PERFORMANCE OF THE SYSTEM I: CONSULTATIONS & DETERRENCE

Comments

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WILLIAM J. DAVEY: The requirement that disputing parties consult before invoking the panel process in the WTO dispute settlement system is an important part of the overall dispute settlement process. The following comments highlight a number of issues and aspects of the consultation process that have arisen since the entry into force of the WTO Agreement.

I. Limited Secretariat Involvement

The WTO Secretariat has only limited involvement in the consultation process and it is not present at the consultations. The Secretariat generally has no role with the exception that one of the parties to the consultations may request the Director-General to exercise his good offices in respect of the dispute.[1] In the case of least-developed countries, explicit provisions are made for the involvement of the Director-General if consultations fail.[2] To the author's knowledge, the Director-General has not had the occasion to be involved in the consultation process to date.

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1. Understanding on Rules & Procedures Governing the Settlement of Disputes art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1226 (1994) [hereinafter DSU].

2. *Id.* art. 24(2).

II. Usefulness of Consultation

The consultation process seems to be useful in promoting settlements, as roughly twenty percent of the requests for consultations appear to have resulted in some form of settlement. With the commencement of the dispute settlement process, countries are forced to consider their likelihood of prevailing if a dispute goes to a panel and evaluate the costs and benefits of going through that process if they expect to lose.

The usefulness of consultations, however, should not be overemphasized. There remain considerable opportunities for delay in the WTO process. While there are tight deadlines for the panel and appellate proceedings, these may be exceeded. More significantly, despite these tight deadlines, the now-seemingly-accepted standard of fifteen months as the reasonable period for implementation[3] means that the final day of reckoning may be postponed in the dispute settlement system for approximately two and one half years. There appear to be instances where this potential for delay factors in Members' decisions to contest cases that they probably expect to lose.

III. Problems Concerning Consultations

A number of issues have arisen concerning the consultation process that are worthy of mention, although none of them impedes significantly the operation of the dispute settlement system.

A. Multiple Complaints

In at least nineteen cases, more than one Member has individually complained about a measure of another Member. In other cases, there have been joint consultation requests and/or joint panels. Some respondents in these cases have complained that such multiple requests put an inappropriate burden on them because they may end up having to conduct essentially the same consultation several times. This is a particular problem for Members with small delegations in Geneva. While joint consultations may be a useful mechanism to use, they may be viewed as undesirable from the respondent's point of view to the extent that they make settlement negotiations with individual countries more difficult.

B. Joining Consultations

In the case of consultations under GATT article XXII (or its analogous provision in other WTO agreements), other Members with a substantial trade interest may

3. DSU article 21(3)(c) states that "a guideline for the arbitrator should be that the reasonable period of time [for implementation] should not exceed 15 months." In the four cases to date where it was necessary to set a reasonable period for implementation, fifteen months was twice agreed upon by the parties and twice imposed by an arbitrator.

request to join the consultations.[4] The decision on whether to allow this joinder is in the hands of the respondent, who must agree that the request is well-founded. While it has been argued that article 4.11 does not permit a Member that has already requested consultations on its own to join in other consultations, this reading of article 4.11 is contested.

The respondent decides alone if another Member may join consultations. Moreover, the respondent's control over who may join the consultations means that it may allow other Members whose interests are aligned with the respondent to join the consultations. The absence of control over the respondent's discretion has led to complaints of abuse and "stacking" the consultations.

It has been argued, but it is not generally accepted at the moment, that a Member who joins consultations under DSU article 4.11 should be able to request a panel without requesting consultations itself. The inability to proceed directly to a panel has led to procedural problems for the panel process. For example, late-filing complainants have slowed down the progress of cases (e.g., *Scallops, Hormones*) because it was necessary to incorporate the late-filed complaints in the original panel proceeding.

C. Adequacy of the Consultation Process: How to Supervise?

Numerous complaints have arisen about the consultation process itself, as demonstrated by the following examples. First, Members have questioned to what extent the request for consultations and the consultations themselves must include discussion of all issues that are subsequently raised in the panel process. One can argue that since the consultation process is in part an information gathering process, the focus for defining what can be brought before a panel should be the later document requesting a panel. However, totally ignoring how the consultations are conducted could significantly undermine their role.

Second, Members have also raised the issue of whether failure to consult in good faith during the consultation process is an enforceable obligation constituting grounds for requiring the process to be restarted. A version of this argument was rejected in *Bananas III.*

IV. Deterrence Effect of the New System—Too Early to Judge?

In this author's view, it is too early to judge whether the new system has achieved a significant deterrent effect. To date, a number of cases, especially some of the more controversial ones (e.g., *Bananas, Hormones*) have been holdovers from the GATT system. Hopefully, a deterrent effect will develop in the future.

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4. DSU, *supra* note 1, art. 4.11.

AMELIA PORGES: This comment lists a few relevant issues of the legal parameters of the consultation process from the standpoint of a government that is a major user of the dispute settlement process.

I. Orientation

While much attention has been focused on panel and appellate proceedings in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), it goes without saying that litigation is not the only path to settlement of disputes. As Elihu Lauterpacht said:

> [i]t is an inescapable fact that issues that divide States are best settled by negotiation and agreement. That is true whether the dispute is one that falls to be resolved within the framework of existing law or is one of such novelty or proportions that a specifically legislative effort is called for. The greater the direct involvement of the opposing parties in the process of finding a solution to their differences, the greater the likelihood of a satisfactory and lasting outcome.[5]

Settlement by direct negotiation maximizes the control of a dispute by the parties to that dispute. The governments that negotiated and agreed to the Dispute Settlement Understanding (DSU) value party control, because they are sovereign governments representing a variety of interests in a range of possible situations.[6] The DSU supports this viewpoint, providing in article 3(7) that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is to be preferred."[7] In addition, the Appellate Body stated in the *Wool Shirts* case that "the basic aim of dispute settlement in the WTO is to settle disputes."[8]

On the other hand, as Professor Hudec remarked, enforcement in the GATT happens only after the damage is done, and the value of dispute settlement as enforcement is in getting governments to behave more lawfully from the beginning.[9] Government desire for rule-based dispute resolution rather than *sui generis* conciliation has led to a search for consistency and predictability, increased professionalism, and more procedural formality—as seen in the DSU. The DSU

5. ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 6 (1991).

6. Loss of party control in a dispute settlement process is also not in the interest of the forum where the dispute is conducted, as it will lead eventually to the consumers of dispute settlement abandoning that forum in favor of other fora.

7. Understanding on Rules & Procedures Governing the Settlement of Disputes art. 3.7, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1226 (1994) [hereinafter DSU].

8. *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) (visited June 24, 1998) <http://www.wto.org/wto/online/ddf.htm> [hereinafter WTO Website].

9. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 358-60 (1993).

incorporates both settlement values and rule-compliance values at each step in the process. At the consultation phase, settlement values are particularly strong.

While this panel session also addresses the issue of deterrence, deterrence of unlawful behavior relates less to the consultation phase than to the speed and credibility of the formal procedures that follow, including firm deadlines for compliance. If it is indeed true that some Members (for instance, in cases involving non-implementation of Uruguay Round commitments) have decided to contest cases of flagrant violation purely to gain further delay, the remedy is not to tinker with the consultation process. Rather, an arbitrator determining the "reasonable period of time" for compliance under DSU article 21(3)(c) should take away the benefits of delay and find that the particular circumstances call for immediate compliance when faced with such behavior.

II. The Right to Ask for Consultations

Although the DSU now provides the "rules and procedures" for consultations, the reasons for which consultations may be requested—the "causes of action"—are part of the "consultation and dispute settlement provisions of the covered agreements" referred to in DSU article 1(1). The GATT provides two separate general-purpose consultation clauses: one for consultations concerning "any matter affecting the operation of this Agreement"under article XXII, and one for consultations under article XXIII, in aid of "satisfactory adjustment" of legal claims relating to nullification or impairment. During the era of the GATT 1947, the Contracting Parties also created additional rights to ask for consultations and duties to consult, concerning residual import restrictions, border tax adjustments, liquidation of strategic stocks, and restrictive business practices. Some of the Eastern European accession protocols also provide special consultation provisions. In addition, special-purpose consultation requirements exist under various other provisions of the GATT and the WTO.[10]

Each of these consultation requirements was created because it met a need at the time. The right to get another government to discuss a matter it would rather avoid should not be underestimated. It can be quite useful, particularly for smaller countries whose need for dialogue might otherwise be ignored by the larger players in the system.

A request for consultations in the WTO—now obligingly posted on the Internet in three languages by the Secretariat—is often the first public sign of a dispute. However, in the majority of cases, a formal request follows informal inquiries through a government's missions abroad, informal contacts or information-gathering in the context of WTO committee work, or informal consultations in the capitals of the governments concerned. A request for WTO consultations is

10. *See* ANALYTICAL INDEX (GUIDE TO GATT LAW AND PRACTICE) 619-21 (1995) (list of consultation requirements).

not the only means for governments to discover relevant information or settle a dispute, although it can be a useful tool and it is a necessary prerequisite to panel proceedings.

III. The Ability to Kibitz Versus the Right to Be Alone

To resolve a deadlock over the handling of complaints concerning the trade impact of the Treaty of Rome, the GATT agreed in 1958 that article XXII could become a vehicle for plurilateral consultations. Any requests for consultations under article XXII would be notified to the Secretariat and circulated for the information of other contracting parties who could then be joined in the consultation if the target of the original consultation request agreed that the joining country had a "substantial trade interest."[11] This procedure, including the "substantial trade interest" standard, was incorporated unchanged into article 4(11) of the DSU, which now applies not only to requests under GATT article XXII but to requests under corresponding consultation provisions in the other WTO agreements.[12] Under the WTO, some responding governments have accepted all requests for participation under article 4(11). However, some have chosen to refuse requests for such participation that do not present any evidence of substantial trade interest, or have refused requests where the nature of the interest was irrelevant to the consultations (for instance, where consultations concern a particular import tariff-rate quota (TRQ) and a third country requests to participate not because its exports are affected by the TRQ, but because it too has an import TRQ on the product in question). The U.S. practice in requesting participation under article 4(11) has been to cite trade data or other indicators of substantial trade interest in the request.

No such option to kibitz has ever been created with respect to article XXIII; if a request for consultations is framed under GATT article XXIII (or analogous provisions in the other WTO agreements), the requesting government has the right to consult alone with the respondent. Requests under article XXIII are also notified to the Secretariat and circulated in the three WTO working languages, but for information only. The ability to consult in private is important. Privacy is usually more conducive to settlement; it may also be useful for a Member who

11. Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties, Nov. 10, 1958, GATT B.I.S.D. (7th Supp.) at 24 (1959); *see* The Treaty Establishing the European Economic Community, GATT B.I.S.D. (7th Supp.) at 69-71 (1959) (in connection with conclusion of examination of the Treaty of Rome).

12. These consultation provisions are listed by name in footnote 4 to the DSU. Such consultation requests are translated and circulated in the three WTO working languages by the WTO Secretariat, and any WTO Member other than the consulting Members that considers it has a "substantial trade interest" in the consultations may request to be joined in them; under DSU article 4.11 as interpreted by the DSB, the deadline for such a request is ten calendar days after the date of circulation stated on the WTO document or the next WTO working day, if the tenth day falls on a weekend or holiday.

believes—correctly or not—that another has discriminated against it as a result of a bilateral agreement with a third party who would not be present.[13]

At present, the choice between article XXII and article XXIII appears to be dictated primarily by whether the requesting government wants to be alone with the respondent or whether it wants to invite plurilateral participation in the consultations. However, in a number of cases in the past two years where the request was addressed under article XXII (indicating that at least the requesting party did not see privacy as essential), the respondent has denied claims of "substantial trade interest" from parties who both expressed and had obvious substantial trade interests, or accepted such claims only from parties likely to be sympathetic, or denied participation by any WTO Member that had requested consultations in its own right. This situation has occurred in spite of the fact that a rejected would-be participant could have requested consultations on its own without demonstrating its trade interest, and can participate as a third party in a panel proceeding under DSU article 10 merely on the basis of a "substantial interest" (i.e., no trade interest required at all). There has been widespread frustration with this anomalous result, which can only be explained as an unintended result of historical convergence.[14]

Before opening the door to any and all participation once a request has been made under article XXII, it may be worth reflecting on where the WTO dispute settlement system as a whole is headed—i. e., the system as it is reflects an ecological balance between settlement values and enforcement values. Settlement values support the complainant or respondent who wants to have a private discussion without kibitzers; enforcement values support the quasi-working-party approach of plurilateral article XXII consultations. The costs and benefits of any change need to be carefully considered. In the end, the historical trend may overwhelmingly favor enforcement over settlement, particularly where it is clear that a respondent's exclusion of parties from article XXII consultations is not in aid of settlement but purely for obstruction and delay. However, WTO dispute

13. *See, e.g., Korea—Laws, Regulations and Practices in the Telecommunications Sector,* WT/DS40/1 (Oct. 29, 1997), *at* WTO Website, *supra* note 8 (complaints by EC on telecommunications procurement).

14. The "substantial trade interest" requirement in the 1958 procedures for article XXII was insisted upon by the EEC; the EEC knew it would be the target for the first round of plurilateral article XXII consultations on the Treaty's impact on trade in various commodities. See discussion of origins of 1958 procedures in 2 AMELIA PORGES ET AL., ANALYTICAL INDEX, 612-13 (6th ed. 1995) [hereinafter ANALYTICAL INDEX], and list of consultations at 623. The "substantial interest" requirement for third party participation in the panel process is completely independent in origin, and dates from the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 213 & 217-18 (1980) (¶ 15 & Annex ¶ 6(iv)); the first "third parties" to participate in panels were Australia (complaining party, in the EEC—Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, GATT B.I.S.D. (25th Supp.) at 68 (1979) and various banana and citrus producing countries also interested in the United Kingdom—Dollar Area Quotas, GATT B.I.S.D. (20th Supp.) at 236 (1974).

settlement has to include the option for governments to consult in private as is now provided under article XXIII. Governments that need privacy will talk privately, whether they do so in the WTO or in some other forum.

IV. The Duty to Consult

With the right to request consultations goes the duty to consult, as provided in the consultation and dispute settlement provisions of the GATT and the other covered agreements as well as article 4(2) of the DSU itself. In the WTO dispute on *Desiccated Coconut*, the defending party, Brazil, refused to consult with the complaining party, the Philippines. The panel report makes it clear that the duty to consult is itself enforceable under the DSU:

> [t]he Philippine's request [for a ruling on Brazil's refusal to consult] concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU . . . [and DSU Article 4.6] make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member.[15]

If the request for a panel finding on this issue had not been outside the panel's terms of reference, the panel clearly would have ruled that Brazil's refusal violated the DSU rules.

Outright refusals to consult have been extraordinary. The few instances in the GATT usually involved consultation requests involving political matters. The United States refused to consult with Nicaragua when Nicaragua challenged the U.S. trade embargo in 1985; the EC refused to consult with Yugoslavia concerning EC trade sanctions in 1991.[16] A few instances in the WTO have concerned matters of internal political sensitivity. When the United States requested consultations in early 1997 with Ireland and the UK concerning customs reclassification of high-technology products, both responded by referring to a letter from the EC stating that "consultations will not be entered into." The issue involved was the division of competences between the Community and its member states in trade in goods. When India, Hong Kong, and Thailand each requested consultations with Turkey concerning Turkish textile restrictions imposed in connection with the EC/Turkey customs union, Turkey failed to appear, reportedly due to institutional concerns expressed by the Community relating to the EC's role in the measures at issue.[17]

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15. *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R, ¶ 287 (Oct. 17, 1996), *at* WTO Website, *supra* note 8.

16. *See* ANALYTICAL INDEX, *supra* note 10, at 672-73.

17. *See Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/1, WT/DS29/1, WT/DS47/1, WT/DS34/2, *at* WTO Website, *supra* note 8 (complaints by India, Hong Kong, and Thailand and panel request by India).

V. Consultation as a Prerequisite

Article XXIII:2 of the GATT provides for referral of a complaint to the Contracting Parties only "if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time." This provision has been customarily construed as a requirement that before a panel request can be made under article XXIII:2 concerning a matter, and certainly before a panel can consider that matter, the matter must have been the subject of consultations under article XXIII:1 or article XXII:1 that have not resulted in settlement.[18] The major exception[19] has been when the target of a consultation request refused to consult or refused to consult on a timely basis. The precedent for establishing a panel in such a situation was set in the 1985 Nicaraguan embargo case.[20]

This theme is not unique to the world of GATT/WTO dispute settlement. For example, dispute settlement provisions of other agreements of the same vintage as the GATT, such as the World Health Organization (WHO) and the International Civil Aviation Organization (ICAO), also provide for third-party settlement of disputes that have not first been settled by negotiation. The 1928 General Act for the Pacific Settlement of International Disputes provides for conciliation of disputes "which it has not been possible to settle by diplomacy."[21] Consultations are a very important means of focusing the dispute and setting up the case to facilitate the panel's work, similar to the role of pre-trial conferences between parties to domestic litigation.

Therefore, consultations have an important function in giving notice to defendants, providing a chance to settle in the manner that maximizes party control (by negotiation), resolving uncertainties about the scope and nature of the measures at issue, eliminating fruitless or invalid claims, and making it possible to present a case in shape for a panel to do its work. Panels can encourage this function by requiring that the consultation requirement in the DSU be satisfied before hearing the dispute. This does not mean that panels must determine that all possibilities of amicable settlement have been exhausted, or that they must evaluate the quality of interaction in consultations. As the panel in *Bananas III* found in rejecting a similar argument made by the EC:

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18. *See* ANALYTICAL INDEX, *supra* note 10, at 672-74; the use of article XXII:1 as satisfying the consultation prerequisite was accepted at least as far back as the 1950s, and was provided for in the Havana Charter negotiations. *Id.* Changes in the subject matter trigger a requirement to consult concerning the changed measures. For instance, during the panel proceeding in the second *Tuna/Dolphin* case, Congress amended the statutes at issue. The complaining parties then requested and carried out another round of consultations on the statutes as changed, before obtaining the agreement of the United States and the panel to include the changed statute in the ongoing panel proceeding.

19. The other exception is for complaints under article XXIII:1(c); although there have been panel requests under article XXIII:1(c), no such panel has ever been established.

20. *United States—Trade Measures Affecting Nicaragua*, C/M/192, *at* WTO Website, *supra* note 8.

21. Sept. 26, 1928, art. 1, 93 L.N.T.S. 343.

> [c]onsultations are . . . a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.[22]

The fact that an issue was included in the request for consultations is prima facie evidence that notice was provided and it was discussed. However, a party cannot be expected to know all the claims it will present before it draws up its consultation request. Certainly if a matter is actually discussed in consultations, as demonstrated by records or copies of statements made at the consultations, the purpose of the consultation requirement has been met and it should be admissible at the panel stage.

Professor Davey has raised the question of whether one Member's consultation request can be used as the legitimate basis for a panel request by a different Member or Members. Such an interpretation would contradict the reference in the text of GATT article XXIII:2 to "satisfactory adjustment . . . *between the contracting parties concerned*,"[23] and practice under the GATT and the WTO since 1948 has not recognized the legitimacy of a panel request by a party that did not ask for consultations in its own right. This issue also raises the possibility of tipping the dispute settlement system toward a quasi-working-party enforcement model, and would require negotiating governments to reflect carefully on the possible consequences.

VI. What Happens in Consultations

A typical consultation lasts no longer than two to three hours and takes place in a small WTO meeting room or a Geneva mission. Consultations are generally conducted in English with no interpreters, no transcript, and no taping. Participants are usually delegates from the Geneva missions of the parties, and may include representatives from their capitals depending on the importance of the dispute, the travel time to Geneva, and the interest of the parties in substantive negotiations as opposed to simple completion of the necessary formalities before a panel process. Where other Members have been joined in the consultations under DSU article 4(11), their representatives may also attend. Otherwise, the consultations are private and closed to other WTO Members and the public.

Consultations may focus on written questions. Sometimes the questions seek factual information or copies of relevant laws, regulations, administrative notices,

22. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, ¶ 7.19 (May 22, 1997), *at* WTO Website, *supra* note 8.

23. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (emphasis added).

or other documents; sometimes they seek to explore legal theories. Our experience has been that governments in the position of responding to a consultation request have been reluctant to provide substantive answers to legal questions, particularly where it is clear that the dispute is heading to a panel. However, constructive dialogue on the factual issues has been more frequent, especially where the responding government believes it can resolve the dispute or at least some of the claims by removing factual or legal misconceptions. A close examination of the record of WTO disputes shows that a significant number of disputes are simply not pursued after the consultation stage.

As the other speakers have noted, under the WTO a remarkably high number of complaints have been settled successfully in consultations. Even in those cases that are not settled and are subsequently referred to a panel, consultations can have a major impact; the exchange of information can lead the complaining party to eliminate claims, and lead to a better-presented, more sharply argued case that makes the panel's job easier.

Yet there are cases where the soufflé does not rise. For instance, a complaining party may present a questionnaire loaded with demands for self-incriminating answers, and these questions may then receive totally circumspect responses. Or, for whatever reasons, the respondent may refuse to provide answers, or its story may change at the last minute. How can the complaining party deal with this situation?

The recent Appellate Body report in the *India Mailbox* case is instructive in this respect. The United States presented written questions during the consultation to India seeking factual information on the existence of an administrative system for receiving "mailbox" patent applications. India declined to answer the questions. At the panel stage, India relied on the novel assertion that India had actually implemented its TRIPS obligations through unpublished administrative guidance. The United States reacted to this new factual assertion at the panel stage by making a new, contingent claim that if such a mechanism existed, its unpublished nature was in violation of the TRIPS Agreement. The panel decided to consider that claim and made a finding against India in the alternative, which India then appealed.

The Appellate Body held that even though India failed to disclose its argument in consultations, the panel was not justified in reacting by unilaterally extending its own terms of reference to be able to deal with the new U.S. claim in the same panel proceeding. However, they then issued the following appeal to WTO disputants:

> [a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subse-

quent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding.[24]

Obviously, the Appellate Body cannot legislate new rights and duties in the consultation process beyond those already provided in the DSU. However, if the responding party refuses to provide answers to questions in consultations, the complaining party can make its claims and request fact-finding by the panel. As a practical matter, any answer not provided to a party in consultations can certainly be requested by a panel, and if a party does not respond to a panel question the panel is likely to draw its own conclusions.

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QUESTION AND ANSWER SUMMARY: The question arose as to the role of the private practitioner in the dispute settlement procedure. Gary Horlick responded that the private practitioner today may be involved in every phase of dispute settlement, from consultation to argument before a panel. Typically, a private practitioner will be hired by a government or by the interested private industry. A government with minimal resources and no WTO expertise may seek the assistance of a private practitioner.

Horlick commented that a private practitioner representing a government in WTO dispute settlement is well advised to think like a government. Since a government may be a plaintiff one day and a defendant the next, it is important that a private lawyer not advise the government to do something it does not want done to it at some later date. The potential role for private practitioners is particularly great in light of the fast pace of WTO dispute settlement, a pace about twice as fast as under the GATT.

Responding to another quesiton, Horlick stated that the rule under the DSU is that panels should look only to their terms of reference in deciding which issues to address and which not to address, and should not look to what the parties may or may not have discussed in consultations. If a party wishes to stonewall, that's its right. But, if it refuses to participate in consultations at all, it risks having a panel called eleven days after the request for consultations is made. And, if the party stonewalls during consultations, it risks having the complaining party ask for very broad terms of reference.

Kenneth Reisenfeld, referring to proposed settlements in the *U.S.—Helms-Burton* dispute and the *U.S.—Textile Rules of Origin* dispute, asked about the terms of those proposed settlements and the likelihood of Congress implementing their terms. Horlick responded that in the case of *U.S.—Helms-Burton*, Congress would have to waive title IV of the Act. In the case of *U.S.—Textile Rules of Origin*, Congress would have to change the rules of origin applicable to silk scarves from France and Italy. There is no constitutional impediment to either

24. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, ¶ 94 (Dec. 19, 1997), *at* WTO Website, *supra* note 8.

action, but Horlick declined to comment on the likelihood of either happening. Amelia Porges responded that in the *Textiles* dispute, it is possible that the proposed settlement requires only the submission of legislation to Congress, as opposed to the actual enactment of legislation by Congress. Horlick commented that if the EU has agreed to a settlement of the *Textiles* dispute, whereby legislation simply would have to be submitted to Congress, then essentially a political dispute would be defused by papering it over. Of course, he added, "the paper may come undone."

The question was posed about how to respond if a party is not forthcoming with a key document during consultations. Porges responded that a panel will not automatically draw a negative inference from a party's failure to turn over a key document to its adversary. She pointed to the recently decided *Argentina—Apparel* case, in which Argentina declined to turn over to the United States certain customs invoices. The panel did not draw a negative inference from Argentina's conduct in that case. If a defending party fails to cooperate by producing documents requested by the complaining party, the complaining party may ask the panel to reiterate the request. In stonewalling, a defending party risks having to comply with a request by the panel.

Horlick commented that this illustrates why consultations are not the right forum in which to conduct discovery. A defending party may use consultations to highlight favorable facts without putting forward all of the facts. It may put forward facts intended to show the complaining party why it will lose. A panel is needed to run discovery, in order to draw out the truth of the matter, without the spin that parties are likely to put on the facts during consultations. Porges added that in putting forward facts during consultations, a defending party may attempt to show that its own circumstances are not unlike circumstances in the complaining country.