PERFORMANCE OF THE SYSTEM I: CONSULTATIONS & DETERRENCE

The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View

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I. Introduction

The United States Government's position on consultations is summarized at 62 Fed. Reg. 52,611: "The new dispute settlement rules often make it possible for us to enforce WTO agreements without ever having to reach a panel decision."[1] This Federal Register Notice lists favorable settlements for the United States in seven cases: 1) *Korea—Measures Concerning the Shelf Life of Products*;[2] 2) *E.U—Duties on Imports of Grains*;[3] 3) *Japan—Measures Concerning Sound Recordings*;[4] 4) *Portugal—Patent Protection Under the Industrial Property Act*;[5] 5) *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*;[6] 6) *Turkey—Taxation of Foreign Film Revenues*;[7] 7) *Hungary—Export Subsidies in Respect of Agricultural Products*.[8]

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1. Office of the United States Trade Representative, Report on Trade Expansion Priorities Pursuant to Executive Order 12901 (Super 301), 62 Fed. Reg. 52,604-611 (1997).

2. WT/DS5, (May 3, 1995) [hereinafter *Korea—Shelf Life*] (visited July 1, 1998) <http://www.wto.org/wto/online/ddf.htm> [hereinafter WTO Website].

3. WT/DS13 (July 19, 1995), *at* WTO Website, *supra* note 2.

4. WT/DS28 (Feb. 9, 1996), *at* WTO Website, *supra* note 2 [hereinafter *Japan—Sound Recordings*].

5. WT/DS37 (Apr. 30, 1996), *at* WTO Website, *supra* note 2 [hereinafter *Portugal—Patent Terms*].

6. WT/DS36 (Apr. 30, 1996), *at* WTO Website, *supra* note 2.

7. WT/DS43 (June 12, 1997) *at* WTO Website, *supra* note 2 [hereinafter *U.S./Turkey Film Taxes*].

8. WT/DS35 (Mar. 27, 1996), *at* WTO Website, *supra* note 2 [hereinafter *Hungary—Agricultural Export Subsidies*].

The European Union view is reflected by Sir Leon Brittan's reported comment, after *losing* the Banana and Beef Hormone cases,[9] that the binding nature of the Dispute Settlement Understanding[10] (DSU) encourages the settlement of disputes through consultations.[11]

A private practitioner's viewpoint will sometimes differ from that of a government official. The most important difference in practice is that a private practitioner can only offer advice to her or his government client, while the government lawyer frequently is making the decision as to what arguments to make, what tactics to follow, and so on. Another practical difference is that a law office in a government (or in the WTO itself) involved in many WTO disputes will have more collective experience than a private law office, although a private law office may have more WTO experience than law offices of governments with few WTO disputes (and individual private lawyers may have more experience than individual government lawyers).

The requirement in articles XXII and XXIII of the GATT that Contracting Parties (CPs) participate in consultations when requested predates the development of the GATT panel system for resolution of disputes. This may reflect a diplomatic approach to dispute resolution which was preferred by at least some CPs during much of the GATT's history. The ability until the 1980s of a CP to "block" establishment of a panel provided an effective basis for the use of diplomacy before, or instead of, a more formal dispute resolution approach (although in practice such "blocking" was infrequent, it had some "chilling" effect on use of the GATT dispute process).

II. GATT Practice

Professor Hudec records 207 requests from 1948 through 1989 for consultations under article XXIII or its equivalents (e.g., in the MTN codes) as part of the GATT dispute resolution process. Of these, eighty-eight (43%) were the subject of formal rulings, and sixty-four (31%) were settled prior to a formal ruling. In addition, at least twenty and as many as twenty-eight were withdrawn by the complainant for apparently valid reasons.[12] Thus, of the 207 cases, at least eighty-four (42%) were settled prior to panel ruling, without counting at least twenty-seven other cases withdrawn (such as the nine cases

9. *E.U.—Regime for Import, Sale and Distribution of Bananas*, WT/DS16, WT/DS27 [hereinafter *Bananas*], *at* WTO Website, *supra* note 2; *E.U.—Measures Affecting Meat and Meat Production (Hormones)*, WT/DS26 (Apr. 25, 1996) [hereinafter *E.U.—Beef Hormones*], *at* WTO Website, *supra* note 2.

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

11. *See* INSIDE U.S. TRADE, Sept. 26, 1997, at 4.

12. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, 277, 281-83 & 291 (1993).

against the EU, U.S. or EU member states withdrawn notwithstanding valid legal claims).[13] This record supports the high value given to settlement within the GATT legal system.[14]

III. Legal Requirements

The WTO DSU requires consultations prior to a request for a panel, but now effectively precludes "blocking" of panel establishment (by the requirement of negative consensus, DSU article 6.1). Thus, it is impossible to prevent establishment of a panel (with standard terms of reference), under DSU article 7.1 if a requester so insists. Arguably, then, the requirement of Article 4.7 of the DSU that a requester go through a consultation process (that will probably last the maximum sixty days, except for "perishable" goods—but not perishable services) appears vestigial. In practice, however, the consultation requirement appears to play a useful role in encouraging settlement—similar to the role that initial procedural skirmishing can play in domestic litigation.

IV. Consultations and Settlement

Lawyers recognize that legalistic procedures are no bar to settlements throughout the course of a proceeding, and indeed the procedures may encourage or provide opportunities for settlement. The key factor in WTO consultations is the binding nature of the dispute resolution mechanism. Thus, a request for consultations is a possible indication that the requesting country is willing to proceed through dispute resolution if its problem is not resolved satisfactorily. At that point—if not sooner—all sides evaluate their legal positions, gauging their chances of winning and pondering the prospect of losing. To the extent that both sides coincide on the likelihood of success or failure, there is room for negotiation.

Of course, the room for negotiating flexibility will vary by the facts of each case. Changes to a statute may be more difficult, or take longer, than decisions within administrative discretion. Thus, in *U.S.—Reformulated Gas*,[15] consultations and initial steps in the GATT panel process led to settlement by administrative (Environmental Protection Agency) process, but the settlement was blocked by Congressional enactment (which could not be reversed by administrative decision). In *Japan—Sound Recordings*, the implementation of the settlement was

13. *Id.* at 284-85.

14. *Id.* at 280. To date, of the first 117 requests for consultations, it appears that fourteen have resulted in Appellate Body decisions, and one is before the Appellate Body. The WTO lists twenty as settled or inactive (to which should be added at least five to six others technically active but potentially settled (*e.g.*, subject to national legislative action)). Thus, it appears that the GATT pattern of nearly equal numbers of settlements and final decisions seems to be continuing, although the sample is still too small to permit conclusions.

15. *U.S.—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 17, 1996), *at* WTO Website, *supra* note 2 [hereinafter *U.S.—Reformulated Gas*].

timed to the need for Diet enactment. Nevertheless, even the difficulties of overturning national legislation have not precluded settlement through consultations. In *U.S.—Helms-Burton Act* and *U.S.—Rules of Origin on Textiles*[16] the settlements were a varying range of commitments by the U.S. to seek new legislation in 1998. As long as the requesting country can accept that type of outcome, it will be repeated. Probably a trickier problem is statutes at the sub-federal level, as in *U.S.—Massachusetts Government Procurement/Burma*.[17] So far, the consultations requirement seems to have provided a politically acceptable basis in that case for *not* continuing through the panel process. In that case, and perhaps *U.S.—Helms-Burton*, the relatively low actual harm to the requester may be outweighed by fear of damage to the WTO system as a whole, as local politicians discover that their power can be limited by international agreements. A more pressing test might be presented by U.S. sanctions on European companies for transactions with Iran, with larger amounts at stake.

Not surprisingly, cases with multiple parties are more difficult to settle than one-country cases. Thus, separate complaints were brought by automobile producing countries against Brazil and Indonesia, and different countries have been separately blocking settlements with each of the two defendants.

Even more challenging is the problem of enforcing settlements reached during consultations. A number of "settlements" have already led to allegations of inadequate implementation, see e.g., *Korea—Shelf Life, Australia—Leather*,[18] and *Philippines—Pork*.[19] If no panel has been requested prior to settlement, the offended party can at least immediately request a panel (and get one established in no more than forty-five to sixty days). Once a panel has been requested and the request withdrawn (or suspended and terminated), a new round of consultations may be required, with attendant delays. Those prospective delays could be a disincentive to settling rather than seeking a binding panel ruling. This disincentive could be alleviated if the settling defendant Member would agree to comply immediately if it loses the panel (or Appellate Body) decision. Alternatively, the rules could be changed to permit the winning Member to seek compensation (or apply retaliation) as soon as the panel decision is issued, to limit the continuing harm (if any) caused by the offending measure after the decision, but prior to defendant importing Member implementation. On a more modest scale, one could

16. *U.S.—The Cuban Liberty and Domestic Solidity Act*, WT/DS/38 (Oct. 16, 1996), *at* WTO Website, *supra* note 2 [hereinafter *U.S.—Helms-Burton Act*]; *U.S.—Measures Affecting Textiles and Apparel Products*, WT/DS85/1 (May 23, 1997), *at* WTO Website, *supra* note 2.

17. *U.S.—Measure Affecting Government Procurement*, WT/DS88/1 (June 20, 1997), *at* WTO Website, *supra* note 2 [hereinafter *U.S.—Massachusetts Government Procurement/Burma*].

18. *Australia—Subsidies Provided to Products and Exports of Automotive Leather*, WT/DS106/1 (Nov. 10, 1997), *at* WTO Website, *supra* note 2 [hereinafter *Australia—Leather*].

19. *Philippines—Measures Affecting Pork and Poultry*, WT/DS74/1 (Apr. 1, 1997), WT/DS102/1 (Oct. 7, 1997), *at* WTO Website, *supra* note 2 [hereinafter *Philippines—Pork*].

allow a party alleging the failure to implement a settlement (perhaps by a showing—to whom?—that consultations had already occurred bilaterally) to file an immediate request for a panel, without requiring a "new" first round of consultations.[20]

V. The Process of "Consulting"

A member may request[21] consultations on virtually any basis for which it is not embarrassed, since under article 3.3 the requested Member faces a possible request for (automatic) establishment of a panel within eleven days of the request for consultation days. The DSU does not provide for any exceptions to the obligation to consult. In the *Brazil—Desiccated Coconuts*[22] case, though the panel concluded that the WTO Agreement did not apply to the dispute and the issues concerning Brazil's alleged failure to consult was not within the terms of reference, the panel went out of its way to state that there was an absolute right to consultations under the DSU.[23] "In our view, these provisions (Article 4.2 and 4.6 of the DSU) make clear that Members' duty to consult is absolute."[24] Thus, even if the requested Member does not think there is a basis under the WTO for the request, the only practical reply is "yes" (albeit with a disclaimer of acceptance of the right to the consultations).

The consultations themselves can be scheduled to the convenience of the Members, although if the requested Member refuses to enter into consultations within thirty days, the requester may proceed to a panel request. The consultations are usually, but not necessarily, in Geneva, sometimes just between the missions of the two countries, although often people from the capitals come.[25] The request for consultations is sent through the Chairman of the DSB to all Members, to

20. These possible remedies could also reduce the arguments over the retroactivity of remedies. At present there is an incentive to seek a panel as soon as possible, to start "the clock running" so a remedy can be implemented as soon as possible. Some panels have been sought even though the measures complained of would expire before the full DSU process could be completed and a remedy implemented.

21. The request may be under articles XXII, XXIII or both, depending in part on whether the requesting Member wants third-party Members to be able to participate in the consultations. DSU, *supra* note 10, art 4.11.

22. *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22 (Appellate Body's Report adopted Mar. 20, 1997), *at* WTO Website, *supra* note 2 [hereinafter *Brazil—Desiccated Coconuts*].

23. *Id.* para. 28.

24. *Id.*

25. One interesting problem involves consultations with WTO members which are also EU member states, particularly where the competence within the EU is either shared or disputed. *See, e.g., Portugal-Patent Terms, supra* note 5. Apparently the practice so far is for the EU to at least sit in on all WTO consultations with member states, but that can be evaded by bilateral non-WTO consultations (*e.g., Belgium—Measures Affecting Commercial Telephone Directory Services*, WT/DS80/1 (May 2, 1997), *at* WTO Website, *supra* note 2). It is not difficult to imagine situations in which the EU would prefer to see a member state measure which is inconsistent with EU law also recognized as inconsistent with the WTO.

permit them (within ten days) to request "third party" participation in the consultations. The *requested* Member can deny that participation to that Member, apparently on the ground of lack of a "substantial trade interest"[26]—although DSU article 3.8 precludes any such impact test at least for a violation finding.

So far, third party participation in consultations is less than the author expected. The first round of WTO cases is setting many basic precedents (only formally non-binding) that should be of interest to more Members than those participating so far in consultations as third parties. The reason may be the short time span to request participation, in cases where direct interests are not at issue, coupled with the subsequent ability to participate in the panel even by a third party who did not participate in the consultations. Resources may also be a problem. It appears that the two Members with the largest staff resources, the EU and the United States, are also the two most frequent third party "consultants."

Not surprisingly, the challenged Member(s) in consultations often do not admit error or guilt, and the challenging Member(s) will not often concede its error. Sometimes one or both parties does not want to explain its legal theories or factual arrangements until the panel is reached. Obviously, this depends on the nature of the case. For example, the EU would not have had much new to say about the scientific evidence in consultations before *EU—Beef Hormones*. In antidumping and countervailing duty cases, the United States (which never complied with any GATT panel on the subject, even adopted ones) will often not answer questions. It would be interesting, once there is five to ten years of experience, to explore the hypothesis that "defendant" Members are more likely genuinely to seek settlements in consultations where the "complainant" Members are either similar in economic size (e.g., *Singapore/Malaysia Polyethylene*[27]) or larger (e.g., *U.S./Turkey Film Taxes*). It will also be interesting to see breakdowns based on developed/developing status, subject matter, and time periods, to contrast to Hudec's calculations with the GATT experience.

Since there is no WTO requirement that the consulting parties actually make any progress toward resolution of the dispute in consultations, rather than just "stonewall," the consultation process can be viewed as one of the series of milestones in the WTO dispute resolution process that serve as "action forcing events" for the two governments to rethink the merits of their cases and the desirability of moving forward.[28] In this context, settlements can occur at any

26. DSU, *supra* note 10, art. 4.11.

27. *Malaysia—Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS1 (settled July 19, 1995), *at* WTO Website, *supra* note 2 [hereinafter *Polyethylene*].

28. One fundamental aspect of the WTO DRM is that it is essentially a "one size fits all" system. While this is probably inevitable given its history, it underlines the role of the consultation phase as a possible source of flexibility for handling different types of disputes. When Clayton Yeutter became U.S. Trade Representative in 1985, he set up a study group on dispute settlement, headed by Julius Katz (the author was privileged to serve on it). One of the more interesting presentations

time, not just in pre-panel consultations.[29] The *EU—Scallops*[30] cases are a good example—as soon as the interim report came out, the losing party in effect conceded as long as the report was kept secret. While unfortunate for the development of WTO law, settlement of cases with relevant documents sealed is not unfamiliar to litigators.

By contrast, in cases such as *EU—Beef Hormones, U.S.—Costa Rica Textiles*[31] or possibly *Brazil—Desiccated Coconuts*, the losing party knew or should have known at the outset of the case it had little or no chance to win, but as a government had to show that it was taking every possible step, including appeal to the Appellate Body.

If the consultation phase is to be regarded as primarily an opportunity to settle cases, greater separation of the consultations and the panel proceeding could be considered. At present, sophisticated WTO members, including members hiring outside counsel, often refuse to discuss the legal theories or enter into factual discussions during the consultations process, for fear that such openness will be punished in the panel phase as admissions against interest or as failure to raise enough legal theories. This may be a "hangover" from the pettifogging practice of certain GATT CPs, and panels, to use the consultations process as a trap for the unwary.[32] This should be precluded by the *Bananas* case, but an additional possibility would be to clarify articles 6 and 7 of the DSU, to establish that the sufficiency of the request for the panel will be the issue, not what might or might not have been said in consultations.[33] To the extent that discovery is needed, that could be handled by the panel, not by the parties in the consultation phase without a neutral decision-maker and finder of facts,[34] unless the parties can "stipulate" to certain agreed facts, or at least to the accuracy of translations.[35]

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was by an AFL-CIO staffer and a management-oriented labor lawyer. They pointed out that dispute resolution under collective bargaining agreements often requires several, differentiated dispute resolution mechanisms. These can range from highly informal proceedings with single arbitrators (in situations where neither the union nor the company cares much about the outcome, as long as the procedure is perceived by both workers and management as fair) to formal judicial procedures and even "big cases" which cannot be solved by dispute resolution mechanisms (e.g, a strike results).

29. Consultations can continue during the panel process, and lead to settlement. *See e.g., India—Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products*, WT/DS96/1 (July 21, 1997), *at* WTO Website, *supra* note 2.

30. *EU—Trade Description of Scallops*, WT/DS7, WT/DS12, WT/DS14 (Aug. 5, 1996), *at* WTO Website, *supra* note 2.

31. *U.S.—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24 (Nov. 8, 1996), *at* WTO Website, *supra* note 2.

32. *See, e.g., EC—Antidumping Duties on Audio Tapes in Cassettes Originating in Japan*, GATT Doc. ADP 136 (Apr. 28, 1995) (unadopted).

33. *See Brazil—Desiccated Coconuts Appellate Body Report, supra* note 22, para. 22.

34. *See e.g., Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS)*, WT/DS101/1 (Sept. 15, 1997), *at* WTO Website, *supra* note 2.

35. *See e.g., Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44 (June 13, 1996), *at* WTO Website, *supra* note 2.

VI. Other Functions of Consultations

Consultations can have many functions other than settlement. A member can seek to gather useful information (the EU as a third party in *U.S.—Shrimp-Turtle*[36] had access to the arguments by the U.S.—arguments that the EU could use to defend itself against likely U.S. charges in its dispute over the EU ban on furs caught in leg-hold traps.[37] Members can explain their factual arguments (*U.S.—Broom Corn Brooms*[38]), or their political needs (*Hungary—Agricultural Export Subsidies,* settled by a waiver to accommodate those needs while avoiding acceptance of an inconsistent measures), or make its legal and factual arguments to try to ward off a panel (the U.S. in *Shrimp/Turtle*). Often a real exchange of factual data can be useful. In an article III case, the exporting member will know how imports are treated, but may not know how domestic interests are treated.[39]

Another aspect of the consultation requirement the importance of which should not be downplayed is that it preserves the "fig leaf" that the dispute resolution system remains a diplomatic process rather than legalistic one. While that idea may strike some lawyers and so-called "realists" as fiction, it is a fiction that is important to maintain for many diplomats who control WTO affairs in many countries. If the process is a legal one rather than a diplomatic one, then diplomatic jobs would be cut and lawyers' jobs increased.[40]

VII. Deterrence

Only national decision-makers can comment with any degree of certainty on the degree to which their decisions are constrained by the prospect of binding

36. *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (Oct. 8, 1996), *at* WTO Website, *supra* note 2 [hereinafter *U.S.—Shrimp-Turtle*].

37. *See* INSIDE U.S. TRADE (Dec. 5, 1997).

38. *U.S.—Safeguard Measure Against Imports of Broom Corn Brooms*, WT/DS78/1 (Apr. 28, 1997), *at* WTO Website, *supra* note 2. [hereinafter *U.S.—Broom Corn Brooms*].

39. *See e.g., Canada—Certain Measures Concerning Periodicals*, WT/DS31 (July 30, 1997), *at* WTO Website, *supra* note 2.

40. This may also explain why the system has been so reluctant to openly let outside lawyers for Members enter the process. While it is established international law that a country may accredit whomever it chooses—Grotius, the Dutch father of international law, served as Ambassador to the Court of France for Sweden—and past GATT practice was inconsistent, the likely outcome is that small Members will be allowed to retain outside lawyers and accredit them as speaking members of their delegations (*see e.g., Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS59 (Oct. 3, 1996), *at* WTO Website, *supra* note 2) while larger countries, which also have more specialized bureaucracies to protect, will continue to make the arguments themselves, even if they have outside counsel in the room to assist them. This compromise is recorded in the recent Canada—Israel Free Trade Agreement, which expressly provides that outside counsel for the governments are allowed in the room but not allowed to speak. *Free Trade Agreement Between the Government of Canada and the Government of the State of Israel* at Article 8.9(5)(a) and (b). This in fact is what happened with the first NAFTA Chapter 20 panel and was put into the Chapter 20 rules. *See Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products*, CDA095-2008-01 (Jan. 22, 1996); NORTH AMERICAN FREE TRADE AGREEMENTS: TREATY MATERIALS—MODEL RULES OF PROCEDURE FOR CHAPTER 20 OF NAFTA 4 (James R. Holbein & Donald J. Musch eds., Oceana, 1995).

WTO dispute resolution—and only for their own country. Anecdotally, it is clear (at least to the author) that the prospect of the WTO DSU system seems to concentrate the mind of national decision-makers in at least two ways:

(1) National decision-makers either refrained from taking WTO-inconsistent actions, or took actions to avoid continuing inconsistency, apparently because of requests for WTO consultations or threats thereof.

(2) At least as important, national decision-makers began to bring to the DSU process cases that probably would not have been brought to the GATT dispute resolution process, but instead could have festered for years on bilateral agendas. This accounts in part (along with the greater coverage of the WTO and wider membership of the specialized agreements) for the sharp increase in cases in the WTO (thirty-five a year in 1995-97) compared to the GATT (five a year from 1948-79 and eleven a year from 1980-89).[41] This may increase the deterrent effect of the WTO dispute settlement process.

41. HUDEC, *supra* note 12, at 289.