

**Special Session of the Dispute Settlement Body
13 – 15 November 2002**

MINUTES OF MEETING

Held in the Centre William Rappard
on 13 – 15 November 2002

Chairman: Mr. Péter Balás (Hungary)

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The Chairman welcomed participants to the sixth meeting of the Special Session of the DSB and referred to the proposed agenda of the meeting which comprised three items, namely (i) discussion of new proposals submitted by delegations; (ii) discussion of specific issues raised in the proposals (in the order listed in the checklist of issues – JOB(02)86/Rev.4); and (iii) "Other Business". Under the first item, the Chairman proposed to invite participants which had submitted new proposals to present them formally and give other participants the opportunity to react to them formally if so they wished. He said that participants could also comment on any of the earlier proposals under the second agenda item. He, however, cautioned them against making lengthy comments on the proposals at this stage, as participants would have the opportunity to discuss informally all the elements of the proposals when the second agenda item was taken up. The item relating to "Other Business" was deleted prior to the adoption of the agenda, as no participant had indicated that it would like to make a statement under this agenda item.

1. Discussion of proposals submitted by participants

(a) Proposal by Japan (TN/DS/W/22)

1. The representative of Japan recalled that her delegation introduced informally this proposal at the fifth meeting of the Special Session. She said that to a large extent the present proposal was based on the joint proposal (WT/MIN(01)/W/6) submitted to the Doha Ministerial Conference by a group of countries including Japan. The new proposal, however, contained some novel elements concerning status reports and compensation. It did not, however, include the suggestions in the original proposal relating to overall time-frames and special and differential treatment of developing countries. She said that like the previous proposal, this new proposal also focussed primarily on the "sequencing" issue, to which Japan attached great priority as evidenced by the sponsorship of a number of documents on this issue, including most recently the concept paper (JOB(02)/45), which had been submitted in May 2002. She said that while there were a number of similarities between the new Japanese proposal and that of the EC proposal, there were differences in the approaches adopted on a number of issues, including: (i) whether consultations should be held before a request for the establishment of a compliance panel could be made; (ii) whether the Member concerned should be

obliged to submit a compensation proposal; and (iii) when should arbitration take place to decide the level of the nullification and impairment.

2. She said that Japan's proposal also addressed the so-called "mandatory law" issue, under which a Member was obliged by domestic legislation to adopt certain measures that were inconsistent with its WTO obligations. The implementation of such measures meant that the Member would have violated its obligations towards other Members. The practice under Article 22.4 of the DSU was that the level of the suspension of concessions should be equivalent to the level of the nullification and impairment resulting from the specific WTO-inconsistent measure in question. In cases where a "mandatory law" was involved, it might be difficult to establish "equivalence" between the impact of the law and the level of retaliation. Given that only the actual impact of the law in the case in question was taken into account for purposes of determining the level of nullification and impairment, the level of retaliation could not be equivalent to the total trade-distorting effects that the mandatory law might have when additional measures were pursuant to it in the future. Given this imbalance, there was no incentive for Members to comply, as retaliation in the event of non-compliance was likely not to be effective. To address this situation, Japan had proposed that the scope of Article 22.4 of the DSU should be broadened to encompass not only the trade effects created by the measure in question under a "mandatory law", but also those that would be created in the future by subsequent measures that might be adopted pursuant to the law.

3. She further stated that Japan's proposal also covered the so-called "discretionary law" theory, under which the legislation of a Member entitled it to choose between WTO-consistent and WTO-inconsistent measures. It had been held by panels and the Appellate Body that such laws, *per se*, did not violate WTO rules and that only measures taken pursuant to them could be found to be in breach of WTO rules. In Japan's view, such a situation was not satisfactory as it did not deal with the underlying problem, which was the enabling "discretionary law". If trade remedy measures were abused pursuant to a "discretionary law", trade with third countries would be affected when an investigation was initiated. Attempting to get back subsidies or reversing a government procurement after tendering would be practically difficult. It was conceivable that a Member might decide to protect a domestic industry under a "discretionary law", even after it had been found to be in breach of WTO rules in an earlier case involving the same law. It might adopt the position that it had a right to maintain the new measure, until such time that a decision was made by a panel or the Appellate Body. It might even be encouraged by the fact it could not be required to amend or repeal the "discretionary" law. The possibility for abuse was real and it was necessary to address this issue. Accordingly, Japan had proposed that an exception to the application of the "discretionary law" theory, when repetition of the same violation was highly probable. For instance, when it was evident that a Member had deliberately ignored the recommendation of the DSB not to apply a particular measure enacted pursuant to the law and applied similar measures subsequently. Regarding modalities, Japan was of the view that the changes that it had proposed could be achieved through an amendment of the relevant WTO provisions or through an authoritative interpretation of Article XVI:4 of the Marrakesh Agreement Establishing the WTO, in accordance with Article IX:2 thereof. She said that Japan had also suggested that the burden of proof in cases involving "discretionary" laws should be shifted to the Member imposing the measure, if there was evidence that repeated violation had taken place. In such situations, the measure would be presumed to be inconsistent with WTO rules, unless proven otherwise. Japan had also proposed that such cases should be referred to the original panel or division of the Appellate Body, whenever possible with a shorter deadline for recommendations and rulings.

4. She further said that Japan's proposal also called for an increase in the number of the Appellate Body members, given the increase in the number of cases being appealed and the difficult nature of the legal issues that had to be resolved. She said that if Members expected the Appellate Body to maintain its high standards and avoid any delay in the issuance of reports, it was necessary to increase the number of Appellate Body members. In that context, Japan had proposed an amendment of Article 17.1 of the DSU, so that the number of the Appellate Body members could be adjusted, as and when required, by a decision of the DSB or the General Council. Flexibility was required and

Japan's proposal would obviate the need to amend Article 17.1, each time it was decided to adjust the number of Appellate Body members. In the meantime, it would be helpful to commission a report on which number would be adequate, taking into account all related factors such as workload and the financial implications of any increase in the membership of the Appellate Body. Regarding transparency, she said that Japan had proposed improved access to submissions by Members and the general public. Arguments and rebuttals in a dispute were of interest not only to the parties and third parties, but also to other Members, especially those that might be contemplating having recourse to the DSU in the same or a similar matter. With the exception of confidential business information, it was Japan's view that the submissions of parties and third parties should be made accessible to all WTO Members as well as to the general public within two weeks from the date of each relevant meeting of a panel or oral hearing of the Appellate Body. She said that Japan was ready to respond to any queries that participants might have and looked forward to receiving their support for its proposal.

(b) Proposal by Mexico (TN/DS/W/23)¹

5. The representative of Mexico said that the primary objective of the dispute settlement system was to provide security and predictability to the multilateral trading system. It was therefore imperative for Members to comply promptly with the recommendations and rulings of the DSB. By signing the Marrakesh Agreement Establishing the WTO, all Members committed themselves to ensuring the conformity of their laws, regulations and administrative procedures with WTO disciplines in the various agreements. The two hundred and seventy-four cases which had been initiated since January 1995, when the WTO Agreement went into force, seemed to suggest that Members had not been faithfully implementing their obligations. It was Mexico's considered view that the DSU had a structural problem which had to be addressed in order for it operate to its fullest potential. The main weakness of the system was the excessive length of time that a Member could maintain a measure which had been found to be WTO-inconsistent without any consequences. Based on rough estimates made by Mexico, a Member could maintain a WTO-inconsistent measure for more than three years "for free", which invariably translated into losses of millions of dollars a year for the exporting Members. Based on arbitration awards that had been circulated excluding the case on United States – Tax Treatment for Foreign Sales Corporation, the average was almost 370 million dollars per case. There would be no better way of fulfilling the mandate given by Ministers at Doha than by addressing the structural problems that had prevented the dispute settlement system from achieving its full potential. To contribute to realising this objective, Mexico was proposing the introduction of four concepts in the DSU, namely: (i) early determination and application of nullification or impairment; (ii) retroactive determination and application of nullification or impairment; (iii) preventive measures; and (iv) negotiable remedies.

6. Regarding the early determination and application of nullification or impairment, he said that the Mexican proposal was quite simple. It would involve moving forward the arbitration procedure foreseen in Article 22.7 to the original Panel proceeding's phase and granting authorization to suspend concessions or other obligations upon adoption of the original Panel/Appellate Body report. Under the suggested framework, the parties could engage in discussions concerning the level of nullification or impairment after the issuance of the interim Panel report. The level could be adjusted depending on the findings of the Appellate Body. The main advantage of this proposal was that it created incentives for Members to promptly comply with the recommendations and rulings of the DSB. The early suspension of concessions would induce the Member concerned to bring its measures into conformity "immediately" or "in the shortest period possible within its legal system". It would furthermore be inclined to consult with the complaining Member in order to seek a mutually satisfactory solution, without which it might be difficult to determine when the suspension of concessions would be lifted. Besides, this proposal would encourage and facilitate negotiations, because Members would be aware of the level of nullification or impairment even before the adoption

¹ See attachments to the proposal on pages 4 and 5.

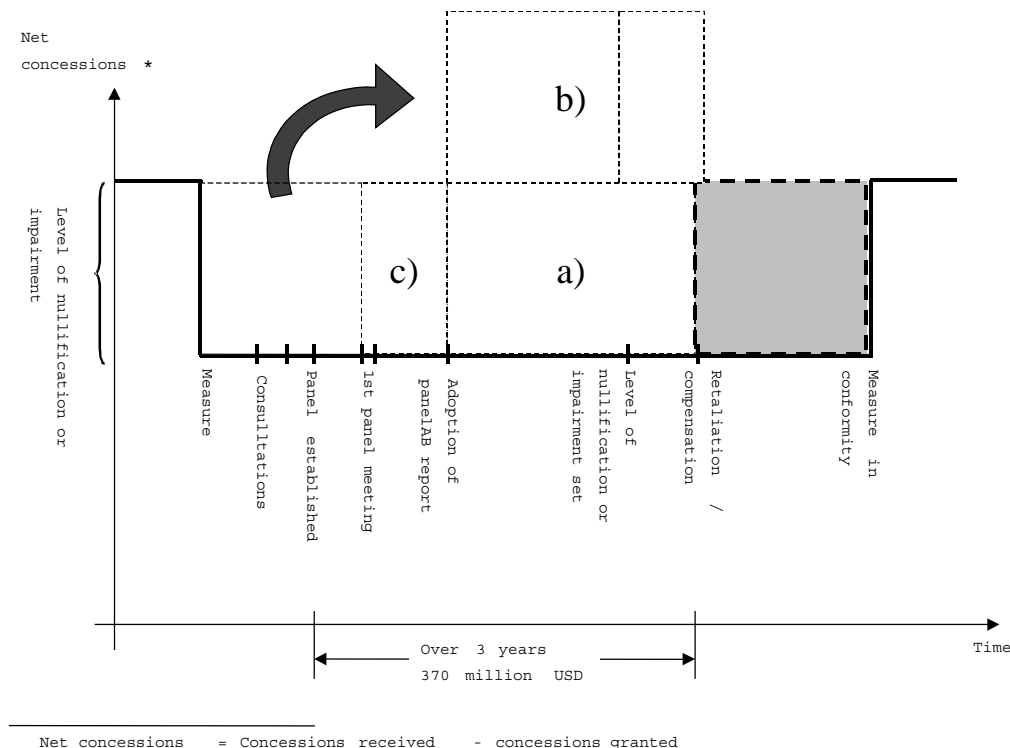
of the original Panel or Appellate Body report. Finally, the period of non-compliance with the DSB's recommendations and rulings would be greatly reduced. (See Fig.1, box (a)).

7. Regarding retroactive determination and application of nullification or impairment, he said that the objective was not only to authorize the prevailing Member to suspend concessions and other benefits prospectively, but also retrospectively for a period which could start as early as: (i) the date of establishment of the Panel; (ii) the date of request of consultations; or (iii) the date of imposition of the measure. The advantage of this proposal was that it created incentives for the Member concerned to bring its measures into conformity with the DSB's recommendations and rulings as promptly as possible. With retroactivity, it would not be in the interest of the Member concerned to deliberately delay the proceedings, as any benefits obtained were likely to be offset by the amount it would have to pay in compensation or the losses it would incur following the suspension of concessions or other benefits by the prevailing Member. Furthermore, benefits would be allocated in a more equitable manner, ensuring the preservation of the balance of rights and obligations under the WTO Agreement. (See Fig. 1, box (b)).

8. With regard to preventive measures, he said that the objective was to allow panels to request the responding Member to suspend the application of a measure, which was causing or threatening to cause damage which would be difficult to repair at a later date. If the responding Member did not comply with the decision to suspend its measure, the Panel could then authorize the complaining Member to take the necessary measures to prevent the damage from occurring. This would provide an adequate level of protection for the complaining Member during the proceedings and obviate the need for that Member to adopt an inconsistent WTO measure in response which could affect other Members who had nothing to do with the underlying dispute. (See Fig. 1, box (c)).

Fig. 1

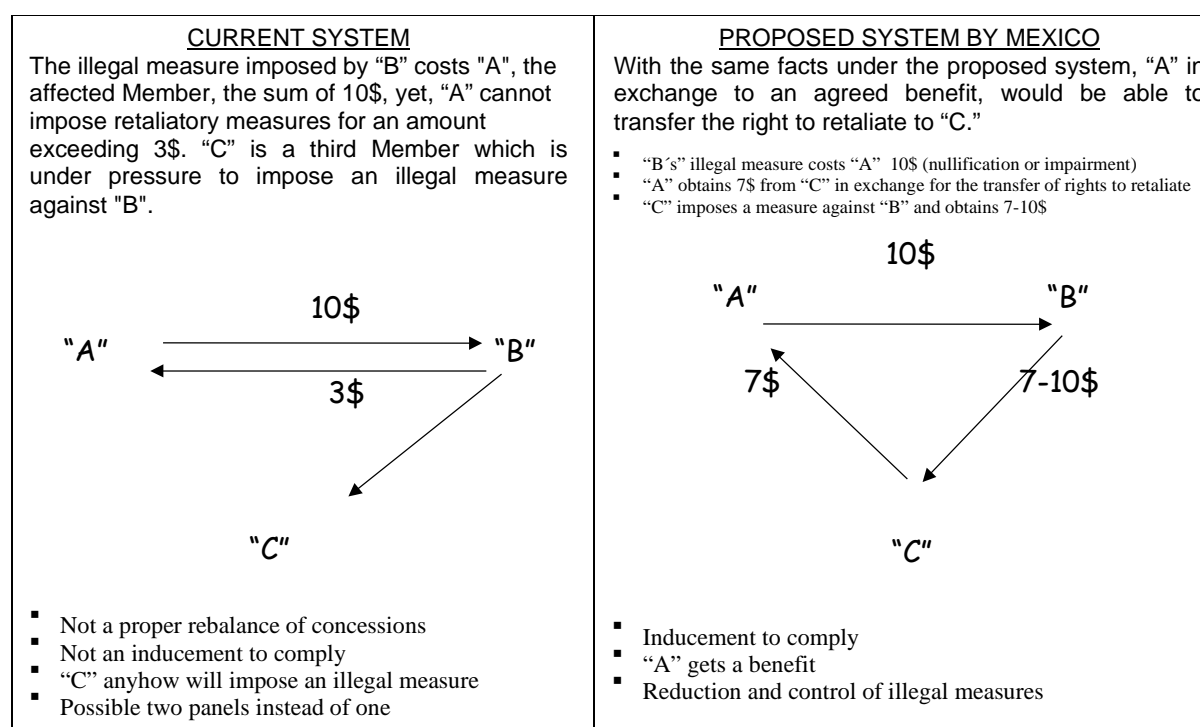
- (a) Early determination and application of nullification or impairment
- (b) Retroactive determination and application of nullification or impairment
- (c) Preventive Measures



9. Regarding negotiable remedies, he said that the objective was to allow Members to "negotiate" their right to suspend concessions in exchange of a specific benefit from any interested Member. Currently, a number of Members were of the view that suspension of concessions was not a real option for them considering the harm that it could do to their economies. This proposal would make suspension of concessions a viable option and attractive to them. He proceeded to explain how the proposal would work in practice. He said that if the responding Member had been unwilling to negotiate with the complaining Member with a view to agreeing on compensation, the former could transfer its right to suspend concessions or other benefits to another Member in exchange of a negotiated benefit (i.e., "A" might agree with "B" the transfer of the right to suspend concessions or other benefits to "C" in exchange of a mutually agreed benefit, which might even take the form of cash). He said that this proposal would have two main advantages: first, it would provide incentives for the responding Member to comply, since in all likelihood, it would not want the involvement of a third party with real power to retaliate; and second, it would provide tangible benefits at the end of the process for the complaining Member, even though it could not retaliate itself, thus guaranteeing a better readjustment of concessions.

Fig. 2

Negotiable Remedies



10. He said that while these concepts might appear to be new to the WTO dispute settlement system, they had been successfully applied in most Members' domestic legislation and in other areas of international law. In adopting these concepts, the WTO would only be bringing its regime in line with other systems. These proposals offered the dispute settlement system the best chance of achieving its full potential. The incentives provided by the current system were weak and encouraged non-compliance. It was likely that these proposals would lead to fewer disputes and an expedited process for settling disputes, as well as a more equitable allocation of rights and obligations. He noted that there were a number of similarities between Mexico's proposal and those tabled by other participants. All these proposals shared one thing in common and that was streamlining and improving the functioning of the dispute settlement system. He concluded by saying that it was

domestic policy-making agencies which would benefit the most from these proposals, as they could rely on them to resist calls from special interest groups to adopt protectionist policies.

2. General comments on the proposals

11. The representative of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) said that her delegation attached great importance to the dispute settlement system, as it was central to the effective functioning of the multilateral trading system. It was the expectation of Chinese Taipei that the improvement and clarification of the DSU would result in the greater participation of developing-country Members in the system. She said that her delegation wished to comment on the proposals of the United States, the European Communities, Costa Rica and Jamaica, particularly those sections addressing transparency and the rights of third parties. Regarding transparency, she said that Chinese Taipei was strongly in support of it, as it could facilitate greater participation of Members in the dispute settlement system. Effective participation in the system by all Members would enhance its credibility and lead to greater compliance with the recommendations and rulings of the DSB. Notwithstanding its broad support for increased transparency and third party rights, Chinese Taipei had some strong reservations against some of the proposals that had been tabled.

12. Regarding the proposal by the United States (TN/DS/W13) that the dispute settlement process should be opened up to the general public and also provided with all the relevant submissions, she said that her delegation had some hesitation in supporting these proposals. The dispute settlement system was unique and opening it up in the manner suggested by the United States would compromise the process and make it particularly difficult for the parties to reach mutually satisfactory solutions to their disputes. With respect to *amicus curiae* submissions, she said that her delegation was in disagreement with the proposal by the EC (TN/DS/W/1) that panels and the Appellate Body should be authorized to accept unsolicited submissions. This proposal, if accepted, would place an unfair burden on Members, particularly those with the least resources. Regarding the proposal by the United States (TN/DS/W/17) that guidelines should be drawn up to regulate the handling of such submissions, she said that her delegation did not see the need for them, as the case law currently being developed by panels and the Appellate Body was replete with such guidelines.

13. On third party rights, she said that Chinese Taipei was conscious of the uneasiness of some participants who seemed to be of the view that enhanced third party rights would make the dispute settlement process cumbersome and frustrate the efforts of the parties to find a mutually satisfactory solution to their dispute. In Chinese Taipei's view, these concerns were misplaced and did not take into account the profound effects a case could have on third parties. It was against this background that Chinese Taipei supported the proposals by Costa Rica (TN/DS/W/12), Jamaica (TN/DS/W/21), and the European Communities (TN/DS/W/1) aimed at enhancing the participation of third parties in the dispute settlement process, particularly their access to all relevant information except for business confidential information and the final report at the same time as the parties to the dispute, and being present at all meetings of panels and the Appellate Body, except when business confidential information was being considered.

14. She said that while Chinese Taipei was in favour of strengthening third-party rights, it was also of the view that their rights should be less than those of the parties to the dispute. In that context, it was not in agreement with Costa Rica that the "substantial trade interest" provision in Article 4.11 of the DSU should be amended to make it easier for third parties to participate in consultations between the parties to the dispute. It was also not in agreement with the proposal that would require the arguments of third parties to be reflected by Panels in their report, not the proposal that third parties should have the right to provide comments on the descriptive part of the Panel report and the interim Panel report. Chinese Taipei was of the view that the extensive involvement of third parties in the dispute settlement process could compromise the basic function of the dispute settlement process, which was to secure a positive solution to the dispute between the parties. If panels and the Appellate

were to reflect the arguments of third parties in their reports, it could delay the process and consequently undermine one of the basic tenets of the dispute settlement system.

15. The representative of Chile welcomed the proposals by Japan and Mexico and said that they would make an important contribution to the work of the Special Session. Regarding the proposal of Mexico, he said that it correctly identified the main weakness of the dispute settlement system. It was pointless attempting to improve and streamline the rules and procedures for dispute settlement, if Members would not comply with the recommendations and rulings of the DSB. Although the statistics revealed that the general level of compliance was satisfactory, there were certain cases in which the failure to comply was testing the limits of the system. A distinction could be broadly drawn between Members who had managed to obtain a waiver from their WTO obligations in exchange of the imposition of retaliatory measures by the complaining Members, and those who had simply found it difficult to bring their measures into conformity with the recommendations and rulings of the DSB. These cases continued to multiply casting a doubt on the effectiveness of the dispute settlement system. There at least eight cases where implementation of the recommendations and rulings of the DSB was still outstanding.

16. Given the growing list of unimplemented recommendations and rulings of the DSB, Chile would support any proposal that would create incentives for compliance. Chile was not particularly attracted to the proposals on compensation, as there was the tendency to see it as a substitute for compliance. He said that whereas the stated purpose of the Mexican proposal was to create incentives for prompt and effective compliance, it appeared that it would generate more doubt than certainty. Careful thought should be given to the proposal relating to the retroactive determination of nullification and impairment. In Chile's opinion, this proposal could be implemented more easily in the area of trade remedies such as in anti-dumping cases. Should a panel or the Appellate Body find that an anti-dumping duty had been imposed in contravention of the relevant WTO rules, the concerned Member should not only be required to abolish that duty, but it should also be made to refund all the duties it had collected illegally with interest. This proposal might not lend itself to easy application in other types of disputes. It would be essential to ensure that the calculation of nullification or impairment was not merely a statistical exercise, but that it took into account dynamic effects as well.

17. Regarding preventive measures, he said that while the proposal was attractive, it would imply a change in the current terms of reference of panels. The proposal as it currently stood could inadvertently lead to the pre-judging of issues by panels. He said that in Chile's view, it would be difficult to require a Member to withdraw or suspend the application of a measure when no final decision had been made about its consistency with WTO rules. It was not very clear whether under the proposal, the panel could recommend the adoption of a preventive measure or impose that decision on the Member in question. It was also not certain whether the decision of the panel would have direct application or needed to be adopted by the DSB before taking effect, nor was it clear whether the decision of the panel could be appealed. These issues needed to be clarified before a proper assessment of the proposal could be made.

18. Regarding the proposal relating to the transfer of the right to retaliate, he said that while it was innovative, it was doubtful whether it could be easily implemented in the context of the WTO. Implementation of this proposal would turn the WTO into a market where rights to retaliate were trafficked. It could create a situation where Members with resources would always acquire a right to retaliate. This "acquired" right could be misused to further the interests of the Member wielding it, including those that might not be related to dispute settlement. Regarding the appropriate time to determine the level of nullification and impairment, he said that while Chile was generally supportive of early determination, as it would help the parties to know exactly what was at stake, it was sceptical about Mexico's proposal which would result in determinations being made before the final settlement of disputes. It was necessary to take into account the partial implementation of the recommendations and rulings of the DSB in the determination of the level of nullification and impairment. At the

minimum, provision should be made for a review of the determined level. A possible solution would be the procedure under Article 22.6 of the DSU. He concluded by saying that the Mexican proposal was very interesting, but it needed to be elaborated further.

19. Turning to the Japanese proposal, he said that it contained some interesting suggestions that merited further consideration. As regards mandatory laws, he said that they presented no serious challenges, as it could be assumed that they were inconsistent with the relevant WTO disciplines, and that the only way for the Member concerned to fulfill its WTO obligations was to amend or abolish them. The case of discretionary laws was different, as they could not be said to be inconsistent with WTO disciplines. However, they undermined security and predictability, as there was always an element of uncertainty as to how they would be applied. It was in that context that Chile was supportive of the Japanese proposal that a mechanism should be found to ensure that Members did not abuse such laws. Regarding whether the membership of the Appellate Body should be increased, he said that Chile was of the view that the present number was adequate. He said this view was shared by former members of the Appellate Body. Regarding the nature of their employment, he said that given the intensity of the work done by Appellate Body members, they should be employed on a full-time basis. He said in that connection that Chile would be interested in hearing the views of the members of the Appellate Body on the proposal being discussed in the negotiations. Regarding the proposal on the "sequencing" issue, he said that since the proposal was based on an earlier proposal by a group of countries including Chile, his delegation was supportive of it.

20. The representative of Paraguay welcomed the proposals by Japan, Mexico and Chinese Taipei and said that his delegation would like to make a few preliminary comments. Regarding the Mexican proposal, he said that it was very innovative and designed to solve one of the major problems confronting the dispute settlement system. He said that his delegation shared Mexico's concern about the growing number of unimplemented reports and lack of effectiveness of WTO remedies, hence its decision to submit a proposal on good offices, conciliation and mediation. He said that Paraguay, however, had some doubts about how the proposal on retroactivity would work in practice. Regarding the Japanese proposal, he said that his delegation was in agreement with the approach advocated for settling the "sequencing" issue. He said that his delegation was in agreement with certain elements of Chinese Taipei's proposal and that it would provide comments at a future meeting of the Special Session.

21. The representative of Thailand welcomed the Japanese proposal and said that his delegation broadly shared the views of Japan on the "sequencing" issue. As regards the proposal relating to mandatory and discretionary laws, he said that his delegation was in agreement that the burden of proof should be shifted to the Member taking the measure in question. On the proposal relating to the membership of the Appellate Body, he recalled that his delegation had introduced a similar proposal suggesting that the number of Appellate Body members should be increased in order for the Appellate Body to continue discharging its duties effectively and efficiently. Regarding the proposal on access to submissions by the general public, he said that his delegation was not convinced about its underlying reasons, as under the current system, the general public could access panel and Appellate Body reports on the Internet.

22. Turning to address the Mexican proposal, he said that his delegation was supportive of the idea of determining the level of nullification and impairment at an earlier stage. Arbitration under Article 22.7 was an integral part of the DSU and was frequently being resorted to by Members. He said that his delegation was encouraged to learn that Mexico had an open mind as to when the determination of the level of nullification or impairment should be made public. In Thailand's opinion, it would be better for the determination to be kept confidential, until the circulation of the Appellate Body report. He noted that the Mexican proposal was complementary to the proposal that Thailand and Philippines (TN/DS/W/3) submitted to amend Article 22.7 of the DSU. As regards retroactivity, he said that it would be helpful if Mexico could clarify further its proposal. It was not clear if Mexico had in mind *restitutio in integrum*, i.e., restoring the injured Member to the position it

would have been had the damage not occurred. If this was what was contemplated, then compensation would need to be calculated from the date the damage occurred or when the injured Member became aware of it. Given these options, he said that Thailand could consider the point of reference for calculation of the damage as proposed by Mexico. Alternatively, it could be left to the discretion of panels and the Appellate Body to decide. Regarding preventive measures, he said that it was implicit that Mexico had in mind a type of injunctive relief. He said that his delegation had some doubts about how it would work in practice, given the possibility that a panel might sanction the adoption of a preventive measure, only to decide later that it was not warranted and that compensation should be provided to the alleged wrongdoer. It would in such cases make sense for the requesting party to pay compensation as and when it became evident that the request was frivolous. Probably, compensation made on account of some punitive damage could be an option to preventive measures, as was the case under some domestic laws.

23. The representative of Ecuador welcomed the proposals by Japan, Chinese Taipei and Mexico and said that they would make an important contribution to the work of the Special Session. He said that at this stage, his delegation only wanted to offer some comments on the Mexican proposal, which it considered to be very innovative and an attempt to address one of the major problems confronting the dispute settlement mechanism. He recalled his delegation's proposal and said that it shared Mexico's concern that under the current system, some Members acted as if they had been granted a waiver from implementing the recommendations and rulings of the DSB. According to their estimates, this *de facto* waiver could remain in force for approximately five years. Mexico's statistics showed that it was more than three years, starting from the date of the establishment of the panel. If you took account of the time spent on formal and informal consultations between the parties, the total time spent on each case was nearer the estimate they had provided. He referred to the figures provided by Mexico regarding the amount of losses incurred as a result of the non-implementation of the recommendations and rulings of the DSB and said that this was proof that the current dispute settlement system rewarded countries which did not comply with their obligations. It actually created incentives for countries to violate their obligations.

24. He reiterated his delegation's view that top priority should be given to addressing the lack of implementation of the DSB's recommendations and rulings. He said in that context that even if other reforms were made, but nothing was done about the "de facto" waiver that Members had, then it was doubtful if they would achieve their stated objective of improving the DSU. He said that his delegation favoured an early determination of the level of nullification and impairment and had made a proposal in that regard, although it differed from the Mexican proposal under which the determination would be made at an earlier date. What was of paramount importance, however, was addressing the *de facto* waiver that Members had under the current system. Specifying the level of nullification and impairment in the panel report would be positive, as the responding Member would know exactly what was at stake and accordingly weigh its options. If it chose not to comply, it would be aware that it could face retaliatory action in the amount specified in the report. As regards retroactivity, he said that his delegation was also in support of the Mexican proposal. Currently, the remedies provided under the DSU were prospective in nature. They did not fully cure the damage done by the inconsistent measure. With respect to preventive measures, he said that they should enter into force immediately after the adoption of panel and Appellate Body reports or after the authorization to suspend concessions or other obligations. This would force the hand of the responding Member to comply with the recommendations and rulings of the DSB. Finally, he urged participants who have submitted similar proposals to work together and explore the possibility of presenting a joint proposal given the May 2003 deadline.

25. The representative of Uruguay welcomed the proposals by Japan, Mexico and Chinese Taipei and said that they would make an important contribution to the work of the Special Session. In respect of the Japanese proposal, he recalled that his delegation had offered some comments at the previous meeting of the Special Session and as such would not be commenting on it at the present meeting, except to reiterate its support for the ideas put forward to resolve the "sequencing" issue. As

regards Chinese Taipei's proposal, he said that his delegation could agree to some of its elements and would be making a detailed statement at a future meeting of the Special Session. Turning to the Mexican proposal, he said that it had correctly identified one of the major problems confronting the dispute settlement system and proposed solutions which, in his delegation's view, merited further consideration. The lack of implementation of the recommendations and rulings of the DSB was severely affecting the credibility of the dispute settlement system and the multilateral trading system as a whole and needed to be addressed as a matter of priority. He said, however, that Uruguay was in agreement with Chile that some of the proposals tabled by Mexico needed further elaboration, particularly in terms of how they would work in practice. Given the far-reaching implications of the Mexican proposal for the dispute settlement system, it was doubtful if consensus could be reached on it before the May 2003 deadline.

26. The representative of Brazil welcomed the proposal by Japan and said it would make an important contribution to the work of the Special Session. In relation to Article 4.7 of the DSU, he said that developing countries should have the right to request that consultations be extended up to 60 days. Thus, the phrase "if the parties agree" should be deleted from the proposal. Brazil was in agreement that a new Article 10.3 should be inserted into the DSU, which would provide for enhanced access to documentation, although it was of the view that the participation of third parties in any of the substantive meetings should be reflected upon further. He said that his delegation could also support the insertion of a deadline into Article 3.6 of the DSU, which would oblige parties to notify their mutually agreed solutions within a specified time-period.

27. With respect to measures implemented by a Member under a WTO-inconsistent mandatory law, he said that it was Brazil's view that it would not be easy to establish precisely the trade effects that might be generated in the future, as a result of measures that might be implemented under the law. As regards the "hit and run" situation that could happen under a discretionary law implemented by a Member, he said that his delegation was in agreement with Japan that in cases of repeated violations, the matter should be dealt with as expeditiously as possible by the panel or the Division of the Appellate Body that handled the original case. He said in that context that proceedings under Article 21.5 of the DSU could serve as a model for cases of repeated violations of a discretionary law. He said that proposals aimed at expediting the dispute settlement process, including the Australian proposal, deserved to be given further consideration.

28. With respect to the proposal by Mexico, he said that it was remarkable in that it addressed some of the most contentious and difficult issues which were central to operation of the dispute settlement system. Turning to the specifics, he said that his delegation was supportive of the proposal that would require the determination of the level of nullification and impairment during the interim review stage of the panel proceedings. He said that the question was whether it made sense to determine the level of nullification and impairment when it was still possible that the panel report might be appealed. Given the proposal to eliminate the interim review stage in the panel proceedings, he said that it was Brazil's view that it might be advisable to determine the level of nullification and impairment after the adoption of the panel report. Analogies to domestic legislation might mischaracterize the nature of the international trading system, but if that should be considered relevant, then it might be reasonable to require the complaining Member to request a determination of the level of nullification and impairment in its first submission. As regards preventive measures, he said that his delegation would like Mexico to further elaborate on its proposal. It was not clear from the proposal how a Member could prove "*fumus boni iuris*" (appearance of a good right) and "*periculum in mora*" (danger in the delay). It would also be helpful if Mexico could indicate whether these measures would be generally available or restricted to some areas such as trade remedies.

29. The representative of Argentina welcomed the proposals by Japan and Mexico and said that they would make an important contribution to the work of the Special Session. Regarding the proposal by Japan, he said that his delegation could support it as it reflected most of the ideas contained in the proposal of the co-sponsors which (WT/MIN(01/W/6), otherwise referred to as the

"Suzuki" text, which was submitted in 2001 to Ministers for their consideration at Doha. He said that Argentina had reservations against some of the proposals, but it was willing to discuss them with Japan. He further said that his delegation attached the highest priority to the sequencing issue, as it had been a source of contention between Members. Resolving it definitively would help ensure security and predictability.

30. As regards the proposal on mandatory laws implemented by Members, he said that his delegation appreciated the reasons behind its introduction by Japan. He said that the proposal in its present form did not shed light on a number of issues. It was, for example, not clear how Article 22.4 of the DSU could be amended so as to take into account trade effects that might be created in the future as a result of the application of the mandatory law by the concerned Member. It was also not clear how similarity between measures could be established. In relation to the repeated application of WTO-inconsistent measures under a "discretionary law", he said that the proposal was interesting, but it also needed to be elaborated further. It was imperative for there to be clear benchmarks for establishing similarity between measures implemented by the concerned Member under the discretionary law. He inquired whether the mere proof that a measure was adopted under the discretionary law, which had itself not been found to be WTO-inconsistent, created any presumption that the Member concerned was in breach of its WTO obligations? He said that Argentina was of the view that rules concerning burden of proof should be based on objective criteria.

31. Regarding the proposal relating to the increase in the membership of the Appellate Body, he said that Argentina was of the view that the opinions of the Appellate Body members should be sought before a decision was made. He further said that Argentina could support the proposal relating to the amendment of Article 17.1 of the DSU, so that the number of Appellate Body members could be modified by a DSB or General Council decision. Regarding access to submissions, he said that his delegation was still considering it, but was likely to agree to it in one form or the other.

32. With respect to the proposal by Mexico, he said that while his delegation was appreciative of the underlying concerns and possible benefits in terms of time-savings and inducing compliance with the DSB's recommendations and rulings, it was sceptical of the proposal to bring forward the arbitration procedure in Article 22.7 of the DSU, with a view to determining the level of nullification and impairment during the panel stage. In Argentina's view, it would be tantamount to requiring the responding Member to defend two actions in parallel, namely the consistency of the challenged measure with WTO rules and the appropriate level of nullification and impairment. This could be unfair to the responding Member, as there was the possibility of the measure being found subsequently to be consistent with WTO rules. Another reason why it might be premature to determine the level of nullification and impairment at the panel stage was the possibility of the responding Member adopting a new measure in response to the recommendations and rulings of the DSB. It would only be equitable to take into account this new measure in the calculation of the level of nullification and impairment. In relation to the proposal on retroactive application of remedies under the DSU, he said that it would be in accord with the general principles of international law on state responsibility. He further said that if this proposal were to be accepted, then retroactive application of remedies should only apply to measures implemented after the entry into force of the corresponding amendment to the DSU. He expressed doubts about whether there would be consensus on this proposal before the May 2003 deadline.

33. Regarding preventive measures such as requiring the responding Member to suspend the application of the challenged measure or authorizing the complaining Member to suspend concessions or other obligations towards the responding Member, he said that while his delegation was sympathetic to the proposal, there was the issue of how panels could distinguish between well-founded and frivolous claims that the challenged measure was causing or threatened to cause irreparable damage. With respect to the proposal that would entitle a Member to transfer its right to suspend concessions or other obligations to another Member, he said that his delegation was unsure as to how it would work in practice. It was difficult to ascertain why another Member would "purchase"

a right to suspend concessions or other obligations towards another Member whom it had no complaints against. There was also the broader issue of the compatibility of this proposal with the basic principles of the multilateral trading system.

34. The representative of Israel thanked Japan, Mexico and Chinese Taipei for their proposals and said that they would make an important contribution to the work of the Special Session. With respect to the proposal by Chinese Taipei, she said that it touched on issues of importance to Israel in these negotiations and that her delegation would comment on it at a future meeting of the Special Session. With respect to Japan's proposal, she recalled that participants had an opportunity at the fifth meeting of the Special Session to discuss informally the proposals relating to mandatory and discretionary laws. She noted the usefulness of these discussions, but said that it was necessary for Japan to further elaborate on its proposal. With respect to the proposal on the "sequencing" issue, she said that her delegation attached the highest priority to it and would like to see it resolved definitively during these negotiations.

35. With regard to the proposal by Mexico, she said that her authorities were studying it and that she would only make some preliminary comments at this stage. She noted that the proposal had identified some of the major problems confronting the dispute settlement system including the lack of incentives to induce compliance with the recommendations and rulings of the DSB, and proposed interesting solutions to deal with them. She, however, expressed some doubts about the proposal which would require the determination of the level of nullification and impairment at the panel stage.

36. The representative of the United States thanked Japan, Mexico and Chinese Taipei for their proposals. With respect to Japan's proposal, he said that his delegation welcomed Japan's suggestion that dispute settlement submissions be made public. The United States believed that, with the exception of confidential information, they should be made public upon submission. The United States also looked forward to discussing Japan's other proposals, as it had a number of questions about them. For example, the United States wondered how it would be possible to calculate the trade effects of a measure that might be taken in the future. This would appear to require some speculation. The United States also wondered about the basis for presuming that a measure similar to a WTO-inconsistent measure was also inconsistent. This would appear to presume that the specifics of a particular measure were unimportant in determining consistency, whereas the United States' experience was the opposite. With respect to Mexico's proposal, the United States said that it appeared to call for radical changes in the dispute settlement process, particularly in how the suspension of concessions would operate. The proposal needed to be studied very carefully, and the United States looked forward to a thorough debate on its implications. With respect to the contribution of Chinese Taipei, the United States welcomed Chinese Taipei's support for greater transparency in the dispute settlement system and looked forward to discussing the paper more after having had some time to review it.

37. The representative of Canada welcomed the proposal by Mexico and said that his delegation would only be making some preliminary comments. He said that his delegation sympathised with the underlying concerns behind Mexico's proposal and agreed that the lack of implementation of DSB's recommendations and rulings was affecting the credibility of the dispute settlement system. In Canada's view, the focus of the Mexican proposal should be on how to create greater incentives to comply, rather than on facilitating retaliation for non-compliance. He said in that connection that Canada had a number of questions and concerns, which it would like to get responses and clarifications from Mexico. With respect to the proposal for an "early determination and application of nullification and impairment", he said that it was not clear what the net benefit would be, if the procedure for determining the level of nullification and impairment under Article 22.7 of the DSU was advanced to the panel stage. It should be noted that a significant number of panel decisions were reversed or modified on appeal by the Appellate Body. The Mexican proposal might be overly optimistic as to the benefits that an early Article 22.7 process could bring in terms of facilitating negotiations between the parties and easing the burden on the dispute settlement system. Should one

of the parties come to the conclusion that the level of retaliation set by the panel was not correct, it was more likely to appeal that aspect of the report, rather than enter into negotiations with the prevailing party with a view to reaching a settlement. Members seemed to eschew other equally important considerations before they initiated or defended cases in the dispute settlement system. The mere indication of the level of nullification and impairment was unlikely to convince a Member to abandon its legal strategy.

38. Regarding the proposal that compensation or suspension of concessions could take effect "from the date of adoption of the Panel or Appellate Body report", he said that his delegation also had some concerns, as it appeared to do away with the right of Members to a reasonable period of time, if immediate implementation was not practicable. The Mexican proposal seemed to be based on the belief that responding Members were somehow deliberately stalling the system in order to gain more time. While that might be true in some instances, it could not be said that was the situation in all cases. There was a presumption that Members would implement their obligations arising out of the dispute settlement system in good faith. He said that his delegation would like to leave open the argument that it was only when there had been a determination of inconsistency with WTO obligations and a reasonable period of time for implementation had been fixed that domestic policy issues get addressed in anything other than a defensive manner. Indeed, the Mexican proposal might in certain cases make compliance less enticing, i.e. - create domestic pressure to "just pay for it".

39. With regard to the proposal on "retroactive determination and application of nullification and impairment", he recalled that his delegation, along with many other Members, voiced strong opposition to retroactivity at the time of the adoption of the compliance panel report in the Australia-Automotive Leather case and said that Canada's views had not changed since then. He cast some doubts about Mexico's reference to the Agreements on Anti-Dumping and Subsidies and Countervailing Measures in support of its proposal for "preventive measures". In Canada's view, it would not be appropriate to consider a practice in the field of domestic trade remedies as a benchmark for the WTO dispute settlement. Furthermore, the proposal that "... if a complaining party considers that the challenged measure is causing or threatens to cause damage ... it should be able to have the Panel request the defending party to suspend applying the challenged measure ...", appeared quite close to permitting a unilateral determination of WTO-inconsistency. The proposal also raised some practical questions, including whether the responding Member would be able to adopt some measures during the period of suspension of its challenged measures? 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. Would it be reasonable to assume that a Member would be able to immediately apply new measures and did Mexico envisage any constraints being placed on the Member in terms of its choice of interim measure? As regards the proposal on "tradeable remedies" proposal, he said that his delegation was concerned that it could create a market in trade-restrictive measures and thus run contrary to the object and purpose of the WTO.

40. The representative of Norway welcomed the proposal by Mexico and said that it was a significant contribution to the work of the Special Session. He said that Norway shared the underlying concerns which the proposal sought to address, namely the lack of incentives to comply with the recommendations and rulings of the DSB. He, however, said that his delegation had some questions and comments on the proposal. Regarding the proposal on "early determination of nullification and impairment", he said that like Brazil, his delegation found it to be very interesting. In several domestic jurisdictions, a claim for compensation would normally be contained in the plaintiff's statement of claim. Could an analogy be made and require that a claim for compensation had to be included in the complaining Member's panel request? This would ensure that the issue was within the terms of reference of the Panel. Regarding the early determination of the level of nullification and impairment, it was the view of Norway that this would necessitate an amendment to Article 17 of the DSU, as the level had to be changed by the Appellate Body, if it reversed or modified the panel findings. This determination was not a question of law. He said that his delegation would appreciate the views of Mexico on this point. He said that his delegation could not

understand why Mexico was proposing that the determination should be kept confidential. Did Mexico have any special reasons for this position? Norway would prefer if the determination was made public with the possibility of challenging it before the Appellate Body. This seemed to be the practice in most domestic jurisdictions.

41. With regard to the proposal that compensation could be computed as of the date of the panel report, he said that given the overall objective of the proposal to make WTO remedies more effective, it might probably be more effective if "daily fines" were imposed on the responding Member, with the provision that failure to pay the fine on a timely basis would attract the payment of a penalty, as was the case in some domestic jurisdictions. This suggestion would make it prohibitively expensive for Members who chose not to comply with the recommendations and rulings of the DSB.

42. Regarding the proposal on retroactive determination and application of nullification or impairment, he said that his delegation found it very interesting. Based on the reasons given by Mexico and the general rules on state responsibility under public international law, his delegation would favour the calculation of compensation from the date of the establishment of the panel, as it was more likely to take care of the loss sustained by the complaining Member. On preventive measures, he said that this was a concept common to all legal systems and other international tribunals, including the International Court of Justice and as such could be seriously considered. He, however, expressed the view that Mexico's proposal might lead to abuses, as the threshold standard- "damage that would be difficult to repair" - did not seem to be high enough if compared with other international tribunals, which expected the country making the request to adduce evidence which indicated positively that irreparable damage would be caused if the other country did not terminate its actions. He said that Norway had an open mind on the sort of standard that should be applied to trade disputes and requested if Mexico could elaborate further on its proposal and demonstrate how it would work in practice. With respect to the proposal on negotiable remedies, he said that his delegation had some doubts and wondered how it would work in practice. He concluded by inviting Mexico to comment on whether its proposal and that of Ecuador regarding mandatory compensation were mutually supportive?

43. The representative of India stated that the dispute settlement system of the WTO had worked satisfactorily since its inception in 1995. However, the seven years that it had been in operation had also showed that it had some serious weaknesses, particularly in the implementation phase of the process. It was some of these weaknesses that the Japanese and Mexican proposals sought to address. He said that his delegation was therefore sympathetic to these proposals and looked forward to participating in the discussions that would be held on them and on other proposals. With regard to the proposal by Japan, he recalled his delegation's support for the earlier proposal on the "sequencing" issue which was submitted to the Doha Ministerial Conference by Japan and a group of countries. As the new proposal incorporated most of the elements of the old proposal, he said that his delegation could support it as well as the other proposals put forward by Japan. On the proposal relating to measures taken pursuant to a "mandatory law", he said that his delegation understood the concern of Japan that the mere finding of the law as WTO-inconsistent might not compel the Member to withdraw the measure, unless there was a threat of retaliation in case non-compliance. He asked whether Japan was suggesting that WTO law should provide remedies for future measures under such law and, if so, how could the level of retaliation be assessed for such non-existent measures. He further inquired as to how Article 22.4 of the DSU could be amended to accommodate the proposal by Japan.

44. With regard to the proposal that would create an exception to the application of the "discretionary law" theory, when repetition of the same violation was highly probable, he said that his delegation was supportive of it, as well as the other proposals relating to the expeditious conduct of proceedings and the shifting of the burden of proof onto the defendant in cases of repeated violations under a "discretionary law". With respect to the proposal on authorizing the DSB or General Council to modify the number of Appellate Body members depending on the workload, he said that his

delegation would like Japan to clarify whether the present number of seven could be reduced in the event of a considerable reduction in the workload of the Appellate Body in the future? With regard to the proposal for enhanced access to submissions by the general public, he said that it was his delegation's view that the decision should be left to the discretion of each Member. With regard to the proposal by Mexico, he said that his delegation was studying it with interest and that they would provide their comments at the next meeting of the Special Session.

45. The representative of New Zealand welcomed the proposals by Mexico and Japan and said that they would make an important contribution to the work of the Special Session. With respect to the Mexican proposal, he said that it correctly identified one of the major problems confronting the dispute settlement system, namely the ability of Members to maintain WTO-inconsistent measures for a long period of time without any consequences. He said that his country had experienced this sort of situation before and was consciously aware of the ineffectiveness of trade sanctions as a tool to induce compliance with the recommendations and rulings of the DSB. With regard to the proposal on retroactivity, he said that his delegation was sympathetic to it given its own past experience. A victory under the DSU was not able to make up the losses that New Zealand had incurred as a result of the breach of WTO commitments by other Members. He said that his delegation would make further comments on the Mexican proposal during the issue-by-issue discussion which would take place in an informal mode. One way of addressing the problem of lack of timely implementation of the recommendations and rulings of the DSB was by expediting the dispute settlement process, especially in areas such as safeguards. He mentioned in that context his delegation's support for the Australian proposal. If the process was streamlined and made more expeditious, there was the possibility that it could lead to faster implementation of the DSB's recommendations and rulings. Turning to Japan's proposal, he said that as one of the co-sponsors of the original paper on the "sequencing" issue, his delegation attached priority to this issue and would like to see it resolved during these negotiations. In that context, New Zealand was of the view that the proposal by Japan provided a good basis for further discussions on this issue. He also said that his delegation could also support the proposal relating to greater access of submissions by the general public.

46. The representative of Peru welcomed the proposals by Japan, Mexico and Chinese Taipei and said that they would make a significant contribution to the work of the Special Session. With respect to the proposal by Japan on the sequencing issue, she said that her delegation was in support of it. She further said that there appeared to be consensus among participants on this issue, and that it was the expectation of her delegation that it would be included in the final package that would be adopted at the end of the negotiations. She, however, expressed some doubts about the other proposals of Japan, particularly the one relating to the need to broaden the scope of Article 22.4 of the DSU to encompass not only the trade effects created by the measure in question under a "mandatory law", but also those that would be created in the future by subsequent measures that might be adopted pursuant to the law. With respect to the proposal by Mexico, she said that her delegation was studying it with great interest and would give its comments at a future meeting of the Special Session. As a preliminary comment, however, she said that her delegation could support a number of its elements, including the early determination of nullification and impairment. As regards the proposal on negotiable remedies, she said that her delegation could not support it, as it would fundamentally alter the way the DSU operated.

47. The representative of Pakistan welcomed the proposals by Mexico, Japan and Chinese Taipei and said that his delegation would like to offer some preliminary comments, on the understanding that they would make substantive comments at a future meeting of the Special Session after they had had the opportunity to review the proposals thoroughly. With respect to the proposal by Mexico, he said that it contained very interesting proposals which merited further consideration by the Special Session. The dispute settlement process was cumbersome and could be protracted, especially during the implementation phase. As Pakistan saw it, the objective of the Mexican proposal was to streamline the dispute settlement procedures and make it easier for a Member to get relief after its rights had been impaired or nullified by a WTO-inconsistent measure. According to the statistics

provided by Mexico, a WTO-inconsistent measure could remain in place for a long time after it had been declared inconsistent by a panel or the Appellate Body. From Pakistan's experience with the dispute settlement system, it was clear that most of these measures were maintained so as to protect domestic industries from competition. Instead of encouraging Members to promptly comply with the recommendations and rulings of the DSB, the current system rather created incentives for non-compliance. He made reference to the statement by Japan that Members could get around their discretionary laws by adopting "hit-and-run tactics", and said that under the WTO dispute settlement system, a Member could maintain an inconsistent measure to protect its domestic industry, until such time a panel or the Appellate Body pronounced on its illegality and, even then, the Member could delay the implementation of the DSB's recommendations and rulings. While the time it took for disputes to be resolved was partly responsible for the delays associated with the implementation of the DSB's recommendations and rulings, it was Pakistan's view that given the complexity of the process, the present time-frame should be preserved, unless it was absolutely necessary.

48. With regard to the Mexican proposals on interim relief and retroactivity, he said that his delegation saw a need for their introduction in the dispute settlement process. It was imperative to remove the incentives which encouraged Members to delay the implementation of the recommendations and rulings of the DSB. Granting interim relief to a complaining Member could forestall the damage that would have been done to its economy, if the responding Member were to continue to maintain its measures which might be WTO-inconsistent. Currently, WTO remedies were only prospective, thus past wrongs were not compensated. Changing the rules to allow for compensation would be equitable. The proposal on "negotiable remedies" appeared to be too radical and required further consideration. As an initial comment, it would politicize the dispute settlement and marginalize countries which lacked economic clout. Turning to the proposal by Chinese Taipei, he said that his delegation was in agreement with it that opening up meetings to the general public and enhancing their access to submissions would not necessarily improve the DSU and that it was essential that for the inter-governmental nature of the WTO to be preserved. Regarding *amicus curiae* briefs, he said that his delegation was in agreement with the position taken by Chinese Taipei and that the acceptance of such briefs would put developing countries in a disadvantageous position given the limited resources at their disposal.

49. The representative of Cuba thanked Japan, Mexico and Chinese Taipei for their proposals and said that they all deserved to be discussed further by the Special Session considering the very important issues that they addressed. She said that her delegation had some comments and questions which they would like to raise. Regarding the proposal by Japan, she said that while her delegation was in agreement that equivalence had to be established between suspension of concessions and the level of nullification and impairment, she wondered whether Japan was suggesting that in calculating trade effects, account had to be taken not only of trade effects created by the existing measure, but also of those that might be created in the future by similar measures. In Cuba's view, making such a judgment would amount to pre-judging the content of future measures that might be adopted by Members. As regards the proposal by Japan aimed at enhancing the access of the general public to submissions, she said that her delegation was, in principle, not opposed to it, but thought it should be left to the discretion of each Member. It was unnecessary to have a provision in the DSU governing this issue.

50. With respect to the proposal by Mexico, she said that her delegation shared the view that one of the fundamental problems of the current dispute settlement system was the ability of Members to delay the implementation of the DSB's recommendations and rulings without any consequences. With respect to the proposal on early determination and application of nullification and impairment, she said that her delegation could, in principle, support it. However, as regards preventive measures, she said that Cuba shared the view of Chile that it was currently beyond the terms of reference of panels to grant such orders. Moreover, given the possibility of the reversal of conclusions reached at first instance on appeal, it was necessary to exercise caution. With respect to the proposal on retroactivity, she said that her delegation was still considering it and would comment on it at a later

date. She said that her delegation was also interested in the proposal relating to costs – counsel fees and litigation expenses - and was studying it with great interest. With respect to negotiable remedies, she shared her delegation shared the view of Pakistan that it might politicize the dispute settlement system. Turning to the proposal by Chinese Taipei, she said that her delegation supported the views expressed by Chinese Taipei on access to submissions by the general public and also on *amicus curiae* submissions. She recalled that her delegation and other countries had co-sponsored a proposal (TN/DS/W/18) which covered, *inter alia*, the way Article 13 of the DSU should be interpreted.

51. The representative of Colombia thanked Mexico and Japan for their proposals and said that they would make an important contribution to the work of the Special Session. She noted that while the WTO dispute settlement system was a significant improvement over its GATT counterpart, there were some drawbacks, including the ability of a Member to maintain inconsistent measures for around three years without any consequences. It was in this light that her delegation supported any proposal that aimed to address this issue and contribute to the objective of securing prompt resolution of trade disputes. Turning to the Mexican proposal, she said that it was a bold and imaginative proposal which should be considered thoroughly by participants. The suggestions on early determination of nullification and impairment, retrospective remedies, preventive measures and negotiable remedies were novel ideas which could address the problem of how to compensate at the national level losses sustained by industry, as a result of protectionist policies implemented by a Member in breach of its WTO obligations. With respect to the proposal by Japan, she recalled that her country was among the group of countries which co-sponsored a proposal on the DSU which covered, *inter alia*, the sequencing issue and other aspects of the DSU during the preparatory process for the Doha Ministerial Conference. As the proposal by Japan was modelled on the proposal by the co-sponsors, her delegation could support many of its elements. As regards the proposal by Japan on mandatory and discretionary laws, she said that her delegation was still analysing them and would provide its comments at a later date. She, however, expressed doubts about the possibility of resolving the problem of discretionary laws through an authoritative interpretation of the relevant DSU provisions. With respect to the proposal on enhanced access to submissions by Members and the general public, she said that it was reasonable and capable of being supported by her delegation. She observed, however, that the distinction between Members who were non-parties to the dispute and the general public was not very clear in the proposal, although it appeared that submissions would be made available to the public after they had been circulated to Members.

52. The representative of Poland thanked Japan, Mexico and Chinese Taipei for their contributions and said that his comments would only focus on the proposal by Mexico relating to negotiable remedies. In Poland's view, the introduction of this concept to the DSU would be an unfortunate development for at least three reasons. First, it would undermine one of the basic tenets of the dispute settlement system and the multilateral trading system, which was that the rights of Members should be protected under multilateral surveillance and that it was up to each and every Member to ensure that its rights and legitimate expectations were not being impaired or nullified. Second, if Members were able to negotiate away the remedies that they were entitled to, it might discourage parties from negotiating seriously to find mutually agreed solutions to their disputes, which was also one of the objectives of the dispute settlement system. Third, it would diminish transparency of the system, as the surveillance powers of the DSB would be severely compromised. For these reasons, participants should critically examine the proposal by Mexico before drawing any conclusions.

53. The representative of Korea thanked Mexico for its proposal which demonstrated its commitment to strengthening the dispute settlement system and to enhancing its credibility. He said that his delegation would like to make a few preliminary comments on some aspects of the proposal. With respect to the proposal that the level of nullification and impairment should be determined by the original panel, he recalled that his delegation had made a proposal that the level of nullification and impairment should be determined by the compliance panel established under Article 21.5 of the DSU. He said that it might not be appropriate to make a comparison between the Korean and

Mexican proposals, as the latter was conceived with a retrospective remedy system in mind, whereas the former was inspired by the current system, which was prospective in character, as no relief was provided for damages suffered in the past. Against this background, what needed to be considered was the value to the DSU of a retrospective system. He stressed that Korea had an open mind on this issue. It was aware that a retroactive remedy system would provide a strong incentive for prompt compliance with the DSB's recommendations and rulings as well as respect for multilateral rules. However, its introduction would necessitate a fundamental change to the current DSU provisions. For example, the first sentence of Article 19.1 of the DSU which provided for the prospective remedy principle would have to be amended. The second sentence of Article 19.1 which conferred discretionary power on panels to make specific recommendations might also need to be re-visited. With respect to the proposal on preventive measures, he said that it was incompatible with the terms of Article 7 of the DSU concerning the terms of reference of panels, and Article 11 of the DSU concerning the functions and standard of review to be followed by panels, 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). This might be tantamount to a substantial rewriting of the DSU. Given the magnitude of the implications of the Mexican proposal, it would require careful analysis. With respect to the proposal by Japan, he recalled that Korea was among the group of countries which co-sponsored with Japan and other countries the proposal on the sequencing issue which was submitted to Ministers for their consideration at Doha. As such, Korea could support the proposal aimed at resolving the sequencing issue. As regards the proposal on mandatory and discretionary laws, he said that his delegation was sympathetic to the concerns of Japan and looked forward to further detailed discussions on these issues. Concerning the contribution by Chinese Taipei, he said that Korea was generally in agreement with the views expressed by Chinese Taipei and would comment on them during the issue-by-issue discussion.

54. The Chairman recalled that there were a number of proposals on the table concerning the appropriate time to determine the level of nullification and impairment and suggested that it might be helpful from a procedural point of view to compare these proposals with the proposal by Mexico which advocated the determination of the level of nullification and impairment to be made by the original panel.

55. The representative of Hong Kong, China thanked Japan, Mexico and Chinese Taipei for their proposals and said that his comments would only focus on certain aspects of the proposal by Mexico. He said that his delegation shared the concern of Mexico that the credibility of the dispute settlement system was being undermined by the ability of Members to maintain WTO-inconsistent measures for a long period of time without any consequences. With respect to the proposal on retroactive remedies, he said that it deserved further consideration taking into account the position under international law and past GATT/WTO cases which had required the reimbursement of duties levied in connection with trade remedies legislation. On the early determination and application of nullification and impairment, he said that the implications of this proposal had to be carefully considered. It would, for example, have implications for the sequencing issue and create uncertainty should the compliance panel under Article 21.5 reach a different conclusion. On the proposal relating to preventive measures, he said that his delegation was in agreement with the views expressed by some participants that it could be abused by some Members, who might initiate frivolous actions provoking retaliatory measures in return. It was necessary to reflect further how it would work in practice, as there were a number of unanswered questions. With respect to the proposal on negotiable remedies, he said that his delegation was also in agreement with other participants that it could politicize the dispute settlement system and undermine its basic character.

56. The representative of the European Communities thanked Japan for its proposal and said that his delegation would like to make the following comments. With respect to the proposal on the sequencing issue, he recalled the statement made by Japan that there were similarities between its proposal and that of the EC and said that his delegation was prepared to work closely with Japan in order to narrow the differences between the two texts. With respect to the proposals on mandatory

and discretionary laws, he said that Japan had identified some fundamental problems which needed to be addressed comprehensively. He said that the EC was willing to consider any ideas that Japan might have in this regard. With regard to the procedure for modifying the number of the Appellate Body members, he observed that the EC's proposal was similar to that of Japan. Given that there would be budgetary implications, the EC was of the view that the decision on this matter should be taken by the General Council. With respect to the proposal on enhancing access to documentation by Members and the general public, he said that the EC was generally supportive of it, as it would promote transparency. He asked the reason for the two-week delay before submissions were made available to the general public and other non-parties to the dispute.

57. With respect to the proposal by Mexico, he said that the EC shared the view that the non-implementation of the DSB's recommendations and rulings was undermining the credibility of the dispute settlement system. The proposal by Mexico was innovative and thought-provoking and as such it deserved further consideration. He said that while the EC was sympathetic to the proposal, it had a number of questions and comments. Given that the arbitration procedure in Article 22 of the DSU was time-consuming, it might be presumptuous to think that panels and the Appellate Body would be able to cope easily with additional tasks and meet the deadlines foreseen in the DSU. The EC wondered whether Mexico had factored this into its proposal. The second question related to preventive measures and retroactive remedies. As they were both intended to protect the interests of the complaining Member, the EC wanted to know if Mexico had thought about when each remedy could be properly invoked or whether the two remedies could be invoked at the same time? The third question concerned non-compliance with a preventive measure ordered by a panel. The EC wondered if Mexico had thought about the penalties for non-compliance. The fourth question related to negotiable remedies. The EC wondered if Mexico was actually convinced about the potential of its proposal creating an incentive for Members to comply with the recommendations and rulings of the DSB? In the EC's experience, suspension of concessions created the same difficulties for Members regardless of their size or economic power.

58. The representative of Malaysia thanked Japan, Mexico and Chinese Taipei for their proposals and said that they would make an important contribution to the work of the Special Session. He said that his comments would focus on some aspects of the proposals by Mexico and Chinese Taipei. With regard to the proposal by Japan, he said that his delegation would provide its comments later, as his authorities were studying it. Turning to the Mexican proposal, he said that his delegation found it intellectually challenging and stimulating. However, given its potential ramifications, it was very doubtful if consensus could be found on it before the May 2003 deadline. Nevertheless, the proposal was worth considering. Turning to the specifics, he said that Malaysia was in agreement with Poland that the proposal on negotiable remedies would undermine some of the fundamental tenets of the dispute settlement system and as such it could not support it. With regard to the proposal on early determination and application of nullification and impairment, he said that his delegation found it very interesting and was willing to consider it further. However, it appeared that it had two major drawbacks. The first was that Members would no longer have a reasonable period of time to implement the recommendations and rulings of the DSB. This could create problems, as it was not always that a member could promptly comply with the recommendations and rulings of the DSB. The second difficulty Malaysia had with this proposal related to the confidentiality of the level of nullification and impairment. In Malaysia's experience, it would be difficult to keep this information confidential. It was more likely to be leaked with its attendant consequences for the relevant actors. With respect to retroactive remedies and preventive measures, he said that his delegation was willing to consider them, although it also had some difficulties in this regard.

59. With respect to the proposal by Chinese Taipei, he said that his delegation's views on a number of issues were quite similar to those of Chinese Taipei. He referred to the US proposal regarding the creation of guideline procedures for handling *amicus curiae* briefs and said that his delegation did not see any need for such procedures. He said that the position of Chinese Taipei on this issue was a little bit ambivalent, as it appeared to be of the view that they were guidelines already

in place that had been established by panels and the Appellate Body. He recalled that Malaysia and a group of developing countries had strongly voiced their objection to the approach that had been adopted by some panels and the Appellate Body in the handling of *amicus curiae* briefs. Their interpretation of the scope of Article 13 of the DSU was wrong and had no textual basis. As such, their position should not be legitimized by adopting those standards that they had created. Lastly, he referred to the statement by Chile that the views of the members of the Appellate Body should be sought in these negotiations and said that Malaysia did not see any advantage in doing that and could not go along with that suggestion.

60. The representative of India said that his delegation was in agreement with Malaysia on the issue of whether the views of Appellate Body members should be sought in the negotiations. He also inquired about the status of the statement made by Chinese Taipei – was it a comment on the other proposals or a separate contribution to the process? The Chairman responded by saying that as he understood it, it was the latter.

61. The representative of the Philippines thanked Japan, Mexico and Chinese Taipei for their proposals and said that they would make an important contribution to the work of the Special Session. He said that the Philippines was still examining the proposal by Chinese Taipei and would provide its comments at a future meeting of the Special Session. By way of a preliminary comment, however, he said that his delegation had taken note of the views of Chinese Taipei on the proposal by the United States and was in agreement with the views expressed by Malaysia concerning the guidelines that had been unlawfully established by panels and the Appellate Body. With respect to the proposal by Japan, he said that his delegation appreciated the underlying concerns and the commitment of Japan to strengthen the DSU by addressing real problems that had been encountered in its application. The Philippines was still analysing the problems presented by Japan and its proposed solutions and would at a later date provide its comments.

62. With respect to the proposal by Mexico, he said that his delegation fully shared the underlying concern of Mexico, namely the ability of Members to maintain WTO-inconsistent measures for a long period of time without any consequences. This was a core problem which had to be addressed in the negotiations. With regard to the elements put forward by Mexico to deal with the issue, he said that his delegation had considered them and had the following comments. With respect to the proposal on early determination and application of nullification and impairment, he said that it would make the sequencing issue superfluous and remove the entitlement that members had to a reasonable period of time to implement the recommendations and rulings of the DSB. The proposal appeared to prejudge the intentions of the responding Member *vis-à-vis* the implementation of the DSB's recommendations and rulings, given the fact that the arbitration procedure under Article 22 of the DSU could be triggered immediately after the circulation of the interim panel report to the parties. It also appeared to prejudge the outcome of the case. The findings of the panel could be modified or amended by the Appellate Body. Given the proposal to discard the interim review stage, the Philippines wondered if Mexico had taken this into account. As regards the complaining Member quantifying the amount of its losses in its first submission, he said that while his delegation appreciated that it could help the case of the complaining Member, it was also of the view establishing injury before it was proved would fundamentally alter the current dispute settlement mechanism and the way Members prepare their cases.

63. With respect to the proposal on retroactive determination and application of nullification or impairment, he said that the DSU in its present form provided some leeway to panels and the Appellate Body to make retroactive determinations in certain cases. A retroactive determination in the case of compensation would only make sense where the responding Member had agreed to provide compensation to the complaining Member. Similarly in the case of suspension of concessions, a retroactive determination would be of less utility to a number of Members, particularly developing countries. If retroactive determination were to be effective from the date of the imposition of the measures as had been suggested by Mexico, what would happen in the case of a measure which

had been in force for a long time, but had only been recently challenged? With regard to preventive measures, he said that this appeared to be the least controversial among all the four proposals. However, Philippines was in agreement with Norway that given the potential for abuse, stringent criteria would have to be agreed if it was to be accepted by it. He said that while Mexico had cited some precedents and WTO Agreements to support its position, his delegation was of the view that the Agreement on Safeguards probably demonstrated more than any Agreement the need for a very careful consideration of the conditions which had to be attached to the right to take "preventive measures". Indeed it might give rise to the question of whether or not the Member invoking the preventive measure had exercised the right properly. If it was perceived that the Member invoking the preventive measure was acting contrary to the agreed criteria, would the responding Member have a right to impose a preventive measure to safeguard its position? It could be envisaged that there could be multiple complaints, something probably not intended by Mexico. He requested if Mexico could clarify the term "harmful effects" and indicate who would determine the existence of such effects. With respect to negotiable remedies, he said that his delegation was not very comfortable with it, as it would turn the WTO into a market-place where countries traded their rights to suspend concessions or other obligations. Upon further reflection, it would appear that Members were engaged in the exercise of exchange of credits earned from disputes which they had lost or won. The Philippines did not want to contemplate the situation where Members initiated disputes just for the purpose of accumulating credits with a view to trading them in for other benefits. He said that his delegation would comment further on these proposals during the issue-by-issue discussion which would take place in an informal mode.

64. The representative of Hungary welcomed the proposals by Japan, Mexico and Chinese Taipei and said that they would contribute significantly to the work of the Special Session. With respect to the proposal by Japan, she said that her delegation had always supported efforts aimed at resolving the sequencing issue. Removing the ambiguity in the relevant provisions of the DSU would ensure legal certainty and predictability. She expressed a preference for the EC's proposal on this issue, but said that as the two proposals had a lot in common, the EC and Japan could probably work towards producing a single text on this issue. She welcomed in that context the statement by the EC that it was prepared to engage Japan with a view to narrowing the differences in their texts. With respect to the proposal on equivalence between the level of nullification and impairment and the suspension of concessions, she said that her delegation was still studying it and would welcome any further clarifications that could be provided by Japan. With respect to the proposal on increasing the membership of the Appellate Body, she said that her delegation had an open mind and was prepared to consider it further. Turning to the proposal by Chinese Taipei, she said that as far as the *amicus curiae* issue was concerned, her delegation was of the view that a consensus-based multilateral solution was preferable to the current case-by-case approach. With respect to third party rights, she said that her delegation was generally in support of their enhancement, although it would like to see a proper balance between the rights of the parties to the dispute and those of third parties. Turning to the proposal by Mexico, she said that the issue of the lack of implementation of the recommendations and rulings of the DSB was a longstanding one and that her delegation was sympathetic to the underlying concerns of the Mexican proposal. However, the proposal contained very radical suggestions which needed to be considered very carefully in terms of their implications for the multilateral trading system.

65. The representative of Japan thanked participants for their questions and comments and said that she would like to provide some preliminary responses. With respect to the sequencing issue, she thanked participants for their positive comments and reiterated that there were a few differences between the proposal of the EC and that of Japan. She said that her delegation looked forward to receiving further comments from participants, so that they could take them into account in narrowing the differences between the two texts. With regard to the question put by Chile concerning the non-repeal of mandatory laws, she said that the idea behind Japan's proposal was to create an incentive for the concerned Member to repeal or modify the inconsistent mandatory law. If there were to be true equivalence between the level of nullification and impairment and suspension of concessions, the

responding Member would not have any incentive to maintain the inconsistent measure. Regarding the question on how to establish true equivalence, she said that her delegation agreed that it would not be an easy exercise, but some projections could be made on the basis of past violations. The current practice would be instructive in that regard. She further said that Japan was open to any suggestions that delegations might have in connection with how equivalence might be calculated. Regarding how the scope of Article 22.4 of the DSU could be broadened, she said that her delegation was working on a text which it would share with participants as soon as it was finalised. Comments by participants on the draft text that would be welcomed. On the question from the United States concerning the presumption that a measure taken pursuant to a discretionary law would be WTO-inconsistent, she said the idea behind Japan's proposal was to shift the burden of proof onto the responding Member, where the complaining Member could initially prove that there had been repeated violations involving the same law. It would then be up to the responding Member to rebut the claim that the measure taken pursuant to the discretionary law was intentional and violative of its WTO obligations. Regarding the question on whether the procedure under Article 21.5 could not be used to address this issue, she said that in its proposal, Japan had advocated an expedited procedure whereby the case would be referred to the original panel or the division of the Appellate Body which heard the case. Additional procedures had been suggested in cases involving discretionary laws. She said in that context that Japan was of the view that there should be a safeguard mechanism which would ensure that the discretionary law would not be applied in a WTO-inconsistent manner. This could be accomplished by finding the law itself to be WTO-inconsistent or requesting the Member concerned to adopt some guidelines which would ensure that any measure taken pursuant to the law would be WTO-consistent. She said that Japan did not have any preference for any of the options and was willing to consider the views of participants. Having only an expedited procedure was not enough; it should be complemented by other procedures.

66. With respect to the questions on the number of Appellate Body members and the modalities for modifying the number, she said that Japan was open to the decision being taken either by the DSB or the General Council. However, given the financial implications, it should probably be the General Council which should make the decision. Regarding the comment that instead of increasing the membership of the Appellate Body, it would be better to convert their current part-time positions into full-time jobs, she said that Japan was aware that given their current tight schedule, it could be said that the Appellate Body members were already working on a full-time basis. However, it was attracted to the option of increasing the number of Appellate Body members given the fact that some people might not want to be in Geneva all the time and also the budgetary implications of engaging them on a full-time basis. Regarding the question by India whether the present number of Appellate Body members could be reduced, she said that her delegation had not thought about that, but they were prepared to consider it. In any event, the language used in the proposal was permissive, so it was possible for the number to be increased or decreased according to the exigencies of the relevant time. It would probably be a good idea to seek informally the views of Appellate Body members on this issue, as had been suggested by Chile. Regarding the question on the rationale for delaying the circulation of submissions to the general public by two weeks, she said that the time-lag was meant to provide Members with an opportunity to block out any confidential information and also to prepare for the necessary press briefings and publishing enough copies for circulation. Regarding the question as to why it was even necessary to make submissions public when the reports of panels and the Appellate Body were circulated widely and could be downloaded from the website of the WTO, she said that her delegation thought that it would promote transparency and enhance the credibility of the dispute settlement system. It would de-mystify the view that the WTO dispute settlement process was undemocratic and manipulated in favour of certain interests. She noted that Japan did not have a policy of making all its submissions public, but was prepared to make this concession in the interest of transparency.

67. The representative of Mexico said that his delegation was encouraged by the comments that had been made by participants. There was almost an unanimous view that the proposal had identified the principal shortcoming of the dispute settlement system. The lack of implementation of the

recommendations and rulings of the DSB in a timely fashion was undermining the credibility of the dispute settlement system. He said that Mexico appreciated the questions and comments on their proposal and would reflect on them and give detailed responses later. He said, however, that he would like to re-state the salient elements of their proposal in order to clarify certain issues which came up during the discussions. With respect to early determination and application of nullification and impairment, he said that under the current system, a Member had to initiate two actions and wait for two to three years before getting results. The situation was simply unsatisfactory and needed to be addressed. As regards retroactive determination and application of nullification and impairment, he said that his delegation could accept the view that it would fundamentally alter the dispute settlement system. However, given the fact that the lack of implementation causes an average loss of roughly US\$370 million to industry for each case excluding legal fees and related expenses, there was no option other than to propose a solution which would deal directly with the problem. With respect to preventive measures, he said that it was also true that it was novel to the dispute settlement system. Currently, a Member which was suffering injury could not request that a panel to order the responding Member to suspend its challenged measures until after the case had run its full course. This situation was unfair and could be easily abused. The merely possibility of being able to request a provisional remedy would increase the confidence of not only Members, but also private parties in the dispute settlement system. With respect to negotiable remedies, he said that his delegation was not surprised by the strong reaction of some participants. While it was true that it would fundamentally alter the dispute settlement system, it would also induce compliance with the recommendations and rulings of the DSB and thereby enhance the credibility of the system. It was domestic policy-making agencies which would be the greatest beneficiaries of these proposals, as they would be emboldened to resist pressures from interest groups to impose WTO-inconsistent measures. With regard to the view expressed by some participants that it would not be possible to reach consensus on the ideas put forward by Mexico before the May 2003 deadline because of the fundamental changes it would make to the dispute settlement system, he said that it was not impossible and that very much depended on the will of Members to address a fundamental problem which could paralyse the entire system. It would serve no purpose to tinker with the problems and not adopt a lasting solution which would strengthen the dispute settlement system and enhance its credibility. He concluded by saying that his delegation would provide specific replies to some of the questions that were posed after having reviewed them carefully. He said that his delegation was ready to enter into constructive discussions with any participant with a view to improving its proposal.

68. The representative of Chinese Taipei welcomed the comments on its proposal and said that she would like to give an initial reaction to some of them. With regard to transparency, she thanked the representative of the Philippines for his statement, and affirmed the support of her delegation for the section of the US proposal on transparency advocating the timely circulation of reports. In Chinese Taipei's view, this would facilitate the implementation of reports consistently with Article 20 of the DSU. With respect to *amicus curiae* submissions, she said that Chinese Taipei had taken note of the comments by participants, but had a preference for maintaining the *status quo*. Regarding the contribution of Chinese Taipei, she said that it should be regarded as a formal proposal to the Special Session. On third-party rights, she said that there were some differences between the Chinese Taipei's proposal and that of Costa Rica and that she would elaborate on them at the next meeting of the Special Session.

69. The representative of Chile said that he wanted to make some general observations about the negotiations. He noted that one of the distinctive features was the active participation of developing countries in the process, with the majority of the proposals tabled by them. Five general conclusions could be made as to the state of progress in the negotiations. First, while the discussions had enabled participants to clarify certain aspects of the proposals on the table, there were still a large number of outstanding issues which needed to be considered. The scope of the various solutions put forward by participants should be determined as soon as practicable. Second, apart from peripheral issues, there was no consensus on any of the major issues which needed to resolve so as to improve the functioning of the dispute settlement system. Third, a number of the proposals seemed to go beyond the mandate

of the Special Session, which was to clarify and improve the DSU. Some of the proposals, for example, sought to create new mechanisms and ways for resolving disputes. While some of these proposals would result in a strengthened DSU, the present mandate was limited and should be adhered to. Fourth, not only did some of the proposals go beyond the mandate of the Special Session, they were intended primarily to address the domestic political problems of some Members. Fifth, there was little time left for drafting the final text considering the May 2003 deadline. Given these considerations, it was imperative for discussions on the proposals to be brought to a close in the next couple of weeks. Once that was done, it should be possible for the Chairman to have an idea about which proposals – considering the scope of the mandate – could have broad support among participants so as to build a consensus around them. These proposals should be compiled into a single document and circulated to participants before the end of the year, possible at the meeting scheduled in December 2002. Judging by the responses of participants, Chile believed that it might be possible to include proposals relating to the following subjects in the document: (i) sequencing; (ii) transparency - access to documentation; (iii) enhancement of third party rights; (iv) streamlining of panel procedures; (v) early determination of the level of nullification and impairment; (vi) incentives for compliance, and (vii) reaffirmation of the bilateral nature of disputes, at least at certain stages, including the appellate review stage, so that the parties could maintain "control" over the proceedings if this enabled a positive solution to be found. The document that would be distributed by the Chairman should form the basis for focused discussions starting in January 2003. Proposals which did not feature in the document of next year should be left aside otherwise there was a risk of missing the May 2003 deadline.

70. The representative of Brazil said that he would also like to share Brazil's view on the state of the negotiations. He recalled that the mandate given by Ministers at Doha was to improve and clarify the DSU by May 2003. Ministers did not give a mandate to draw up a new DSU and did not authorize continuation of work beyond May 2003. It was imperative that this mandate be strictly observed. It was clear that Ministers did not envisage a complete review of the DSU. It was implicit from the mandate and the time-frame that the Ministers envisaged only a limited exercise which would address the most obvious problems that had been encountered in the implementation of the DSU. It was the expectation that once these problems had been addressed, they would improve the functioning of the dispute settlement system. While the mandate did not rule out the consideration of other proposals which focussed on fundamental reform of the DSU, it was clear that it wanted priority to be given to those issues which were of germane importance to the functioning of the DSU. Giving equal treatment to all the proposals risked paralysing the negotiations and missing the May 2003 deadline with no certainty of the mandate being renewed. Some of the proposals on the table were very ambitious and would require in-depth discussions and careful consideration before a decision could be made on them. It was very doubtful if this process could be accomplished before May 2003. There would be further opportunities to review the dispute settlement system, so it would be advisable to focus on the most pressing issues which were likely to be supported by most participants. In Brazil's view, it was feasible to build consensus around the following subjects: (i) sequencing; (ii) detailed compliance panel procedures; (iii) improvement in transparency (access to documentation); (iv) enhancement of third-party rights; (v) procedures for lifting of sanctions; (vi) the time-period for consultations; (vii) remand authority; (viii) early determination of nullification or impairment; and (ix) notification of mutually agreed solutions within a specific time-frame. This was an impressive list which was likely to satisfy almost all the proponents. It was an inclusive list and participants should have their focus on the broader picture instead of their own narrow interests.

71. He welcomed the paper by Japan, which built on the co-sponsors' proposal, and said that by focussing on some of the most pressing issues and proposing solutions, it helped narrow the focus of the Special Session. Together with the proposal by the EC, they could be the basis of any future agreement among participants. Some of the suggestions contained in these two proposals needed to be considered carefully before a decision was made. An example was the suggestion that compensation should be strengthened with a view to making it more attractive than retaliation. There

was no doubt that the system would be strengthened if it was clarified that compensatory arrangements should comply with the most-favoured nation principle. The proposal on the early determination of the level of nullification and impairment was a double-edged sword. On the one hand, it could facilitate compensation negotiations, but on the other it could undermine the primary remedy of compliance with the recommendations and rulings of the DSB. The proposal on switching to a system of permanent panelists also required careful analysis. How the panelists would be selected and the budgetary implications should be reflected on. On *amicus curiae*, he said that the term was misleading and that they should be called *amicus partis* or *amicus causae*, as their objective was primarily to assist one party in the dispute, instead of enlightening the court or adjudicator. He said that the practice of receiving *amicus curiae* at the WTO seemed to be different from that in the United States, where the consent of all the parties was generally required before such briefs could be accepted. According to Rule 37 of the US Supreme Court Rules, it was only in limited circumstances that the court might grant leave for such briefs to be filed when one of the parties refused to give its consent. Thus, it would appear that the WTO practice differed from that of a major common law country, where the concept was supposedly devised. With regard to proposals on time-frames, he said that they should be evaluated carefully, particularly those which advocated a reduction in time-frames with clauses purporting to give an exemption to developing countries "if the parties agree[d]". In Brazil's view, extension of the time-frame would not be automatic and would as such not be in the interests of developing countries who, because of lack of resources, needed more time in the dispute settlement process. In relation to third-party rights, he said that while the proposals appeared to be very attractive, in reality it would only be a few developing countries that would take advantage of the enhanced access to panels and the Appellate Body.

72. He reiterated that if the negotiations were to succeed, participants had to look beyond their own narrow interests and accommodate those of other participants. A strengthened dispute settlement system would be in the interest of each and every Member and as such participants should work towards fulfilling the mandate that was given by Ministers. It was imperative for the DSU evolve and adapt itself to the needs - not fashions - of a changing environment. The results of the negotiations should not only be forward-looking, they should also preserve the most important "acquis juridique" of the GATT/WTO. To all intents and purposes, the DSU had been working satisfactorily and only changes which would actually improve its functioning should be effected during the negotiations. There were some issues that were quite difficult, including the sequencing issue, but which were capable of being resolved by participants in the negotiations. There were other issues such as "carousel" and transparency which by nature were not that difficult, but given their sensitivity to a large number of Members, it would require a careful balancing of the proposals and coming up with a solution which accommodated the various views. There were some issues such as enforcement which, by nature, were very difficult and would require a lot of hard work and compromises before a solution could be found. The diversity of opinions and interpretations of the DSU was making the task of participants very difficult. However, with a clear sense of purpose and flexibility, it should be possible for the mandate to be fulfilled.

73. The representative of Australia recalled that at the fifth meeting of the Special Session, the representative of Uruguay asked whether Australia would consider modifying its proposal in relation to time savings to take account of developing-country interests, and said that her country was willing to accommodate that request in its revised proposal, which it hoped to circulate as soon as possible.

74. The representative of Jamaica thanked participants which had expressed support for its proposal and said that her delegation was looking forward to working with them in order to ensure the inclusion of its suggestions in any agreement that might be reached. She said that her delegation wished to offer some comments on those proposals which addressed some of the issues reflected in its paper. With respect to the proposal by Paraguay, she said that her delegation was in agreement that recourse to Article 5 of the DSU should be made mandatory. She recalled that their own proposal also urged greater use of the Article 5 process and, in general, a strengthening of the consultative process under the DSU. The objective of the DSU was not only to seek prompt resolution of disputes,

but also to facilitate the reaching of mutually agreed solutions by the parties to the dispute. Recourse to litigation was costly and should be avoided whenever possible. With respect to the proposal by the LDCs Group that the DSU should include special procedures which would enable panels to determine whether a *prima facie* case had been made against an LDC or whether due restraint had been exercised before the initiation of an action against an LDC, she said that her delegation had suggested in its proposal that panels should be authorized to make preliminary rulings on such questions. With regard to the proposal concerning Article 27.2 of the DSU, she said that her delegation had made a similar observation that the assistance currently provided by the Secretariat under this article was very limited as to be of any practical use to developing-country Members. It was necessary for this article to be operationalized through the provision of increased and focussed legal technical assistance to developing-country Members. With respect to the proposal by the African Group concerning compensation, she said that while her delegation recognised that compensation was a temporary measure to be resorted to when it was not possible for the Member concerned to promptly comply with the recommendations and rulings of the DSB, it was also of the view that compensation should not be limited to improving the market access conditions for the complaining Member and that other forms of compensation, including monetary compensation, should be explored. She also said that her delegation considered with interest the proposal that would entitle developing-country Members to receive compensation in cases where the WTO-inconsistent measures were withdrawn before the commencement of formal dispute settlement proceedings. There was some similarity between this proposal by the African Group and that of Mexico on preventive measures and retroactivity, in that they were both intended to redress the losses that might have been suffered by the complaining Member before the commencement and during dispute settlement proceedings. Finally, she said that Jamaica was in agreement with the African Group that it was necessary for the WTO and its Members to make available additional resources that could be used to facilitate the greater participation of developing-country members in the dispute settlement system of the WTO.

75. The representative of Argentina said that his delegation was in agreement with the views expressed by Chile and Brazil concerning the need for the Special Session to prioritize its work, if the deadline of May 2003 was to be met. The number of proposals on the table was simply too many and some of the proposals were very complicated requiring painstaking reflection before a decision could be made. Given the short deadline given by Ministers, it was imperative that the Special Session concentrated on those issues which had broad support among participants and in respect of which it was easier to build consensus around. Participants should not feel pressured that they needed to consider all the proposals on the table and reach a decision on each of them. The most difficult and sensitive issues could be taken up after May 2003. He warned against the failure to meet the deadline and said that it could have far-reaching implications for the entire negotiations. He said that while participants' views might differ regarding the issues which needed to be given priority attention, his delegation was certain that there were a certain number of proposals which broadly enjoyed the support of participants. He mentioned in that context that the MERCOSUR member states had identified at the meeting of the Special Session on 15 July 2002, a number of issues, including the sequencing issue, a procedure for lifting sanctions, third-party rights, streamlining the panel procedure and reducing the time-frames at some stages of the procedure, enhancement of transparency insofar as it related to the notification of mutually agreed solutions and access to documentation, which appeared to enjoy broad support among participants. While the proposals relating to compensation and suspension of concessions were interesting, it was very doubtful given their complexity and the far-reaching changes they would make to the dispute settlement system, if agreement could be reached on them before the May 2003 deadline. The agenda needed to be manageable, otherwise it was certain that the May 2003 deadline would be missed.

76. The representative of Uruguay said that his delegation was in agreement with the views expressed by Argentina, Brazil and Chile regarding the need for the Special Session to prioritize its work. There was the need for objectivity and realism. It should be clear at this stage that it would not be possible for agreement to be reached on all the proposals before the May 2003 deadline. The challenge was to determine which issues broadly had the support of participants. While it was true

that there was no consensus on any issue at this stage of the negotiations, it was also equally true that it would be easier to find a consensus on some issues than others. He said in that context that there was a high probability of finding consensus on the list of issues enumerated at the July Special Session by MERCOSUR and also that of Chile at the present meeting. He urged the Chairman to come up with his own list taking into account the degree of support expressed on each proposal by participants. There was the need for realism; it would be pointless if no results were achieved by May 2003. Proposals that did not feature in the Chairman's list could be taken up subsequently when the mandate of the Special Session was renewed. It was imperative for priority to be given to those issues on which it was possible to achieve consensus. It was unlikely for consensus to be reached on proposals which would fundamentally alter the DSU.

77. The representative of Paraguay said that his delegation was in agreement with the statement made by Chile and other participants concerning the need for the Special Session to prioritize its work given the short deadline of May 2003. He urged participants which had tabled proposals to submit draft legal texts in order to make it clearer which provisions of the DSU they wanted to clarify or modify. He said that his delegation was in agreement with those delegations which had requested the Chairman to come up with a list of issues on which it might be easier to reach consensus. The Chairman's text could serve as a basis for the next phase of work of the Special Session. He said in that connection that the Chairman's list should include the issue of mediation and good offices, as there was likelihood of consensus being reached on it. He urged consistency between the treatment of special and differential treatment for developing countries under the DSU by the DSB Special Session and the Special Session of the Committee on Trade and Development (CTD Special Session). He said that the African Group had made a proposal on the DSU which was being discussed in the Special Session of the Committee on Trade and Development, but which did not appear to be in the list of proposals being discussed by the CTD Special Session. In Paraguay's view, the proposal by the African Group should have been submitted to the DSB Special Session. It was important for the Secretariat to do its best to follow closely what was being discussed by other negotiating bodies, so as to ensure consistency and minimise duplication of work. It was necessary for synergies to be created. It was imperative for the Special Session to agree on proposals which would make substantive and positive changes to the DSU, rather than agreeing on proposals which would merely tinker with it and not fulfil the mandate which was given by Ministers at Doha.

78. The Chairman said that the African Group had submitted its proposal (TN/DS/W/15) on the DSU to the DSB Special Session and that it would be discussed in due course by the Special Session.

79. The representative of Paraguay said that the two proposals differed and that the one presented to the CTD Special Session contained certain elements which were not reflected in the one submitted to the DSB Special Session.

80. The representative Ecuador said that his delegation was in agreement with the views expressed by a number of participants, including Argentina, Brazil and Chile concerning the need for the Special Session to prioritize its work given the May 2003 deadline. He said that among the priority issues, there were some which were more urgent than others and that these issues deserved to be considered first. There was the need for realism taking into account the mandate of the DSB Special Session. The aspirations of some participants had to be adjusted to reflect what was achievable by May 2003. He said that his delegation was also in agreement with the suggestion made by some participants that the Chair should come up with a list of issues in respect of which it might be possible to reach consensus. He said that Ecuador would do its best to assist the Chairman in this regard and would consult with participants which had made similar proposals to that of Ecuador and explore the possibility of coming up with a common text.

81. The representative of Nigeria thanked Jamaica for supporting several suggestions of the African Group and said that the Group was willing to engage any participant which had made similar proposals in order to explore the possibility of coming up with a common text. Regarding the

comment made by Paraguay, he said that the African Group wanted to avoid duplication of work, hence its decision not to submit the proposal to the CTD Special Session also to the DSB Special Session. It was thought by the Group that once a decision was made on its proposal, it could then be transmitted to the DSB Special Session for incorporation into any agreement that it might reach.

82. The Chairman thanked participants for their comments and said that he agreed that time was of the essence and that the Special Session had to work very fast and efficiently if it was to meet the deadline of May 2003. He inquired whether any participant intended to submit a new proposal. He said that he would address some of the comments raised by participants when the meeting switched to an informal mode.
