Provisional speaking notes
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Why only a small part of WTO law is enforced through the WTO dispute settlement procedures and whether something should be done about this

WTO at 10 Conference
New York City, April 2006

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I. INTRODUCTION

1. When Members of the WTO decide whether or not to bring a case under the WTO Dispute Settlement Understanding (DSU), they take into account both the potential and the limitations of the DSU. As a result of this "filtering" process, the DSU tends to attract only the cases it is capable of resolving. Anyone wishing to evaluate the performance of the DSU over the past ten years should consequently examine not only the cases that reached panels and the Appellate Body but also the complaints that Members decided not to bring. An assessment based solely on the cases that Member brought would reveal only the potential, but not the limitations, of the DSU.

2. What are the types of disputes that Members have sought to settle through the WTO dispute settlement system? Almost all of them concern a law or regulation that taxes, restricts or prohibits imports or discriminates in favour of domestic over imported products or favours sales in foreign markets over domestic sales. Typically, Members resort to the DSU because their producers seek the removal of a measure that another Member maintains to protect its producers from foreign competition. It is a core objective of WTO law to prevent the continuation of such measures and the DSU procedures have played a crucial role in attaining that objective.

3. WTO law, however, extends beyond laws and regulations protecting a domestic industry. WTO law applies not only to laws and regulations but also to *one-time administrative actions*, such as individual state trading operations and specific government purchases. Its objective is not only to prevent trade-restrictive measures but also to ensure their *non-discriminatory and transparent application* where they are permitted. Finally, WTO law regulates not only the trade policy conduct of the Members of the WTO but also their *conduct within the institutional and procedural framework of the WTO* and the *conduct of the organs* of the WTO.

4. These areas of WTO law have remained largely outside the WTO dispute settlement system. This can of course be explained in part by factors unrelated to the WTO dispute settlement system, in particular economic and political factors. However, in part, this can also be traced to features of the WTO dispute settlement system. I would like to propose three hypotheses that attempt to explain how specific features of that system reduce the range of WTO law enforced through the DSU:

> *"No remedy" hypothesis.* In many situations the DSU does not offer an effective remedy to the Members interested in enforcement of their rights. The only responsibility that a Member found to have violated WTO law incurs under the DSU is to withdraw the measure found to be inconsistent. The DSU provides no redress in situations that have ceased to exist, in the case of

violations of temporary obligations that no longer apply at the end of the DSU proceedings and in respect of acts that are of such a nature that they cannot be withdrawn, such as the temporary denial of an import license or the discriminatory allocation of a government procurement contract to a domestic bidder.

"*No interest" hypothesis.* There are provisions of WTO law that are of great systemic importance but that individual Members have no interest in enforcing, at least not in most situations. This applies for instance to the rules limiting the right to accord tariff preferences under Article XXIV of the GATT or the Enabling Clause and the prohibition of voluntary export restraints under the Agreement on Safeguards. As long the DSU procedures are initiated only by Members pursuing their export interests, this part of WTO law is unlikely to be enforced through the DSU.

"No jurisdiction" hypothesis. The jurisdiction of panels and the Appellate Body is confined to disputes between Members under specified agreements. This means that the WTO or an organ of the WTO cannot be a party to a DSU proceeding and disputes related to the provisions governing the competence and procedures of the organs of the WTO and the relationship between the WTO and its Members cannot be settled through the DSU procedures. There are also provisions in the covered agreements and the DSU that posit legal standards but leave the application of that standard to negotiations between Members or to the discretion of an organ of the WTO. As a result, these legal standards cannot be the basis of a legal claim in a DSU proceeding.

I would like to substantiate these three hypotheses with examples and examine how the negotiators and administrators of WTO law could react to the current limitations in the procedures for the enforcement of that law. A reform of the DSU is often not the only possible avenue. I will therefore also explore other methods to enhance compliance with those parts of WTO law that are currently not enforced through the DSU.

II. ANALYSIS

A. "NO REMEDY" HYPOTHESIS

5. Article 19.1 of the DSU provides:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.[4]

6. Most Members of the WTO and most panels have concluded from Article 19.1 of the DSU that a Member of WTO found to have adopted a measure violating WTO law incurs only one responsibility: to bring that measure into conformity with WTO law; no other compensatory or corrective action is required. The United States expressed this position before a panel as follows:

> Retroactive remedies are inconsistent with the established practice of panels of refraining from recommending remedies that attempt somehow to restore the *status quo ante* or otherwise compensate the prevailing party for WTO-inconsistent actions taken by the defending party.[5]

7. If panels cannot recommend retroactive remedies to the WTO Dispute Settlement Body (DSB), then Members found to have violated WTO law do not incur any responsibilities under WTO law with respect to situations that have ceased to exist or acts that are of such a nature that they cannot be withdrawn. The European Communities has described this as an "established and accepted" feature of WTO law:

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[4] Article 19.1 was included in the DSU at the insistence of the United States, which was concerned about four adopted GATT 1947 panel reports that had recommended that an inconsistently levied anti-dumping or countervailing duty be repaid. (See Committee on Anti-Dumping Practices, Minutes of the Meeting held on 21 October 1991, GATT document ADP/M/35, 11 March 1992.)

[5] Panel report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60/AB/R) para. 5.63.

> The absence of remedy for past and consummated violations has always been a well-known feature of the GATT/WTO system. It is established and accepted that it can lead in some cases to there being no remedy at all for the complaining party.[6]

8. The International Court of Justice has the power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".[7] There is no corresponding provision in the DSU. The complainant has therefore effectively no procedural remedy before the end of the implementation period. Only then, and only if - and as long as - the defendant does not implement the DSB's rulings and recommendations, may the complainant request compensation or, in the absence of an agreement on compensation, an authorisation to suspend concessions.

9. The current WTO dispute settlement system applies exclusively to disputes on measures already taken, not proposed or imminent measures. While it has been recognised that legislation can be challenged under certain circumstances before it has actually been applied, it is currently not possible to obtain a legal ruling on legislation that has not yet entered into force. While the WTO procedures DSU procedures are accessible only after the event, after the damage is done, the dispute settlement procedures under the North American Free Trade Agreement can be invoked in respect of both "an actual or proposed measure of another Party".[8] It is also not possible for a Member to obtain an advisory ruling on a measure that it intends to take itself or on the consequences of a WTO obligation that it intends to assume, such as a specific commitment under the General Agreement on Trade in Services (GATS).[9]

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[6] Panel Report, *Canada –Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU* (WT/DS70/RW), Annex 3-3, Oral Statement of the EC, para. 32.

[7] Article 41 of the Statute of the International Court of Justice.

[8] Article 2004 of the North American Free Trade Agreement.

[9] In the recent case on gambling and betting services, the United States asserted that, when including a specific commitment on "sporting and other recreational services" in its Schedule, it had not expected that commitment to comprise gambling and betting services (Panel Report, *United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, paras. 6.135-6.136). Similarly, in the recent sugar case, the EC asserted that neither it nor any other Member expected the export subsidy rules of the Agreement on Agriculture to cover below-cost sales by private parties and that the Appellate Body's ruling to that effect conferred a windfall benefit to its negotiating partners. The EC went so far as to accuse the complainants of acting in bad faith because they were invoking jurisprudence that they themselves could not have anticipated when the EC determined the scope of its export subsidy commitment (Appellate Body Report on *European Communities- Export Subsidies on* Sugar, WT/DS265/AB/R, paras. 33-39). These cases illustrate that there is a practical need to remove uncertainties about the legal effect of concessions and commitments when they are being negotiated, rather than years after their implementation.

10. As a result of:

- the lack of retroactive remedies,
- the absence of interim relief procedures,
- the requirement that a measure must exist before it can become the subject of a ruling WTO Members, and
- the fact that an obligation can only be enforced through the DSU if it still exists at the end of the DSU proceeding,

Members stand defenceless against violations of WTO law in the following situations:

- *Consummated measures*. The DSU offers no redress in respects of acts that, by their nature, cannot be withdrawn, such as the late registration of a patent (and the resulting loss of priority of the inventor), the discriminatory allocation of a government procurement contract, a transaction by a state trading enterprise not based on commercial considerations or the failure to grant an import license promptly. The panel report in *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, a case that arose in 1992 under the Tokyo Round Agreement on Government Procurement, illustrates the consequences of this limitation of the DSU.[10] The panel was asked by the United States to rule on the procurement of toll collection equipment that had already been installed at the time of the panel proceedings. The panel's recommendation to bring the measure into conformity with the Agreement provided the United States with no redress. The United States "won" the case but was left empty-handed because the panel refused to recommend any form of reparation.[11]

  Another illustration is the WTO case *India – Patents*, in which the United States requested the panel to find that Article 70.8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) requires India to ensure that persons who have filed or would have filed patent applications receive the filing date they would have received if India had established procedures for the registration of patents consistent with that provision. The United States thus effectively requested a finding that Article 70.8 obliges India to correct the consequences of its failure to register patents. India promptly argued that the United States, in the guise of an interpretation of Article 70.8,

[10] Report of the Panel, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GATT document GPR.DS2/R, 28 April 1992.

[11] For a detailed discussion of this case see Dr. Petros Mavroidis, "Government Procurement Agreement – The Trondheim case: the remedies issue" in: Aussenwirtschaft, 48. Jahrgang (1993), Heft 1, pages 77-94.

was asking for a remedy not provided for under Article 19.1. The panel accepted India's argument and refrained from making the finding requested by the United States.[12]

- *Time-bound measures.* It is possible to violate - effectively unsanctioned - obligations under the WTO agreements for considerable periods of time simply by refusing to engage in constructive consultations, unnecessarily complicating the panel proceedings, appealing the panel report on frivolous grounds and forcing the complainant to request an arbitrator to determine the length of the implementation period. For instance, if a WTO Member were to adopt in April 2006 a law providing for GATT-inconsistent import restrictions on meat from the United States for a period of two years, the United States would not be able to do anything under the DSU to re-establish the negotiated balance of benefits. WTO law would require the United States to refrain from taking retaliatory action during the DSU proceedings and would not accord it the right to compensation after the proceedings. This case illustrates that the DSU provides no effective protection against measures inconsistent with WTO law that are applied, or have their commercial impact, within a period shorter than the period it takes to complete the DSU procedures.

- *Time-bound obligations*. All provisions of the WTO agreements that establish obligations applicable only for a period of time shorter than the DSU procedures cannot be enforced through the DSU. Pakistan's complaint against a safeguard measure imposed by the United States under the Agreement on Textiles and Clothing provides an illustration. About three years passed between the imposition of the measure and the end of the DSU proceeding.[13] Under the Agreement on Textiles and Clothing, a safeguard measure could be imposed only for a period of three years.[14] The Dispute Settlement Body (DSB) thus recommended that the United States bring itself into conformity with WTO law at a point in time when the safeguard provisions invoked by the United States in any case no longer applied and the measure would have been terminated anyway.

  There are many legal requirements under WTO law that apply only during specified periods of time, among them the requirements set out in the terms and conditions of waivers and the transitional arrangements contained in various WTO agreements for developing countries. Members have no interest in enforcing such requirements through a complaint under the DSU if the waiver or transitional period lapses before the DSU proceedings would end. The same applies to the final years of a time-bound agreement, such as the Agreement on Textiles and Clothing. No developing country Member brought

[12] Panel report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, paras. 3.1(a), 4.14 and 7.65.

[13] See Minutes of the Meeting of the Dispute Settlement Body held on 5 November 2001, WT/DSB/M/112, paras. 21-22.

[14] Article 6.12 of the Agreement on Textiles and Clothing.

a case under that Agreement during the three years preceding the termination of that agreement, presumably because the lack of effective remedies under the DSU would have made any enforcement efforts meaningless.

11. Article 19.1 of the DSU reflects the needs and constraints of the contracting parties to the GATT 1947. It is anachronistic in a legal system with the scope and depth of WTO law. The remedy that was perfectly adequate to enforce the 38 Articles of the GATT 1947, is insufficient to ensure effective compliance with many of the new trade agreements negotiated during the Uruguay Round, in particular the GATS and the TRIPS Agreement. What worked in a dispute settlement system based on voluntary cooperation, fails when States are drawn into compliance procedures against their will and therefore tend to exploit every weakness in the system. The grand bargain underlying the DSU was: Members agree to renounce unilateral enforcement actions and obtain a legally binding, effective dispute settlement system in return. To prohibit unilateral enforcement measures completely but to provide in many situations only an ineffective substitute erodes the political foundations of that bargain.

12. There is no other international dispute settlement procedure that imposes limits on adjudicators similar to those set out in Article 19.1 of the DSU. That is why the international law on remedies has been developed by tribunals, not the drafters of treaties. Ideally, also the judicial organs of the WTO would be freed from the strictures of Article 19.1 of the DSU and be given the possibility to develop jurisprudence providing for remedies that go beyond the cessation of the illegal act. The complex question of remedies could then be resolved also in the WTO on a case-by-case basis by prudent judges guided by principles of law.

13. Until the DSU has been reformed to provide for more effective remedies, alternative methods to secure compliance with WTO obligations should be considered. The problem that arose in *Norway – Procurement of Toll Collection Equipment for the City of Trondheim* was addressed in the Uruguay Round Agreement on Government Procurement by creating an obligation to create in *domestic law* a “challenge procedure” under which private individuals can claim “interim measures . . . to preserve commercial opportunities” and a “correction of the breach of the Agreement or compensation for the loss or damages suffered.”[18] Also the TRIPS Agreement obliges Members to provide in their domestic law for judicial procedures ensuring the enforcement of any intellectual property right covered by that Agreement.[19] This approach could also be used to ensure an effective enforcement of other WTO agreements. For instance, Members could give their own importers rights under domestic law

[18] Article XX of the Agreement on Government Procurement.
[19] Articles 42 – 60 of the TRIPS Agreement.

incorporating the provisions of the WTO agreements on licensing procedures and customs valuation.

B. "NO INTEREST" HYPOTHESIS.

14. Among the provisions that are of systemic importance but that individual Members normally have no interest in enforcing are the following:

- *Regional trade agreements.* Article XXIV:8 of the GATT stipulates that the members of a customs union apply "substantially the same duties and other regulations of commerce" in their external trade relations. However, there is nothing under WTO law that prevents Members from replacing a customs union by a free trade area or from declaring a trade arrangement described as customs union to be a free trade area for purposes of WTO law. If the members of a preferential trade agreement do not wish to harmonise their external trade relations completely, they can therefore establish a free trade area instead. Given that option, it is meaningless for Members to resort to the DSU for the purpose of challenging a trade arrangement on the ground that it does not fulfil the basic requirement for customs unions set out in Article XXIV:8.

  Article XXIV:8 further stipulates that duties and other restrictive regulations of commerce be eliminated with respect to "substantially all the trade" between the constituent territories of both customs unions and free trade areas. A Member would normally not find it in its interest to challenge a preferential trade agreement on the grounds that the liberalisation of the internal trade between the parties to that agreement does not cover "substantially all the trade" between them. Translated into economic terms, such a challenge would amount to a request that the parties to that agreement discriminate even more against third parties, including the complainant. It is hardly ever in the interest of a WTO Member to launch a dispute settlement proceeding with that objective in mind. While it is important for systemic reasons to require members of customs unions and free trade areas to discriminate against third countries in respect of substantially all trade, the third countries would normally prefer discrimination in respect of less than substantially all trade. Against this background, it is not surprising that formal complaints against regional trade agreements have never been brought, neither in the GATT nor in the WTO.

- *Preferences for developing countries.* The Enabling Clause permits discrimination in favour of developing countries under certain conditions. However, the preferences accorded by the industrialised countries under the Enabling Clause, unlike the tariffs that they apply on a most-favoured-nation basis, are not bound in their GATT schedules of concessions and may consequently be withdrawn at any time. Moreover, the preference donors have retained the right to determine the beneficiaries of their preference schemes

and, according to a recent ruling of the Appellate Body, to differentiate between the beneficiaries in accordance with "objective criteria".[20] If a developing country challenges *a condition* that it must fulfil to obtain preferences, it takes the risk that it no longer obtains the preferences under *any conditions*. The grant of preferences to developing countries has been permitted since 1971. Nevertheless, only once has a developing country challenged the conditions under which such preferences were granted (India in 2004).

- *National security measures.* Article XXI(b)(iii) of the GATT allows a Member of the WTO to take any action which "it considers" necessary for the protection of its essential security interests "in time of war or other emergency in international relations". The claim that the measure is not necessary for the protection of essential security interests could be countered by the argument that the wording of the provision (". . . it considers. . .") leaves the appreciation of that issue to the Member invoking Article XXI. However, arguably, the question of whether the action was taken "in time of war or other emergency in international relations" could be assessed by a panel and the Appellate Body. Nevertheless, the Member targeted by the Article XXI(b)(iii) action will in most situations be better off *acknowledging* that there is an emergency in the relations between it and the Member invoking this provision because it can then claim that it also has the right to act under the legal cover of this provision, and consequently the right to retaliate unilaterally without an authorisation of the Dispute Settlement Body (DSB). A Member against whom such an action under Article XXI(b)(iii) is taken would for these reasons normally have no interest in challenging it under the DSU.

- *Discriminatory export controls.* Article 11 of the Agreement on Safeguards prohibits voluntary export restraints, orderly marketing arrangements and similar measures, whether adopted unilaterally or agreed between the exporting and the importing Member. The purpose of this provision is to ensure that importing Members do not circumvent the rules on safeguards by giving exporting Members the right to capture lucrative quota rents in return for voluntary export restraints. If a Member agreed to impose export restraints, it is likely to prefer them over measures consistent with the Agreement on Safeguards. Moreover, its agreement to the arrangement violates Article 11. It can for these reasons not be expected to rise to the defence of the principles set out in this provision. Third Members are also unlikely to launch a complaint against the arrangement because it will tend to improve their export opportunities by curtailing competing exports. It is therefore not surprising that the DSU has never been invoked to enforce Article 11 of the Agreement on Safeguards.

[20] Appellate Body Report, *EC – Conditions for the Granting Tariff Preferences to Developing Countries,* WT/DS/246/AB/R, paras. 183, 188.

15. The basic provisions of the GATT that regulate the conditions under which Members of the WTO may discriminate between other Members have for these reasons remained practically un-enforced. The grant of preferences is generally prompted by foreign policy considerations. The non-invocation of the GATT provisions limiting the right to discriminate has therefore kept out of the WTO dispute settlement system foreign policy issues that many Members would prefer not to see settled by third-party adjudication. A panel asked to rule on the consistency of a regional trade agreement has to examine not only a specific trade measure affecting a particular complainant but a whole trade regime affecting all Members. And it must do so in the light of the facts and claims submitted by the complainant and - since there are no co-defendants under the DSU - only one of the parties to the challenged regional trade agreement. In the three cases in which a contracting party to GATT or a Member of the WTO invoked Article XXIV as a defence the panels have found ways to escape that unenviable task.[21]

16. The effective enforcement of the various exceptions to the principle of most-favoured-nation treatment through the DSU cannot be reasonably expected as long as the DSU procedures can be initiated only by Members, and Members avoid submitting the determination of the limits to the right to discriminate to third-party adjudication. The most effective, and perhaps the only feasible, way to reduce the practical importance of this issue is to continue to negotiate the lowering of tariffs and, consequently, minimising the trade effects of tariff preferences.

C. "NO JURISDICTION" HYPOTHESIS

17. The jurisdiction of panels and the Appellate Body is confined to disputes between Members under the covered agreements. The WTO or an organ of the WTO can therefore not be a party to a DSU proceeding. There are also provisions in the covered agreements that posit standards of conduct for Members but deny Members the right to invoke them in a DSU proceeding. As a result, the following types of disputes fall outside the competence of panels and the Appellate Body:

- *Institutional provisions.* The procedures set out in the DSU serve to settle disputes between Members of the WTO, not between a Member of the WTO and the WTO. They are "horizontal" in nature, like civil law proceedings between two citizens, not "vertical", like public or administrative law proceedings involving the state and a citizen. For instance, disputes on the question of whether the WTO had correctly fixed a Member's

[21] See GATT Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, 7 February 1985, unadopted, L/5776, paras. 4.6 - 4.10; GATT Panel Report, *EEC – Import Regime for Bananas*, 11 February 1994, unadopted, DS38/R, paras. 159-164; WTO Panel Report, *Turkey – Textiles, DS34/R,* paras. 9.52 - 9.56.

financial contribution to the expenses of the WTO, or whether an organ of the WTO had the competence to take a decision imposing an obligation or whether it followed the correct decision-making procedures could not be submitted to a panel or the Appellate Body. Such disputes must be resolved exclusively through negotiations or through authoritative interpretations. According to the WTO Agreement, the exclusive power to adopt authoritative interpretations rests with the WTO Ministerial Conference and the General Council,[22] which must adopt them with a majority of three-fourths of the Members.

While International Court of Justice has the authority to "give advisory opinions on any legal questions at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request," the Appellate Body does not have a corresponding power to act at the request of a WTO body. The resolution of an issue by a neutral body may have considerable political and diplomatic advantages. It would therefore be worth considering whether the Ministerial Conference and the General Council should be given the right to seek an opinion of the Appellate Body to assist it in settling disputes on institutional or procedural matters.

- *Dispute settlement provisions.* According to the DSU, Members are to engage in the dispute settlement procedures in good faith "in an effort to resolve the dispute". If they have found a solution to the matter, they shall notify it to the DSB, where any Member may raise any point relating thereto. The instrument setting out the *mutually agreed solution* is not a "covered agreement" and cannot be invoked in a DSU proceeding. Whether a procedural defence can be based on such an agreement has been left open by one panel.[23] The DSU thus encourages Members to settle their disputes amicably but does not offer them the possibility to invoke their settlement agreements in a DSU proceeding as the basis of a claim and, possibly, also not as the basis of a defence.

[22] Article IX: 2 of the Agreement Establishing the World Trade Organisation.

[23]India concluded an agreement with the EC according to which it could maintain its balance-of-payment restrictions during a period of five years. When the EC nevertheless brought a complaint against import restrictions, India invoked this agreement as a defence. The EC argued that, not being a "covered Agreement" under the DSU, the bilateral settlement could not be invoked by India "in order to justify the violation of its obligations under the GATT and the TRIMs Agreement". India argued that the issue is not whether the agreement is a covered agreement. The issue is whether the DSU may be invoked again in respect of a matter formally raised under the DSU and settled through a mutually agreed solution notified under the DSU. It asserted that this issue is related to the EC's procedural rights under the DSU, not India's substantive obligations under a covered agreement. India further argues that a mutually agreed solution to a matter formally raised under a covered agreement and jointly notified to the DSB as such "must be regarded as a formal settlement of the dispute that makes the re-submission of the same dispute inadmissible". The Panel did not rule on the issue because it was of the view that the matter before it and the matter settled between the EC and India were different. (Panel report, India – Measures Affecting the Automotive Sector, WT/DS146/R and WT/DS175/R, paras. 7.109-7.111).

According to Article 4.11 of the DSU, a Member considering that it has a *substantial trade interest* in consultations under Article XXII of the GATT or the corresponding provisions of the other covered agreements may request to be joined in the consultations. However, this provision states that such Member shall be joined in the consultations only if the Member concerned "agrees that the claim of substantial interest is well founded". This renders the claim of substantial trade interest non-justiciable and this criterion for access to consultations has therefore been non-operative.

Article 9 of the DSU provides that *a single panel* should be established if more than one Member requests the establishment of a panel related to the same subject-matter. This provision has been interpreted to regulate the conduct of the DSB, not the rights of the disputant parties.[25] A WTO Member can consequently be forced to defend the same measure more than once, as happened to India, which was subjected to two successive panel procedures on the precisely same patents matter, first by the United States and then by the EC. The respondent in a DSU proceeding cannot expect the DSB to enforce the principle set out in Article 9 because it can take decisions to that effect only with the consent of the complainant nor can the respondent expect a panel or the Appellate Body to enforce Article 9 because this provision does not accord rights to individual Members.

[25] In *India – Patent (EC)*, India argued that the EC's complaint should be rejected because the EC had failed to request that a single panel be established to examine its complaint and the identical complaint that another panel had already examined at the request of the United States. India argued that Article 9.1 does not make clear to whom it is addressed because of its use of the passive voice. However, in view of its object and purpose, the duty to submit multiple complaints to a single panel whenever feasible is a duty falling on both the WTO and its membership. India claimed that the EC's complaint should be dismissed because the EC did not perform this duty. The Panel ruled that "the terms of Article 9.1 are directory or recommendatory, not mandatory. They direct that a single panel should (not 'shall') be established, and that direction is limited to cases where it is feasible. We disagree with India that the addressee of Article 9.1 is not clear. Article 9.1 is clearly a code of conduct for the DSB because its provisions pertain to the establishment of a panel, the authority for which is exclusively reserved for the DSB. As such, Article 9.1 should not affect substantive and procedural rights and obligations of individual Members under the DSU." (Panel report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, paragraphs 7.12.-7.14).

Determination of equivalence of suspension of obligations. Members of the WTO may suspend the application of "substantially equivalent concessions and other obligations" in response to safeguard measures[26] and in response to the withdrawal of concessions under the procedures for the modification of schedules of concessions.[27] A dispute as to whether the obligations that a Member intends to suspend are "substantially equivalent" may be referred to the Ministerial Conference or General Council but not to a panel and the Appellate Body. They could address this issue only *after* the suspension has taken place. Moreover, they could determine only whether the suspension actually applied is or is not "substantially equivalent". They could also not determine that the modifying Member had "unreasonably failed to offer adequate compensation" and was therefore not entitled to proceed with the modification. That is a determination that can be made according to Article XXVIII:4(d) only by the Ministerial Conference or the General Council.

Under the GATS, Members affected by the modification of any scheduled commitment have the right to request arbitration on the adequacy of the compensation offered by the modifying Member *before* the modification has been implemented.[28] Similarly, under the Agreement on Government Procurement, disputes on the level of compensatory adjustments for the removal of an entity from the negotiated list of entities can be settled through the DSU procedures before the entity is removed.[29] Disputes about the level of suspension of obligations under the enforcement provisions of the DSU can also be submitted to arbitration before the DSB authorises the suspension.[30] It is difficult to see why the option of arbitration should not also be made available in the case of a suspension of concessions pursuant of Articles XIV and XXVIII of the GATT.

18. All disputes regarding institutional matters must now be settled by agreement. The alternative of settlement by a vote is practically foreclosed, and the alternative of a settlement by a judicial body is legally foreclosed. The price is inflexibility, efficiency and the risk of fossilisation. A relaxation of the consensus practice would need to go hand in hand with the creation of legal procedures that protect the rights of those that are overruled. The question of whether the WTO judicial organs should be authorised to resolve, or advise on, disputes on institutional matters is therefore closely related to the question of whether the practice of giving each of the 149 Members of the WTO an opportunity to block any decision of the WTO should continue.

19. It is not meaningful to establish a legal standard in WTO law but leave the application of that standard to the discretion of each Member (as is done in the consultation provisions of

[26] Article 8 of the Agreement on Safeguards.
[27] Article XXVIII:4(d) of the GATT.
[28] Article XXI of the GATS.
[29] Article XXIV:6(b) of the Agreement on Government Procurement.
[30] Article 21.6.

Article 4 of the DSU). It also not meaningful to establish a legal standard in WTO law and give the exclusive right to determine whether a Member has lived up to this standard to a body that takes its decisions only by consensus (as is done in the GATT provisions on the renegotiation of concessions). Finally, it is not meaningful to assign the realisation of legal standards in the field of dispute settlement to the DSB (as is done, for instance, in Articles 3, 9 and 24 of the DSU) because in the DSB each party to a dispute is legally entitled to prevent decisions aimed at the realisation of the standard. In all these situations, the establishment of the legal standard would only be meaningful if either the consensus constraint was lifted or the matter could be referred to a judicial body.

III. CONCLUSION

20. The DSU has worked admirably well in resolving the disputes that Members have chosen to submit to it during the past ten years. However, the part of WTO law that Members can, and do, enforce through the DSU is limited. This can essentially be attributed to the fact that the dispute settlement procedures of the WTO evolved from those of the GATT 1947 and are therefore geared to the resolution of the type of disputes that had arisen under the GATT 1947. With the limitations that have been taken over from the GATT 1947, the DSU cannot address all the legal issues that arise under the more complex legal system of the WTO.