view to focusing on each group and discussing one after the other. However, a balance of time allocation for the discussions of each of them might need to be found. Access to the system could be resolved by some other means without amending the DSU. Thailand was convinced that the lack of compliance posed a threat to the credibility of the WTO and to the effectiveness of the DSU itself. It required more than amending the DSU to overcome this problem, such as good faith and political will. The reputation of the WTO rested in whole or in part on strict compliance of rulings and recommendations of the DSB. On procedural issues, he noted that the improvement and clarification of the DSU could be dealt with properly by the proposals put forward thus far, including the three proposals by his own delegation. He said that it was the expectation of Thailand that there would be an in-depth examination of the conceptual ideas put forward by delegations and that his delegation was ready to contribute to it with a view to making further progress in the negotiations.

14. The representative of New Zealand said his delegation's overall approach to these negotiations had been based on two considerations: The first was that the DSU had worked very effectively and fulfilled most expectations. The dispute settlement system was used frequently by developed and many developing-country Members. A significant body of jurisprudence had been developed which had helped Members to fully understand their obligations under the WTO Agreements. With the exception of few high profile cases, there had been a very good record of compliance with the recommendations and rulings of the DSB. The second consideration was that the DSU was not perfect and that there was room for improvements. The introduction of binding dispute settlement had been a crowning achievement of the Uruguay Round, and was in many ways unique in international law. So Members should not be too surprised that there were some teething problems, nor should these teething problems be ignored. This was where the DSU negotiations played an important role. It allowed Members to take stock of their experiences after the first eight years of dispute settlement under the DSU, and to make changes to improve the system and enable it to evolve in light of changing needs and circumstances. For New Zealand, the negotiations presented an opportunity to learn from mistakes and create a more robust system to deal with the problems of the future. But this should be done with care. The system was working well and what was not broken did not need to be fixed.

15. In this context, New Zealand viewed Mexico's paper positively, and as it understood, the paper called for developing a better understanding of the problems that needed to be addressed. His delegation agreed that this would be a useful exercise. Developing a better understanding of the problems, both by way of compiling a better factual foundation for Members' work, and through sharing individual experiences and perspectives from working within the system, would help to analyze problems, and put them into the proper context making it possible for appropriate solutions to be found. Members had tabled many proposals in these negotiations and perhaps Mexico was right in saying that sufficient time had not been found to gather the necessary information to evaluate them. There was the need for realism in terms of the results that could be achieved from such a process. It was unlikely, for example, to bridge significant and well-known divergences of views that existed on certain issues. All Members would likely have different perspectives on how significant and relevant certain facts and experiences were. New Zealand did not see this as a matter of detecting only the "fundamental" problems, as suggested in the Mexican paper. What was "fundamental" seemed to a certain degree to be in the eye of the beholder. When something was considered "fundamental" by one delegation, it often seemed to be considered controversial by other delegations. So, the problem with focusing on "fundamental" problems only, was that Members might end up with nothing at the end of the process. Further, there were many issues that might not fall into the "fundamental" category that nevertheless deserved attention. Members should not underestimate the value of gradual improvements to the dispute settlement system, and this, he hoped, at a minimum would be realistic to achieve. Such problems needed to be equally well-diagnosed and analyzed. New Zealand saw much to commend in an approach to Members' work that focused on developing a better understanding of the problems, to enable the crafting of better and more appropriate solutions. For this approach to achieve significant results, Members should be prepared to take a fresh look at all of these issues, and not simply rehearse positions that had been already expressed. New Zealand was prepared to do this itself and finally it would see great merit in broadening the discussions along the lines suggested by Chile this morning. Members should be working from the best possible information base.

16. The representative of the European Communities thanked Mexico for its paper which was neutral and intended to address the systemic problems that had been encountered with the operation of the DSU. He said that the EC was in agreement with Chile that the objective of the negotiations should be to solve problems so as to clarify and improve the DSU. The EC had always kept this objective in view and hoped that other Members would do the same. He said that it was not his intention to make substantive comments on the many different, useful and interesting elements contained in the three areas covered by the Mexican paper, but to offer some comments as Members proceeded in the discussion on an item-by-item basis. Regardless of whether one agreed with the conclusions reflected in the Mexican paper, the different elements espoused in it, could be useful to delegations and help them to achieve a satisfactory result in May. The EC had two comments of a methodological nature and a general comment on the approach. First, while the EC appreciated the importance of quantitative data, there were limits to its utility. To have an accurate picture, it was necessary to also have a qualitative assessment based on past or present experience in the application of the operation of the system. It was, for example, important to know whether it was worthwhile to improve internal transparency or external transparency, or whether the terms of the Appellate Body members should be renewable or not. Statistics were not going to be very helpful in finding answers to these questions. When one looked at quantitative data, it was useful to consider not only the overall picture over the period during which the DSU had been applied, but also see what had been the general trend over the past years. For example, when discussing one of the most important issues in the course of the negotiations, which was how to better integrate the developing countries in the dispute settlement mechanism, it seemed to the EC that it was important to bear in mind the most recent statistics. If one looked at the data covering the period from 2001 to 2003, one would realize the sharp increase in the number of developing countries who became complainants in disputes.

17. The representative of Bangladesh said that Mexico's paper contained an in-depth analysis of the problems underlying the system as a whole. While the paper did not provide any conclusions, it

would help Members move in that direction. It was evident from the paper that LDCs and African countries had never resorted to the DSU process, despite their high reliance on trade. This did not indicate that they did not face any problems in marketing their products. In fact, LDCs had several disputes, but because of underlying problems in the system, they could not pursue them. The proposal submitted by LDCs was intended to address this systemic problem and it was their expectation that Members would favourably consider it.

18. The representative of Costa Rica said that despite the significant process made in the last phase of negotiations, Costa Rica agreed with those who felt that on many occasions Members had failed to focus the work on the most important problems facing the dispute settlement system. The paper submitted by Mexico contained information which should have been available to Members from the very beginning. The information would have helped Members to focus on the problems that had been encountered by Members or those likely to arise in the future. It would be helpful to identify the causes of such problems and determine whether the proposed solutions were apposite. The methodology was therefore very useful. These were by no means the only questions raised and the document did not reflect all the relevant information that should be taken into account. This was why all Members should follow Mexico's example and provide information and evidence concerning the relevance and importance of the ideas proposed. However, it was also true that some problems, essentially those of a political nature, could not be adequately reflected in statistics, and hence the importance of complementing a quantitative analysis with a qualitative analysis. He concluded by reiterating that Costa Rica was ready to work with other Members to find appropriate solutions to existing problems facing the DSU as well as problems that might arise in the future.

19. The representative of Colombia said that Mexico's paper was very useful and should help Members to identify and prioritize the problems bedevilling the DSU. It should assist Members in establishing how often problems arose and how to rank them. While it would contribute to an objective analysis of the dispute settlement mechanism, it should be borne in mind that statistics were not completely neutral and could distort the real picture. When a quantitative analysis was done, one saw that the African countries did not use the dispute settlement mechanism very much, which might be due to cost involved. It also might be because their trade was based mainly on preferences and they did not really need to use the system at this point. However, countries which were experiencing an exponential growth in their trade, such as Brazil, India or some Asian countries, were starting to make more use of the system. Their growth and participation in world trade was important and when their participation in world trade increased, so too did trade disputes start to rise rapidly, which was normal. Referring to the graphs on disputes per year, she said that it might be interesting to examine them in terms of dollars per trading or in terms of value of trade. It would also be interesting to quantify the number of disputes submitted and the trade participation by value of trade. The United Stated had initiated 75 cases, but if one assessed it in terms of units of trade, one might see that Brazil and India use the dispute settlement mechanism more than the United States. It was therefore essential not to take these figures in absolute terms. Regarding the limited participation of developing countries in the dispute settlement system, she said that legal costs could not be the sole reason. A look at the statistics would reveal that developing countries had been successful in most cases initiated by them. Furthermore, developing countries register their interest in cases by participating as third parties. In other words, account had to be taken of the free-riding within the system. Developing countries might not initiate cases also because of trade reasons. They might not feel comfortable in bringing cases to the system because of fear that this might in some way affect bilateral relations.

20. On financial costs, she said that apart from paying the legal fees of the attorneys, it was important for the Member to direct the process in light of its trading and other interests. A number of developing-country Members had yet to develop that capacity. The WTO dispute settlement system was quite unique and its relationship with the domestic processes had to be carefully examined. The WTO dispute settlement system had its limitations and Members could not expect it to be as effective

as the domestic system in each country. She said that Colombia shared the view of Mexico that the issue of compliance was the most important one to be resolved in the long term to maintain the viability and credibility of the system. The Mexican paper showed that in general the rulings had been complied with. However, the reasonable period of time for the implementation of the recommendations and rulings of the DSB had to be extended in most cases resulting in an increase in the costs to the complaining Member. Should the respondent Member fail to implement the recommendations and rulings of the DSB, the complaining Member might have to retaliate. As experience had shown, this remedy had serious limitations as far as developing countries were concerned. Retaliation had the effect of increasing trade barriers which eventually could harm their trade interests. Developed-country Members therefore had an incentive to ignore or delay the implementation of the recommendations and rulings of the DSB. The situation would have been different, if there was a mechanism which ensured prompt and effective compliance with the DSB's recommendations and rulings. This issue had to be addressed in order to increase the confidence of Members in the dispute settlement system.

21. The representative of the United States welcomed the conceptual discussion at the present meeting and the opportunity for delegations to provide their latest views on the negotiations. It especially welcomed the non-Geneva-based delegations and this chance to hear their views. It looked forward to hearing from all other delegations, and indeed the United States had been benefitting from the discussion thus far. The United States also wished to thank Mexico for the obvious thought and effort which went into the preparation of its discussion paper. The statistical work was particularly interesting, and should prove useful to Members in considering the operation of the dispute settlement system. Mexico was wrong to say that this work would win it no friends; all Members could appreciate the effort Mexico had made to try to present an objective look at the dispute settlement system. The United States was now analyzing the paper, and thus its remarks at the present meeting would be of a preliminary nature. As an initial matter, it wanted to add to its expression of appreciation for Mexico's statistical analysis a note of caution concerning the inherent limitations of any such analysis, which was by nature retrospective in approach. Such an approach might not help in anticipating or predicting new problems. For example, as Mexico's paper itself noted, data was often lacking on a particular question. In addition, even when some data was available, it might be partial, or might be based on imperfect sources. For example, Mexico noted that it could identify only two disputes in which all parties disagreed with some finding or conclusion in a panel or Appellate Body report. In many cases, however, such "mutual disagreements" were not on record anywhere so only the particular parties to that dispute would be in a position to know for which issues this might be true. The United States knew from its own experience that there had been other such cases, such as the *Certain Import Measures* dispute.

22. The third caution that the United States wanted to raise was that numbers did not tell the whole story. A single dispute could raise a structural issue that proved to be highly disruptive to the system. Here, delegations needed only refer to the record of the *Bananas* dispute. In addition, even when a problem arose in only a few disputes, the problem could unnecessarily tie up system resources. For example, in *Certain Import Measures*, both the United States and the European Communities agreed that the Panel had made an incorrect finding on GATT 1994 Article II. Notwithstanding this agreement, both parties found it necessary to brief the issue before the Appellate Body, and the Appellate Body had to address the issue in its report. Similarly, in *India Autos*, India initially considered it necessary to appeal an issue that all parties agreed had been decided incorrectly. The United States therefore agreed with the EC and others about the need to have a qualitative perspective as well. Having said this, the United States believed that Mexico's paper was a very useful contribution to the discussions of this body. It could bring a new perspective to issues as Members discussed them. On the part of the United States, having looked at the Mexican paper and at the track record of the dispute settlement system to date, it continued to believe as a conceptual matter that two areas in which the dispute settlement system could be improved were in providing greater external transparency and ensuring that the system had sufficient flexibility to help Members resolve their

disputes. The United States looked forward to discussing this paper and other Members' thoughts and contributions at the present meeting. Finally, with respect to the suggestion made by the Ambassador of Chile, the United States recognized the value that could be gained from the input of others, including academics and practitioners. It was for this reason that the United States requested public comment at the start of these negotiations on the issues involved. It had received many good comments from the public, including from academics, private practitioners, and others. There were indeed benefits in consulting such groups, and the United States had already done so.

23. The representative of Indonesia said that it was regrettable that the deadline could not be met in May. Members were now aware of the fundamental problems facing the DSU and should build on the good work that had been done. Indonesia was in agreement with Mexico that analysis should be based on the empirical evidence accumulated during the first eight years of the system. He inquired about the status of proposals submitted by Members, including the one recently submitted by his delegation.

24. The representative of Japan said the Mexican paper provided empirical data from past disputes and this was particularly useful as Members started a fresh round of discussions on the issues that should be addressed. She said that while statistics could be useful, they could be misleading in some instances. The statistics on panel rulings on issues which had been overturned on appeal by the Appellate Body, for example, needed to be qualified as the outcome depended on a number of things, including the number of claims made at the Panel stage and the number of issues raised on appeal. She said that Japan was in agreement with the view that recent trends had to be taken into account, including on-going cases before panels and the Appellate Body. Some of the issues being examined in these cases were complex and had never been considered before, so they could have a profound effect within the system. Japan also shared the view of the United States that the frequency of the occurrence of problems did not necessarily dictate the importance of a problem. Members might well decide to resolve an issue of systemic importance, even though it happened infrequently. It was important to also engage in a qualitative analysis to complement the quantitative analysis.

25. The representative of Canada said that Mexico had not claimed that its statistical analysis was anything other than a first step and that it was not making any qualitative judgments on its own presentation. The criticisms that had been heard about the Mexican paper had already been acknowledged by Mexico, but Members should not lose sight of the fact that this was the first time that there had been a statistical look at the dispute settlement mechanism by a Member which should be taken advantage of at this particular moment. Members should take advantage of the opportunity to build upon this work rather than criticize it as not doing what it never set out to do. Canada shared the view of Japan and the United States that statistical analysis did not always identify the importance of a problem – even a single occurrence of an event could have serious ramifications. Members needed to identify these big ticket issues and resolve them on a timely basis. Conceptually, problems in the system could be divided into certain categories such as Members' individual and collective experience with the dispute settlement, matters that were technical in nature, and hiccups in the process that had not been considered at the time the DSU was negotiated. With the benefit of eight years of experience, Members could turn to those technical matters and resolve them fairly quickly. The issue, for example, of the lack of transparency in responses to requests by Members to join consultations could be disposed of by establishing clear disciplines.

26. There were matters that were systemic and of fundamental importance to Members, but that were also capable of being resolved through a give-and-take by Members. One could also identify those issues, their limits and the thresholds and basic parameters of the give-and-take at the end of the day. There were matters of interest to the membership that had already been addressed through *ad-hoc* agreements or in some cases by the Appellate Body. Members might agree or disagree about, for example, the status of *amicus curiae* briefs or with the nature of sequencing but, in fact, these had been dealt with in one way or another, respectively by the Appellate Body and Members through *ad-*

hoc arrangements. Members had to decide whether they wanted multilateral solutions to these problems or maintain the *status quo*. There were matters that were political and global in nature and might be intractable. He referred to Chile's statement regarding the nature of the WTO dispute settlement system and asked whether Members wanted to maintain its quasi-judicial nature or return to the less adjudicative model which existed under the GATT. He asked whether Members wanted to continue to develop jurisprudence, have a body of laws governing relations, or go back to the world where reports came to the DSB to be adopted or not as one might please. This issue was not, it seemed to him, capable of resolution by the Special Session. This was a matter that had to be dealt with politically and in the context of a larger view of the nature of the WTO itself.

27. The representative of China said the Mexican paper provided a good background and reference for further negotiations. Compared with previous submissions, this submission highlighted factual evidence using statistics. Through many charts and tables, Members might find where their priorities laid, as well as identifying realistic and practical proposals which would resolve the difficulties that had been encountered. The fact that Appellate Body did not always issue its reports within the normal time-frame did not necessarily indicate that the number of Appellate Body members had to be increased. An increase in their number might affect the collegiality among the members. It was debatable whether the panel phase should be strengthened as against the Appellate Body phase. There were obvious limitations to a statistical approach and any such study must be complemented with a qualitative analysis.

28. The representative of Israel said that to have a complete picture, it was necessary to have both a quantitative and qualitative assessment. A cursory glance at the Mexican paper would reveal that the DSU had worked reasonably well, although there was room for improvement. The paper was clear in its message that Members needed to prioritize and focus on issues which most affected the functioning of the dispute settlement system. She recalled that Israel was among the group of countries which had at the beginning of the process called for the prioritization of issues. While Israel was conscious of the difficulties involved in this exercise, it remained willing to continue this diagnostic exercise to determine the real problems that had to addressed.

29. The representative of India said that Mexico deserved Members' compliments for providing at least a basis to start the discussion on conceptual issues, without which the discussion might have been less structured and shed less light on the issues. He said that as his delegation was in the process of reviewing the paper, he would only be making preliminary comments. Some of the concepts to be discussed did not necessarily depend upon the presence of data. The lack of data could sometimes highlight the need for action to taken to resolve an issue. India shared the view that a quantitative analysis could be misleading and that it was also necessary to have a qualitative analysis. The mandate for these negotiations was clear in that it was aimed at improving and clarifying the DSU based on the experience of the Members thus far. In another dimension, when Members started working on the scope of such improvements and clarifications, it became quite complex, as Members did not seem to be of one mind on what these terms meant. Members had to define their expectations from these negotiations, whether they wanted to overhaul the system, which the Mexican analysis pointed out was working fairly well, or whether to fix only the broken aspects. Although the Mexican paper was not a qualitative analysis of the dispute settlement system, it provided Members with an incentive to engage in analytical thinking to drive the discussion forward. With developing countries, particularly LDCs, making little use of the dispute settlement system notwithstanding their heavy reliance on trade, Members could analyze whether this was due to lack of interest or the lack of capacity. If it was the latter, Members could examine how their participation in the system could be improved. Similarly, if no panel or Appellate Body had ruled against a developing country for not meeting deadlines, he asked whether this was because they had found it easy to meet the deadlines or was it because they had met the deadlines, even by compromising on the quality of the submissions. As was seen from the data given in the paper, 61 per cent of the developed countries and 39 per cent of the developing countries had initiated disputes, which seemed fair. This figure varied depending

on whether account was taken of the fact that the 15 members of the European Communities accessed the system collectively. Could the relatively low participation of developing countries be attributed to the expenses involved in accessing the system. If the answer was in the affirmative, consideration should be given to the proposal by India and other countries for the award of litigation costs to developing countries. While it might be true that countries such as Brazil and India were making greater use of the system, collectively developing countries made less use of the system than their developed counterparts. The statistics provided by Mexico in its paper and cited by Colombia had to be carefully examined.

30. On the issue of *amicus curiae* briefs, the Mexican paper pointed out that while it had arisen in about fifteen cases, Members had made comments in no less than thirteen cases underscoring the need for a multilateral solution to this problem. It was imperative that the relevant provisions of the DSU be strictly interpreted and clarified to reflect the intention of Members. This was not a matter which should be left to panels or the Appellate Body to decide. Sometimes a single occurrence could be enough to need clarification. He said sequencing was one such issue which was important enough to be discussed and to be resolved, irrespective of the fact that some of the Members had been able to make *ad-hoc* arrangements for their own cases. The same could be said of the issue of reappointment of Appellate Body members. WTO Members had a responsibility to ensure that the Appellate Body members, after having been appointed to this high office, were not dependent on the support of the membership for securing a second term. On mutually agreed solutions, the Mexican paper pointed out that details were only available for less than 50 per cent of cases. In the other cases, Members did not get the opportunity to assess the impact of such solutions on their trade. There was therefore a clear case for requesting Members to provide such details. In relation to notices of appeal, a persuasive case could be made that such notices should contain clear and detailed information in order to enable appellees and third participants to fully respond to the claims raised by the appellant. This was particularly important for developing countries given the rigid time-frames at the Appellate Body phase. He once again thanked Mexico for its useful paper and said that India was ready to work with other Members with a view to achieving a balanced outcome in an efficient and timely manner.

31. The representative of Nigeria said that he would only be making preliminary comments on the paper by Mexico, as it was being reviewed by the African Group. He said that it was true that Members gave consideration to economic and political factors before deciding whether to initiate a dispute. With respect to compliance with the DSB's recommendations and rulings, he said that it was vitally important, as Members expected a result after expending substantial resources to initiate a dispute. He said that it was the expectation of the African Group that the negotiations would facilitate the participation of African countries in the dispute settlement system.

32. The representative of Norway said that his delegation was disappointed by the failure to reach agreement at the end of May 2003, notwithstanding the many hours put into the exercise by Members. The proposals submitted by Members revealed the differences of views on conceptual as well as technical and practical issues. After recalling that the objective of the negotiations was to improve and clarify the DSU, he said that Norway was among the group of countries that had from the very beginning urged a delineation of the scope of the negotiations in order for substantive progress to be made. The objective of the negotiations was not to redraft the whole DSU, but to address those issues which really affected the operation of the DSU. In that context, Mexico's paper was a very useful contribution in that it pointed out the need for greater focus on areas of the DSU, where Members actually experienced problems. In particular, Mexico was to be commended for the work they had undertaken in providing empirical material which could prove useful in further work to identify the areas of the DSU which actually needed improvement and clarification. On the issue of access to the system, he said that while participation in the dispute settlement system could be costly, the cost for not challenging an inconsistent WTO measure could be far higher. It was however uncertain whether it was the cost, lack of human resources or other factors that had kept some developing countries from using the system. Experience showed that a number of developing countries were frequent users of

dispute settlement system, while others had made little or no use of the system. Lack of resources should not normally stop countries from addressing problems they had experienced in their trading relations within the dispute settlement system. He referred to the statistics concerning the Advisory Centre on WTO Law in the Mexican paper and said that a growing number of developing countries were making use of their services. With respect to transparency, he said that this was a problem in some cases and that Norway would like to see more internal transparency, but was not sure whether this was one of the most pressing problems for the system for the moment. On the issue of compliance, available information clearly showed that there was a need to ensure that there were enough incentives for Members to comply with the recommendations and rulings of the DSB. This was of particular importance to small countries with little leverage to retaliate. Monetary compensation could be a useful alternative for such countries. It appeared that Members had resolved the sequencing issue through bilateral arrangements. It would, however, be necessary to codify the current practice in the DSU. The carousel issue no longer seemed to pose serious problems for Members.

33. On procedural issues, the figures presented indicated that the time spent in establishing panels and electing panelists was too long and that time could be saved here. On the issue of time-frames, he said that Members had generally been reluctant to reduce the current time-frames for the panel process. He recalled that Norway saw the possibility of saving time in the establishment of panels, the election of panelists and perhaps also during the interim report stage. It did not, however, see this as possible with regard to the time-frame for the panel and Appellate Body proceedings themselves, with the exception of translation of panel reports. The figures presented by Mexico also seemed to indicate that the problem of timing was more crucial after the adoption of the reports than in saving a few days or weeks in the panel process. Finally, the Mexican paper raised some interesting issues with regard to the question of whether parties should have more control over the process. The facts and figures seemed to suggest that the interim review stage could probably be dispensed with, and that there was probably no need to allow the partial adoption of panel reports. Such a procedure was likely to protract the dispute. He concluded by saying that it was in every Member's interests that the system functioned efficiently and effectively and that Norway would continue to play a constructive role in the negotiations.

34. The representative of Brazil recalled two defining moments in the negotiations. The first was in March 2002, when the European Communities presented its proposal covering over 40 issues which put Members on a methodological path. The second was at this current meeting with the introduction of the paper by Mexico which offered Members the possibility to re-direct their work. Both approaches had their strengths and weaknesses. While the EC text had injected some dynamism into the negotiations, it encouraged Members to negotiate on the basis of concrete texts. The Mexican paper was not prescriptive. In posing 41 questions, the paper allowed Members to reflect on the work done so far and decide how progress could be made in light of the experiences that had been accumulated over the years. It was imperative that Members identified the fundamental problems within the system and made an assessment as to which ones could be resolved and those which were unattainable at least during these negotiations. Identifying the fundamental problems would not be easy as Members might have different conceptions as to what was fundamental. He said that the greatest problems could be found in the compliance phase. He wondered whether Members would like to focus on this area and hope to achieve some positive results by May 2004. Given the fundamental nature of the problems in this area, would Members like to wait for the Round to finish before re-visiting them? It was possible that new agreements might result from the Round and some issues such as the scope of "peace clause" would be clarified. If these fundamental problems were cast aside, there would hardly be any substantive issues to negotiate. There were some procedural issues that could probably be resolved before May. Instead of a formal amendment to the DSU, the changes could be effected through decisions of the General Council. Should a decision be taken to leave the substantive issues aside, it might well be asked if the negotiating exercise was worthwhile. He said that it was not the number of times that a problem occurred that should lead Members to a

specific conclusion. It might be that a problem occurred just once, but because of its ramifications for the dispute settlement system, Members might decide to find a solution in anticipation that its recurrence might be damaging. He urged Members to be cautious and said that any proposed changes should strengthen the dispute settlement system which, on the whole, had been working quite well.

35. The representative of Paraguay said that the dispute settlement system was a central element in providing security and predictability to the multilateral trading system and that improving the rules to ensure a speedy resolution of disputes should be a central objective in the negotiations. He said in that connection that Article 5 of the DSU concerning conciliation, mediation and good offices offered developing countries the opportunity to have recourse to the WTO dispute settlement system without having to incur the substantial costs associated with the more formal panel and Appellate Body process. He commended Mexico for its paper and said that Paraguay would work closely with it and other Members in strengthening the dispute settlement system.

36. The representative of Korea said that the Mexican paper contained several useful elements which merited recognition and appreciation. It took a systematic approach, not a country-specific one, to the task of improving the dispute settlement system. The quantitative analysis should help Members to concentrate on the most important issues. However, Members should be mindful of the inherent weaknesses of a quantitative approach. To get a fuller picture, it was necessary to complement the quantitative analysis with a qualitative analysis. Referring to the exponential increase in the number of disputes under the WTO system, he said that there were qualitative differences between the dispute settlement system under the GATT and the WTO. During the GATT era, it often took several Council meetings to establish panels or adopt panel reports, and in a limited of cases, panels were not established and reports were not adopted. The change in the number might represent enhanced efficiency or productivity of the dispute settlement system under the WTO, which ran on the basis of a tight time-frame. Although the Mexican paper did not make any value judgment on any proposals or any specific issues, it seemed to emphasize identifying and tackling fundamental problems of the current dispute settlement system. While Korea could go along with that suggestion, it believed that Members needed to be pragmatic. There was widespread acknowledgement that the DSU had been working quite well and that only few changes should be made to improve its efficiency. The mandate given by Ministers was rather modest and Members needed to be realistic about what could be accomplished within six months.

37. The representative of Venezuela commended Mexico for its paper and said that it would make a useful contribution to the negotiations by helping Members to concentrate on the most important issues. He said that the lack of a common objective had contributed to the failure by Members to fulfil the mandate given by Ministers at Doha. He said that the mandate was intended to identify fundamental improvements and clarifications, rather than just problems. Members should have no difficulty in identifying the fundamental problems which exist – compliance being one of them. If Members did not improve on compliance, there could be no improvement to the DSU. There was no point in perfecting or improving the process or improving access, if a better record on compliance could not be achieved.

38. The representative of Singapore said that her delegation had approached the negotiations from the perspective that the dispute settlement system had been working reasonably well and that the review should address improvements to the system in areas where there were real problems. She commended Mexico for its paper and said that it would make a useful contribution to the negotiations. She said, however, that there were inherent limitations in quantitative analysis such as this. Numbers did not always tell the whole story and it was necessary to look behind them. In some cases, perhaps there was no such thing as an appropriate statistic for a case in question. She said that Mexico was conscious of the limitations of its paper and had not claimed that it was comprehensive. She said that the paper *per se* would not resolve the underlying questions of the so-called fundamental problems, identify the places that had to be fixed, and the form and content of the final package that could have

broad support among the membership. Nonetheless, Singapore believed the paper to be a good diagnostic tool that would facilitate a deeper analysis of the facts and problems facing Members.

39. The representative of Argentina said that it was appropriate to base the working methodology on a diagnosis of how the DSU operated, rather than directly on proposals. Discussion based on this methodology could help de-mystify certain issues or put them in their proper context and allow proper conclusions to be drawn. To that extent, the Mexican paper should make a useful contribution to the negotiations. However, as pointed out by a number of delegations, there were inherent limitations in quantitative analysis such as the one conducted by Mexico. While figures could be extremely useful, they did not usually tell the whole story. Their value was relative and they generally only indicated trends over a long period of time. It was arguable that eight years was not long for a legal regime. It should be recognized that resolving issues such as lack of compliance with DSB recommendations, which according to Mexico's document was the most important problem within the dispute settlement system, might involve carrying out structural reform of the system. In this respect, it was doubtful whether such a task was in keeping with the mandate or whether this was the right time to embark upon such an exercise. Moving beyond Mexico's contribution, he asked whether it was appropriate to undertake an in-depth reform of the DSU as part of the current exercise. He recalled that at last month's informal meeting, Argentina had expressed the view that the debate between maximalist and minimalist visions with respect to improvements and clarifications of the DSU should be viewed within the context of "what was possible", both in terms of the current chances of consensus and in terms of keeping in mind the May 2004 deadline. One step should be taken at a time. Time and practical experience would show how to deal with some of the fundamental issues, such as compliance with the DSB's recommendations and rulings. One should not lose sight of the fact that the DSU had been in existence for only eight years and it was widely acknowledged to have worked well to work well. Argentina had a positive view of the way in which the DSU currently operated, even if there was room for occasional improvements.

40. Argentina was inclined to think that it might be better to undertake a structural reform of the DSU at the end of the current Round of negotiations, when there was a clearer idea of the dispute settlement system's needs. It should not be forgotten that there would be some important developments in the near future, such as the expiration of the transition periods, or the possible achievement of results in the current Round of negotiations, which could engender new experiences and problems that would lead to further challenges for the settlement system. Members should ask themselves whether they wanted to decide now on the type of dispute settlement system that they wanted and whether it was really the right time to do so. After repeated attempts to amend the DSU, Members had to be realistic and should capitalize on the work done thus far. Argentina felt that the Chairman's text of 28 May 2003 covered a set of issues – many of them discussed at length – on which it could be possible to obtain results. This did not imply that Members should immediately work on the text. A frank discussion at a conceptual level of some of the afore-mentioned issues, including sequencing and remand authority was still necessary. Moreover, such discussions might reveal that consensus could only be reached on some of the issues included in the Chairman's text. It was clear that if there was to be any chance of success, Members first had to decide what was possible to be achieved by May 2004. Given the level of discussion they required and the different positions and reactions they inspired, many of the issues, even fundamental ones such as compliance, would probably be more appropriately addressed later when a clearer idea existed of the new challenges to be faced by the dispute settlement system.

41. The representative of Australia commended Mexico for its attempt to focus on the actual problems faced by users of the DSU particularly useful. Australia's position remained that the DSU had served Members well to date, and any changes to the DSU should address real and significant problems and inconsistencies in the current process. Solutions to these problems should be approached with simplicity and practicality. Australia could join the emerging consensus on the need to identify fundamental problems facing the DSU and then examine the range of options that might be

appropriate in dealing with them. It should, however, be expected that it would not be easy to reach an agreement on a list of fundamental problems for which solutions should be sought in this process. As others had noted, what was fundamental was relative and might vary depending on the priorities of each delegation. Members had heard several competing interpretations of what the data – or in some cases lack of it – in the Mexican paper demonstrated with respect to the fundamental nature of issues raised in proposals to date. He said that Australia would be interested in hearing the views of Members on this issue. Regarding the participation of outside experts in the process, he said that Australia was in agreement with the views expressed by Chile, particularly as regards inviting past and present members of the Appellate Body to share their views and experiences with Members.

42. The representative of Hungary, referring to the Mexican paper, said that it was interesting to note the increased participation of the developing countries in the dispute settlement system. The trend had continued during the period not covered by the paper. The paper also showed that there was a fair amount of panelists from developing countries, but at the same time LDCs were not represented as had been highlighted by the LDC Group. She said that Hungary shared the view that the methodology used was only one among several and that quantitative approaches did not usually show all aspects of the problem. It was necessary to look at the qualitative as well as in some cases the political aspects. For example, concerning the issue of sequencing, the paper mentioned only one case where the proper application of sequencing had been disputed. This quantitative approach seemed to imply that it was not necessary to tackle this problem multilaterally. However, Hungary shared the opinion of India, Brazil and others that this issue had systemic importance and required a multilateral solution. Likewise, on the issue of litigation costs, using the example of Ecuador, the paper seemed to imply that the issue of litigation costs was not a very serious problem. However, the proposals and the comments of developing countries during the process seemed to show the contrary. Finally, the fact that in some cases, the parties had been able to reach mutually agreed solutions, or that the Appellate Body had taken a position on specific issues such as *amicus curiae* submissions did not mean that this solution was satisfactory. She shared the view of Canada that instead of a case-by-case solution, it would be preferable to have multilateral solutions which provided general guidance for the treatment of such issues.

43. The representative of Chile said that it was important for the right questions to be asked in order to get a sense of what had to be done to strengthen the dispute settlement system. As an example, with the data showing that no least-developed country had made use of the system, it might be asked whether any LDC had felt the need to have recourse to the system, but because of some particular problems it could not pursue its claim under the DSU. Given that the DSU had been in existence for eight years, it was necessary to continue gathering data so that corrective actions could be taken in light of developments and prevailing circumstances. It would be useful for the Secretariat to build on the Mexican paper and issue a report annually covering recent trends.

44. The Chairman said that an annual report was prepared on the activities of the DSB, which contained some statistical data. He said that perhaps the Secretariat could look into how the statistics could be further developed to make it more informative.

45. The representative of Hong Kong, China said that the Mexican paper was a useful tool that could help Members to take a fresh look at problems facing the DSU. He said that Hong Kong, China shared the view that there were some limitations to a quantitative approach. Citing the sequencing issue, as an example, he said whereas it might appear not to be a fundamental problem, it would be preferable if a multilateral solution was found. With regards to delays in the panel process, he said that there were different ways to tackle such problems as had been expounded in the a number of proposals. These included creating a permanent body of panelists, creating permanent panel chairs, or adopting some procedural actions to deal with the problem. There was still a long way to go before Members could agree on how to resolve particular problems. The DSU had been working reasonably

well and any proposed changes should focus on the real problems that had been encountered and what was attainable within the time-frame.

46. The representative of Mexico said he did not wish to react to delegations' comments because its paper was intended to provoke delegations to discuss the substantive problems facing the dispute settlement system. To that extent, Mexico had achieved its objective of concentrating the minds of delegations on the fundamental problems facing the DSU and how they might be resolved.

47. The representative of the European Communities said that the DSU negotiations were different from other negotiations currently taking place under the Doha Development Agenda. Given the systemic importance of the dispute settlement system, it was important for the negotiations to be carefully handled. The negotiators during the Uruguay Round did a fine job by creating the DSU which had generally worked quite well, as had been attested to by many Members and by Professor Claus Ehlermann in a recent article on his experiences as an Appellate Body member. He recalled that a number of delegations had stated in the recent past that in reforming the DSU, it was more important to get things right than to rush through the process. The negotiations to improve the dispute settlement mechanism had been going on for quite some time and it was important to build on the good work done thus far, as directed by the General Council in its July meeting. The Chairman's text could serve as a useful basis for further negotiations. He highlighted four areas in the text of importance to the EC: (i) sequencing: while this issue was less controversial, the relationship between Articles 21 and 22 of the DSU should be definitively addressed; (ii) compensation: up until now, retaliation had been practically the only available option in cases of non-compliance. There should be more incentives for parties to agree on a temporary compensation deal, without, of course, compromising on their right to apply countermeasures; (iii) third party rights: internal transparency was essential in enhancing the credibility of the dispute settlement system. The fundamental purpose of increased third-party access was to give all Members an opportunity to contribute to the development of WTO law; (iv) remand authority: there appeared to be a convergence of views on the need to grant the Appellate Body remand authority. In view of the growing factual complexity of DSU cases, this would be an appropriate and timely step.

48. The Chairman's text was, however, not exhaustive. There were other areas which could be usefully clarified and improved, if Members showed the necessary flexibility. One of such issues was the selection process for panelists. The EC was a frequent user of the dispute settlement system and had come to the conclusion that the current rules on panel composition could be significantly improved. This was an assessment it had made essentially on qualitative grounds. The EC would be willing to elaborate on its claim during the item-by-item discussion. The collection of evidence, factual analysis, and interim decisions on procedural issues were all technical and time-consuming, but were essential functions of the dispute settlement system and a person serving in a dedicated body of panelists was more likely to perform these functions better and quickly than an *ad-hoc* panelist. The EC continued to be attached to the idea of a body of permanent panelists. Nonetheless, it also recognized that several WTO Members were not ready to deprive themselves of the flexibility provided by the present system, which they perceived – rightly or wrongly – as giving them more control over the selection process. However, it should also be possible for Members, that so wished, to have panels composed from a roster of highly qualified persons. He said that the EC was ready to work with all Members on modalities for panel composition that combined flexibility in the selection process with the establishment of a roster of highly qualified and dedicated panelists. Regarding compliance, he asked whether the current provisions were adequate. There was the need to dispel the myth that more severe remedies would necessarily lead to better and earlier compliance. Indeed, the reluctance by WTO Members to actually apply retaliation suggested that better records of compliance were unlikely to be achieved through a merely theoretical increase of retaliation rights in the DSU text. By this, however, he did not mean that Members should not have a serious debate on compliance. The EC would participate constructively in the discussion on this complex and important area. It was important for Members to always keep in mind the lack of balance between adjudicatory processes

and political decision-making processes in the WTO. Members should be careful not to expect to get from the adjudicatory system what should be demanded in the negotiating arena. Transparency could increase public confidence in an adjudicatory system and make it easier to introduce significant changes. He invited Members to put aside their prejudices and consider the possible benefits from opening up the dispute settlement system to the general public in cases where the parties to the dispute did not have any objection. On developing countries, he said that it was clear that measures should be adopted to enhance their participation in the dispute settlement system. Members needed to put aside their preconceptions and address the real difficulties faced by developing countries. It was the belief of the EC that a major effort should be made to train lawyers from developing countries in WTO law taking into consideration the differences that existed among developing countries.

49. The Chairman said that this discussion had shown that Members were determined to reach a successful outcome by the target date of May 2004. Despite the various views on whether there should be any further work on the DSU, it was his sense that the majority of delegations at this stage did not want to contemplate any work programme beyond this date. On the contrary, his feeling was that after several unsuccessful attempts, both before and after Doha, there was a broadly felt wish to try to have some results from this exercise. There was a challenge of ambition versus realities. There was understandably an interest to try to correct the problems which many delegations felt existed in the operation of the DSU based on the experiences of the past eight years. On the other hand, there was the question of what was doable in the relatively short period until the mandate's deadline. The Chairman recalled that he had attempted to restart the work as early as possible and was glad that Members had been able to make a meaningful start at the present meeting, but only six months remained to complete the work. In order to reach an agreement on improvements and clarifications to the DSU, Members needed to resume work from now on at a sustained pace. The discussion on the conceptual issues might help focus the issue-by-issue discussion and energize the process with some new perspectives on all issues under negotiations. He noted that comments had been made on how to deepen the diagnosis, including soliciting the views of past and current members of the Appellate Body.

50. He said that the purpose of the issue-by-issue discussion was to take stock of where Members stood in respect of the various issues that have arisen through the work done thus far. This exercise was complementary to the discussion which had just taken place and should be a logical continuation to it, as there some overlaps between these two agenda items. He said that he had received some comments and useful proposals from Members, including preparation of a list of questions which Members could focus on in their work. He said that with the assistance of the Secretariat, the first list of questions had been circulated covering the pre-panel phase. The list was not meant to be exhaustive, nor intended to pre-judge the position of any delegation on any of the issues under discussion. He said that Members could raise any issues of interest to them, but should be conscious of the lengthy and detailed discussions on the various issues contained in the proposals and the reactions proponents had heard from other delegations to some of their proposals. He referred to the Mexican proposal and said that notwithstanding the inherent limitations of quantitative analysis, it should make a useful contribution to the negotiations. It was apparent from the discussions that Members had shown their readiness to supplement the quantitative analysis with qualitative assessments and also take into account political considerations.