CONSULTATIONS UNDER ARTICLE 4 OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING: ROLE OF NON-LITIGIOUS APPROACH IN SETTLING DISPUTES

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I. INTRODUCTION

An adequate means to settle international disputes is necessary to address two fundamental problems of international law – the need to prevent escalation of conflicts between states into breaches of the peace, and that of making available procedures for the interpretation and application of rules of international law. The numerous international dispute settlement treaties concluded since the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes distinguish between a number of political and legal procedures which are viewed as complementary options.

Under the World Trade Organization (WTO), dispute settlement procedures provide for almost all political (or diplomatic) and legal methods of dispute settlement, and can be divided into four principal stages: consultations, the panel process, the Appellate Body, and implementation. Bilateral consultations provided for by Article 4 of the Understanding on Rules and Procedures Governing the Settlement Disputes (DSU) are a precondition for recourse to panel procedures. The WTO consultations serve these functions: facilitation or resolution or settlement of the dispute so as to avoid further proceedings, management of domestic constituencies and containment of negative fallout from trade disputes, and assistance to the panel process by refining opposing views and revealing facts and legal theories in advance of the panel process.

In the history of the WTO dispute settlement system, around 185 consultation requests have been made as of January 2000, 53 Panels have been established, 33 Panel reports have been issued, 25 Appellate Body Reports have been given, and 27 reports have been adopted. It would appear from the statistics that a significant number of cases have been withdrawn or resolved in the consultations stage. Indeed, three-fifths of all disputes end prior to a panel ruling, and most of these without a request for the establishment of a panel even being made\(^1\). While this implies that the role of consultations in WTO dispute settlement is quite significant, this initial phase, relative to the later stages of the WTO dispute settlement
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procedures, has received little attention and not the subject of many scholarly work. This study would like to make a modest contribution toward addressing a perceived paucity of structured views on the subject.

The study examines how the dynamics of negotiations in the consultations phase of the WTO dispute settlement procedures has been used by Members, whether to prevent escalation of disputes, or to hasten proceedings toward the litigious phase. As such, it puts into perspective the role of consultations to achieve the objective of prompt settlement of disputes, and provides insights on whether such role needs to be enhanced or diminished.

The structure of the study is as follows: to provide theoretical explanation of Members’ behavior toward disputes, relevant theory on bargaining and negotiations in an economic setting, including the economics of disputes are presented in Chapter II. The succeeding chapter presents a brief background of negotiations toward the settlement of international disputes including alternative dispute resolution, and the obligation to consult under the GATT. Chapter IV is devoted to a statistical overview of relevant information on consultations, including mutually agreed solutions under Article 4 of the WTO Dispute Settlement Understanding (DSU), and a simple comparison between such consultations and parallel procedures under the previous GATT system. Chapter V is an assessment of the effectiveness of the consultations phase toward settling disputes, and identification of issues perceived by Members to be affecting its operation, and other issues that while not addressed in the current rules, present a theoretical possibility. The chapter also identifies the linkages between consultations and the subsequent proceedings in the dispute settlement procedures, through an examination of WTO jurisprudence, and where applicable, reference to GATT 1947 procedures and practices. Chapter VI concludes and puts forward recommendations for consideration.

Two sets of documents submitted by Members to the WTO, i.e. requests for consultations and notifications of mutually agreed solutions, were examined for detailed information on consultations under Article 4 DSU. More important, to supplement the

1 Busch and Reinhardt (2000)
limited literature on the subject and the unavailability of official records kept by the WTO of consultations proceedings due to the confidentiality requirement, interviews were conducted over a two-month period to gather the opinions and experiences of a number of representatives of the different Missions of WTO Members in Geneva. Eighteen (18) Member countries were represented in the group of respondents, selected for their frequency of use of the WTO dispute settlement system. These are Argentina, Australia, Brazil, Canada, Chile, Egypt, European Communities, India, Japan, Republic of Korea, Mexico, New Zealand, Pakistan, Philippines, Switzerland, Thailand, Turkey, and the United States. Moreover, proposals submitted by Members to the WTO on the reform of the Dispute Settlement Understanding (DSU) with respect to consultations phase were also considered.
II. THEORIES ON NEGOTIATION AND THE ECONOMICS OF DISPUTES

Relevant to an analysis of how the consultations phase has been used by WTO Members to settle disputes is a review of some theories on negotiation and the economics of disputes. Concepts in economic negotiation are important because the process of consultations between sovereign countries over a certain issue is characterized by bargaining and negotiations the progress of which is determined by the interplay of factors both inherent in and external to the issue. On the other hand, a brief look at the economics of disputes is also helpful to explain why Members choose to pursue a case when mutually satisfactory outcome has not been achieved through diplomatic means.

A. The Economic Negotiation Process and Theories on Bargaining

Three related, and even sequential elements must be present in order to justify entering into negotiations. These are: a) unacceptability of the situation, b) inability to improve the situation alone, and c) acceptance of the other party to participate. Zartman and Berman further assert that negotiation is appropriate when they deal with an exchange of outcomes that can only be decided upon jointly, that is, new outcomes are not shared but traded. Furthermore, negotiations is the means of establishing terms of trade in a contract when the values or “prices” of the exchanged items are not fixed. This is when a party wants the other party to give up something and looks about for an acceptable item of exchange, or when a party wants to give up something that is valued by the other and tries to establish a fair price in a currency that the first party values. Any negotiation is a matter of each party’s establishing how much it wants and how much it is willing to give to get it, and then reconciling the two to attain a balance.

The economic negotiation process refers broadly to the sequence of actions in which two or more parties address demands and proposals to each other. Economic negotiations are those where parties’ demands, offers, and related actions refer to the production, movement or exchange of goods, services, investments, money, information, or their

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2 Zartman and Berman (1982)
regulation. Several variables affect the negotiation process: market conditions, beliefs, domestic politics all of which influence the strategy adopted, and consequently, the outcome, as illustrated in Figure 1.

**Figure 1. Economic Negotiation Process Variables**

![Diagram showing the economic negotiation process variables](image)

(Adopted from Odell, John S., Negotiating the World Economy, 2000)

**Factors which influence negotiating behavior**

A. *Market conditions*. The negotiator’s objectives and priorities will vary with his country’s position in the world market. An average-sized exporting country will emphasize higher prices and lower barriers to its exports more than other negotiators, while the importing country will aim for lower prices to the extent possible.

B. *Beliefs* about how the other party will react. This refers to beliefs about feasibility and strategy choice, which may be influenced by the following:

   a) *Past behavior*. Favorable behavior of the other party toward integrative attempts by the negotiator or other parties in past experience, lead to expectations of similar response in the future. Knowing the other party’s behavior pattern allows a negotiator to tailor
his behavior accordingly; he will know what to expect and will not mistake routine behavior of the other party for signals of special significance, just as he will be able to interpret the importance of digressions from that routine.

b) *Expectations of tough claiming*. Expectation that difficult economic and political conditions at home may be exploited by the other party through tough claiming will lead to avoidance by the negotiator to make integrative moves. This avoidance is based on the belief that information disclosed might be manipulated and used by the other party to extract concessions that is more than what the negotiator is willing to offer at the first instance.

c) *Credibility of threat*. Awareness of the other party’s capability to carry out and sustain actions, including in the case of disputes, the ability to exercise its economic and political power in diplomatic approaches or the wherewithal to bear the costs of long and difficult legal proceedings, also determine a party’s negotiating behavior.

C. *Domestic politics*. Government negotiators when they go to the negotiating table, are involved in complex two-level games. Domestic political conditions define the context of the first-level game, and dealing with the issue on the international level, the second-level. The character of a country’s internal politics shapes its negotiating stance and determines its credibility with the other party whether in making offers or concessions, or in issuing threats or counterthreats. In value-claiming strategies, internal divisions which reflect the multifarious interests of a country’s constituency are likely to affect its credibility to implement threat. The strength of the opposition of its domestic players to the threat, if known and properly assessed by the other country, would lead to smaller concessions the latter will give up, and therefore, smaller gains achieved by the threatening country. The gains from offensive claiming also depend on the target’s internal politics. The higher the political costs raised by the domestic players is to the government for complying relative to the political costs of impasse, the smaller the concessions the government will make, thus reducing the other party’s gain.
Negotiating Strategy

Strategy is a set of behaviors that are observable in principle and associated with a plan to achieve some objective through bargaining. The application of any strategy will necessarily be adapted to the special features of the situation. The negotiations, whatever the strategy applied, aim to show the amount of agreement that exists and narrowing the subjects of disagreement.

a) Value-claiming strategy

Strategies vary along the spectrum between two polar ideal types. At one end is the pure value-claiming or distributive strategy which describes a set of actions that promote the attainment of one party’s goals when they are in conflict with those of the other party. Offensive claiming tactics attempt to take value from the other. Defensive claiming tactics, meanwhile, attempt to prevent the other from taking value from the first. Distributive behavior is a rational response to a situation in which no settlement can make both parties feel better-off than they were prior to bargaining.

Tough bargaining risks stimulating manipulation and counterthreats from other parties, perhaps convincing them that the negotiator is not serious about agreement – which may lead to ending the negotiation, increasing resistance, or at least failing to uncover possibilities for gain that could have been revealed with a different strategy.

Claiming is not restricted to the most powerful states. Defensive claiming is common among all states although harsh offensive claiming by the weak against the strong is perhaps rare. Delay and refusal to make unrequited concessions are forms of defensive claiming. Mutual claiming often ends with an unequal split.

It has also been observed that when parties are assymetrical, weaker parties tend to seek more formal negotiating forums. However, weaker states can afford erratic or irresponsible behavior more easily than stronger states, particularly when the rules of
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regularity and responsibility favor the stronger party. The tactics of toughness and softness vary according to the strength of the parties. Under symmetry, toughness leads to toughness, and under asymmetry, to softness, with weaker parties following the lead of stronger parties. Weak states generally perform better by rewarding stronger states’ concessions rather than “hanging tough.”

To reach a solution, parties may suggest the possibility of exchanges, side payments, compensation, and other contingent benefits as inducement for agreement, or as Zartman and Berman term it, “positive exercises of power.” The other way to reach a solution is through threats and warnings.

Threats can generate internal hostility to an agreement as well as fear of the costs of refusal. Three scenarios are possible: a refusal to agree could be popular and yielding risky, the opposite could happen, or either position has no net effect on domestic politics. Based on this proposition, as domestic resistance against concessions rise relative to domestic pressures supporting them, the government’s claiming strategies will stiffen. The reverse situation in domestic politics, on the other hand, will lead to the government adopting a more accommodative approach. Viewed in this way, the resistance point in the government’s strategy will depend on domestic politics and the alternatives or options facing the government at the external level given a certain course of action it decides to adopt.

Threat credibility is also affected by the openness of the domestic political institutions in the threatening country. Openness, as may be expressed through requirement to conduct public hearings, call constituents’ attention to the possible consequences of a decision, which if regarded to adversely affect them later, will increase public opposition to its implementation. This makes it easier for the target government to learn about opposing internal preferences, and adjust its negotiating behavior accordingly to leverage itself against what it perceives the other party’s stance to be.
b) Value-creating strategy

At the other end of the spectrum is the integrative strategy, also known as value-creating strategy which involves actions that promote the attainment of goals that are not in fundamental conflict. At the first phase, the parties explore, discover, and reveal the nature of the problem, their objectives and their priorities. Throughout the process, openness about information is favored. The next phase is a joint search for potential solutions, and a joint effort to estimate the likely consequences of various options. Here, the parties may start to explore for concessions that might be valued differently, and thus exchanged. In the final phase, parties combine their utility functions in some way and test the alternative solutions against them.

Other elements of negotiations

Issue linkage is found in strategies of every type. In economic negotiations observed by Odell (2000) some linkages combine issues from within a given area such as tariffs, while others link issues from different areas, such as tariffs and commercial counterfeiting or human rights. Issues have been linked whenever demand or agreement covers more than one provision or issue, and gaining a benefit conferred by one element is contingent on observing the rest of the deal. What varies from one negotiation to another is the particular set of issue or issue areas linked and excluded.

Fallback position is an important consideration of the negotiator. Each party should have a clear idea of its security position, the value or acceptability of its position if there is no agreement. Somewhere in between is the minimum position.

Cultural context of negotiations is also another factor. The Asian approach to negotiations is elastic. Asian negotiators are observed to be accustomed to living with greater diversities than are representatives from many other cultures. As such they are more at ease resolving the specifics of a particular dispute without necessarily agreeing to everything an adversary calls for or put another way, they are more easily able to agree to disagree. While
culture does not affect the perceptions and assumptions of negotiators when they approach the negotiating table, there are valid counterarguments. These are: a) that negotiations is a universal process, utilizing a finite number of behavioral patterns and that cultural differences are simply differences in style and language, and b) there is a whole cultural area that is real but only peripheral to the understanding of the basic negotiating process, and this relates to language, cultural connotations, social rules and taboos, and other aspects of communication.

Certain elements of pre-negotiation also help to clarify behavior of governments during the initial stages of the negotiations phase. Zartman and Berman (1982) point out that an element of ambiguity plays an important part at this early stage. Too much clarity before a position has been defined between parties may make concessions difficult, and will not provide the necessary flexibility.

Outcome

The negotiation eventually terminates in either impasse or agreement. The latter includes the tacit or informal settlement, a pattern of government behavior equivalent to compliance with an explicit agreement. The outcome of an international trade negotiation refers to the terms of the governments’ settlement rather than the behavior of markets after that settlement.

When agreement is reached, it is reasonable to conclude that concessions have been made. The concession is the outcome of tactics employed that maximized both the amount and the chance of gain, from the point of view of both parties. Ways to concede have been identified by Zartman and Berman (1982) and these include: prolonging the original process and putting time into preparation of the “final offer”, employing the tactic of withdrawing the concession and raising the demands if the final offer is not accepted, not making any offers but encouraging the other party to make and modify own proposals, and heading back toward the formal phase.
Standard concessionary tactics include “soft” tactic used by weaker parties with high needs, little power to force concessions, and who mainly rely on moral appeals. This is characteristic of developing nations’ situation when dealing with big or developed nations.

Negotiations assume a certain internal dynamic, or “bargaining rhythm”. In terms of time dimension, deadlines for negotiations are either set by the parties or imposed externally. Deadlines facilitate agreement, lower expectations, call bluffs, and produce final proposals.

B. The Economics Of Disputes

The question of pursuing disputes in a formal setting after negotiations or consultations fail to settle the conflict is also determined by the outcome of an economic assessment of its procedural aspects, or the social costs of litigation. The procedural aspects refer to the process from the filing of a complaint to the resolution of the dispute.

Regardless of the substantive issues, a full-blown legal dispute has the stages depicted in the figure below.

*Figure 2. Stages in a Legal Dispute*

(Adopted from Cooter and Ulen, 2000)
Procedural rules may be regarded as instruments for applying substantive law. The use of such instruments incurs costs, which may be called “administrative costs.” These “administrative costs” is the sum of costs of filing a legal claim, exchanging information with the other party, bargaining in an attempt to settle, litigating, and appealing. However, the instruments sometimes causes errors in applying substantive law, and as such distort incentives and imposes a variety of costs on society. Examples of errors include, the wrong party being held liable, or the right party being held liable for the wrong amount.

An economic objective, therefore of procedural law, is to minimize the sum of administrative costs and error costs. Assuming that the parties settle on the same terms as the judgment that the courts would have reached if the case had been tried, the error costs of settlement equal the error costs of trial. The administrative costs of the settlement, however, are much lower than a trial, therefore, the settlement saves social cost. Settlements that replicate the results of trials, in general, reduce the social costs of resolving disputes.

**Value of a legal claim**

Game theory has been used to explain the value of a legal claim. The initiation of a complaint creates a legal claim. The decision of a plaintiff to file a suit is usually based on a comparison between the cost of the complaint and the expected value of the legal claim. The expected value of the legal claim depends on what the plaintiff thinks will occur after filing a complaint, taking into account probabilities and payoffs of continuing or settling at certain points of the legal process.

In computing expected values, one begins with the last possible event, which is appeal, and works towards the first event, which is the decision to file a complaint. The rules for paying the legal costs differ between systems. In some, it is “each pays his own” while in others, it is “loser pays all.” To simplify, Cooter and Ulen (19__) designed a decision tree and contrived figures so that both rules yield the same results. When the expected value of appeal (second trial) is negative, the plaintiff who loses at trial will not appeal the case. At the first trial, which the plaintiff will resort to after failing to settle out of court by bargaining,
the plaintiff has equal probability of winning and losing. The expected value of the first trial is the sum of the payoffs multiplied by the probabilities, which in the example yields a positive figure.

The plaintiff who completed the process of exchanging information with the other party can bargain to settle out of court with a higher probability of success. The expected value of the bargain is the sum of the probabilities of successful bargaining and a failed bargaining. If the expected value of bargaining to settle before beginning the trial is positive, the plaintiff who reaches this stage will choose to bargain.

On the other hand, the expected value of the legal claim when the complaint is filed is determined by the ability of the plaintiff to settle immediately and the failure to settle immediately which then leads to exchange of information with the other party. After the exchange of information, parties continue to bargain. The expected value of the claim, therefore, is the result after taking into account the probabilities of receiving settlement, the costs of settlement, the costs of information exchange and the expected value of the claim.

In filing a legal complaint, the plaintiff must also consider the filing costs (costs of hiring a lawyer, drafting the complaint, and paying the filing fee assessed by the court). If the expected value of the claim is greater than or equal to the filing costs, that is, the expected net payoff is positive, then the plaintiff proceeds to file a legal complaint. If the expected value of the claim is lower than the filing costs, the rational plaintiff will not file a legal complaint.

**Determining Suits**

The number of legal complaints being filed is determined by the increase in the number of underlying events that cause them to increase. Decreases in the cost of filing a complaint should also result in the increase in the number of legal complaints. Filing costs act as a filter for disputes, separating valuable legal claims from worthless legal claims. High-value disputes result in lawsuits, while low-value disputes do not result in suits.
Settlement Bargaining

Concepts in bargaining theory are relevant here. In a bargaining situation, the parties may choose to cooperate, or each party may choose to act on its own without the other’s cooperation. The joint payoff from cooperating exceeds the sum of individual payoffs from not cooperating. To induce the other party to cooperate, the party must receive at least as much as can be obtained by not cooperating, which is the threat value. The sum of the threat values equals the noncooperative value of the game. The difference between the joint payoff from cooperating and the noncooperative value of the game equals the cooperative surplus.

In order to cooperate, the parties must agree about dividing this surplus. An equal division is a reasonable outcome. The rational pursuit of narrow self-interest, however, does not guarantee that the parties will be reasonable so they may end up not agreeing, or if they do, the agreement may be unreasonable.

In cases where settlement out of court can replicate any judgment that the court would have reached after a trial, that is, the parties may come to an agreement on certain terms without a trial, parties would save the cost of litigation. Generally, for any trial, a settlement usually exists that makes both parties better off, so trials are usually inefficient. Exceptions to this generalization occur, as when one party wants the publicity of a trial, or when one side wants to create a precedent by winning on appeal.
III. NEGOTIATIONS IN INTERNATIONAL DISPUTE SETTLEMENT

A. Negotiations Toward the Settlement of International Disputes

In international relations, for a dispute to exist, a claim must be made by a state in relation to another state by which the former would have the latter act or refrain from acting in a given manner, and there is refusal by the latter party to accede. The claim must be based on a right of the first state or on a norm of international law obliging the second state to act or refrain from acting as claimed by the first state. A claim which is not based on norms of international law accepted by the states concerned, or on a right obtained by a state in accordance with international law which implies a corresponding obligation for another state, could not be considered a dispute with the consequence that the other state should enter into a procedure of negotiations over the issue. Elements of an international dispute as frequently cited in many definitions include the following: the disagreement between the parties, the object of that disagreement, the legal norm governing the inter-state relations as viewed from either side.4

The provision of adequate means for the settlement of international disputes had its origins in the search for ways to avoid escalation of conflicts between states into breaches of the peace, and the establishment of procedures for the interpretation and application of rules of international law. Imposing a rule on states to refrain from the threat or use of force against other states, however, must be accompanied by alternative processes for solving disputes and changing inequitable situations. In the United Nations Charter, the peaceful settlement of disputes is writ large and among the principles clearly enshrined therein is the obligation for member states to settle their international disputes by peaceful means in order not to endanger international peace and security.

It is a truism of international diplomacy that diplomatic negotiations between the two governments concerned, without meddling of third parties, other states, or international organizations, is the most efficient method of settling international disputes. This belief is

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4 Diaconu (1983)
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reflected in the innumerable provisions in international agreements referring to the peaceful settlement of disputes, which limit its applicability to those ‘which it has not been possible to settle by diplomacy.” Preliminary exchange of views between the concerned parties are also provided for, as well as an obligation to consult again on the question whether to return to negotiations or to use some other means, if the initial process does not lead to a settlement.

In jurisdictional conflicts, experience shows that in the ‘balancing’ of interests between states, negotiations or consultations are preferred. The process of negotiation is more flexible than the use of the judicial process, and is observed to be more suitable to economic or commercial conflicts of interests. This recognition is evident in initiatives by some states, for example the Anti-Trust and Consultation Procedure under the 1959 ‘understanding’ between Canada and the USA, and the advocacy of the Organization for Economic Cooperation and Development (OECD), through its Restrictive Business Practices Committee, of prior consultation as the most appropriate procedure. The technique of consultation may be adapted to suit the varying degrees of commitment. Bilateral consultations without more is possible although this is effective only if the result would be the withdrawal of the complaining party of the threat to exercise jurisdiction as a result of being satisfied during the consultations. There is also the possibility of multilateral consultation, as exemplified in complaints by countries during the previous GATT days, whereby the complainant and the defendant states make their case before a Panel of states and benefit from the collective view of the contracting Parties.

B. Alternative Dispute Resolution in International Law

The obligation to settle, however, does not end if negotiations fail. Article 33 of the United Nations enumerates the following approaches, in addition to negotiations: enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. A distinction usually is made between means in which a third party facilitates looking for a solution and those in which a third party renders a binding decision. The first category includes good offices, mediation, enquiry (fact-finding or investigation),
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conciliation, and recommendations by international organizations. The second category includes arbitration or judicial settlement, and in a few instances, binding decisions rendered by international organizations which have been duly authorized.⁶

Diplomatic methods or the non-litigious approach is characterized by flexibility of procedures, control by the parties, freedom to accept or reject proposed settlements, avoidance of winner-loser situations, and takes into account political and legal considerations. Here belong consultations/negotiation, good offices, mediation, enquiry, and conciliation. Consultations is further defined as a process which is either voluntary or obligatory, bilateral or multilateral, the success of which depends on the belief by both parties that the benefits of a settlement outweigh their losses, and it is prepositional power-oriented and not principled, rule-based bargaining.

Legal methods, on the other hand, are characterized by rule-oriented legally binding decisions by independent judges based on previously agreed procedures and substantive rules of law that reflect the long-term interests of the parties. In this category belong adjudication and arbitration.

Contemporary international law enshrines two norms with regards the establishment of the means to settle disputes: parties are free to choose which means to use, and the continuation of efforts by alternative means should the first means fail to lead to a solution.⁷ Most international treaties provide for negotiations as the only or the first means of settling disputes. In fact, most other means of peaceful settlement (those enumerated above), are designed to encourage parties to reach a negotiated solution. Diaconu (1983) further asserts that a more flexible method of reaching solution in international disputes and explicitly provided for in international agreements is consultations between parties to a dispute. This concept is used in the same sense as negotiation. Since this means appears in bilateral treaties, indicating that consultations may be through diplomatic channels, it is a simplified,
less formal and more direct form of negotiation, the aim of which is to reach an early and discrete settlement or to agree on a means of settlement.

In economic relations, state practice requires intergovernmental consultation before one government acts unilaterally to frustrate another government’s reasonable expectations involving price or quantity of goods or services, including money, moving in noncapital international transactions, except in certain circumstances. The duty to consult would not arise if there is no basis for expectations on the part of the other government, as would be the case in tariff increases bound tariffs in GATT. On the other hand, implementing international standards, even against a state that has not expressly agreed to the standard, e.g. in restrictions on trade in endangered species), is not a unilateral act that would automatically trigger the duty to consult. In some cases, such as those which involve exchange restrictions proposed by members of the International Monetary Fund (IMF) – the duty to consult is performed through consultation with the relevant international organization.

**C. The Obligation to Consult in International Law**

According to Sohn (1983), the obligation to consult is not purely formal. There is a prior consultation principle governing international disputes which seeks the “avoidance of prejudice to the interests of other states by giving sympathetic consideration to their views before a decision is made.” In the *North Sea Continental Shelf cases*, [1969] ICJ 47-48, the International Court of Justice (ICJ) has stated, in particular, that

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

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8 Kirgis (1983)
9 Sohn (1983)
So that even if the obligation to negotiate does not require the parties to actually reach an agreement, the obligation is ‘not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreement.”

Rogoff (1994), however, is of another view. He asserts that although an obligation to negotiate is highly desirable, it seems that there is no general obligation on states, applicable in situations of dispute, to enter into negotiations as a matter of customary or conventional international law. The two decisions of ICJ related to this however hold that states are obligated to negotiate in certain situations.10 The justification is that states are under this obligation in situations where each possesses legal rights which can only be defined in relation to the legal rights of the other. Moreover, he asserts that the language of the relevant Article in the UN chapter referring to the peaceful settlement of disputes, does not apply to all disputes but only to those that “the continuance of which is likely to endanger the maintenance of international peace and security”, and that it contemplates a series of events beginning with attempts at peaceful settlement by the parties, investigation and recommendations by the Security Council, and referral by the parties to the Security Council.

He contends further that in the North Sea Continental Shelf Cases, the ICJ did not derive the obligation from more general principles of international law that required peaceful settlement of disputes, but from the specific rules and principles of customary international law relevant to the delimitation of continental shelf areas between adjacent states. In the Fisheries Jurisdiction Case, the ICJ found the obligation to negotiate “flow[ing] from the very nature of the respective rights of the Parties…” The reasoning here has far-reaching implications with regard to the obligation to negotiate. Once it is found as a matter of conventional or customary international law that the extent of specific rights of a state is only defined in relation to the rights of another state, then in case of a dispute between them regarding the precise definition of their respective rights, the concerned states are under an obligation to negotiate.

10 These were the Fisheries Jurisdiction Case, 1974 ICJ 3, 32 and the North Sea Continental Shelf Cases, 1969 ICJ 3, 47.
Article 4 Consultations: Role of Non-Litigious Approach in Settling Disputes

That agreement has to be reached after parties negotiate is not necessary. In the *Railway Traffic Between Lithuania and Poland*, 1931 P.C.I.J., the Court stated that “an initial obligation to negotiate does not imply an obligation to reach an agreement…” With regard to the approach with which parties must undertake negotiations, the Tribunal in the Graeco-German Arbitration of 1972, 19 R.I.A.A. stated with reference to the relevant article of the Agreement that this article was a *pactum de negotiando* and that

[this] is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken…Though the Tribunal does not conclude that Article 19 in connection with paragraph 11 of Annex I absolutely obligates either side to reach an agreement, it is of the opinion that the terms of these provisions require the parties to negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties and thus bring an end to this long drawn out controversy.

The Tribunal, moreover, noted that the obligation to negotiate implies the obligation to enter into “meaningful” negotiations. It stated that,

To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though, as we have pointed out, an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made.

On the other hand, there are legal consequences of breach – that is, situations where the failure of a state to honor a consensual or customary obligation to negotiate would allow the other party to take certain legal action that would otherwise be legally impermissible. This would include termination of a treaty relationship or acting in a manner otherwise prohibited. While the termination of a treaty relationship seems to be a drastic response, the existence of that possibility provides threat value to the other party to enter into serious negotiations.

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11 Graeco-German Arbitration of 1972, 19 R.I.A.A.
D. Duty to Consult under GATT Rules

Consultations have always been an important element of the GATT system. In fact, there are 19 clauses in the GATT that require the parties to GATT to consult in specific instances. This requirement is further carried in the area of dispute settlement.

The origins of dispute settlement in the World Trade Organization (WTO), which is now emerging as a reliable and fully-accepted rules-based system in the multilateral setting, may be traced to two articles in the General Agreement on Tariffs and Trade 1947 (GATT 1947) relating to the settlement of disputes. At that time, there were no formal procedures governing disputes and the Contracting Parties to GATT 1947 relied mainly on working parties to resolve disputes by consensus through negotiation and diplomacy. Dispute settlement panels relied on consultations and diplomacy to arrive at solutions that are binding under international law.

While the system has evolved into a more judicial and rules-based framework for settling disputes, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) has continued to make available both “political” or diplomatic, and legal methods in settling disputes. Political methods of settling disputes include Consultations (Article 4), Good Offices (Articles 5, 24), Conciliation (Articles 5, 24), Mediation (Articles 5, 24), Recommendations by Panels (Article 19), Appellate Body (Article 19), Dispute Settlement Body (Articles 16,17), Surveillance of Implementation of Recommendations and Rulings (Article 21), and Compensation and Suspension of Concessions (Article 22). The legal methods include the Panel Procedure (Articles 6-16, 18, 19), the Appellate Review Procedure (Articles 17-19), Rulings by Dispute Settlement Body on Panel and Appellate Reports (Articles 16, 17), Arbitration among States (Article 25), Private International Arbitration (e.g. Article 4 Agreement on Preshipment Inspection), and Domestic Court Proceedings (e.g. Article X GATT, Article 13 Anti-Dumping Agreement, Article 23

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12 Jackson (1969)
13 GATT 1947 Articles XXII and XXIII
Article 4 Consultations: Role of Non-Litigious Approach in Settling Disputes

Agreement on Subsidies, Articles 32, 41-50 TRIPS Agreement, Article XX Agreement on Government Procurement). 15

Diplomatic approaches entailing further consultations between parties are emphasized by the DSU even when the dispute has reached the litigious stage. In the case of non-violation complaints, “the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.” This is because one of the functions of the panels, as provided for in Article 11, is to give the parties “adequate opportunity to develop a mutually satisfactory solution.” In Article 5.5

If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

Moreover, conciliation is an underlying theme in the whole dispute settlement process as evident in parties being required to mutually agree on decisions. Article 5.5 calls for parties to agree before deciding to pursue diplomatic approaches parallel to the panel process. Article 21.3 and 4 provides for parties to mutually agree in relation to timetable. Article 22.2 requires the parties to enter into negotiation for mutually acceptable compensation before seeking authorization from the Dispute Settlement Body (DSB) to suspend the application of concessions or other obligations under the WTO Agreements. Resort to arbitration shall be subject to agreement of both parties, as well as the procedures to be followed, as provided in Article 25.2.16

GATT’s General Consultation Clauses (Articles XXII and XXIII:1 GATT)

Early dispute settlement reflected GATT’s diplomatic roots. GATT’s dispute settlement rules were minimal. Primarily, these were GATT Articles XXII and XXIII which

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14 Cameron and Orava (2001)
15 Petersmann (2000)
16 Wang (1995)
Article 4 Consultations: Role of Non-Litigious Approach in Settling Disputes

deal, respectively, with “consultations” and with “nullification and impairment” of benefits accruing under GATT.

Article XXII, by itself, has no direct consequences and simply requires consultations with respect to any matter affecting the operation of the Agreement. If the matter is not resolved during bilateral consultations, it may be referred to the Contracting Parties jointly for consultation. Article XXII, therefore, provides a broad general authorization for consultation among countries in a two-step mode. A decision was adopted in 1958 which regulated these procedures wherein a complainant is required to inform the Director-General of GATT in regard to any consultation under Article XXII. The purpose was to allow the Director-General to notify all contracting parties and find out if any other country wished to join the consultation. While the 1958 decision is broad enough to require this procedure in all consultations under Article XXII, Article XXII:1 seems to contemplate private consultations. Eventually, these consultations became a basis for the generation of GATT’s dispute settlement process that was grounded in Article XXIII, GATT’s primary rule of adjudication. Neither Article contains specific procedures.17

Specific consultation procedures have also been set out under explicit authority of other GATT clauses, e.g. under Article XII:4 relating to balance-of-payments consultations. Moreover, some decisions of the CONTRACTING PARTIES make explicit reference to the consultation facilities under Article XXII or set up procedures referring to that article.

On the relationship of consultations under Article XXII and consultations under Article XXIII, Jackson (1969) further provides an analysis of Article XXIII. Paragraph 1 specifies another “consultation” procedure which in some ways is a duplication of the Article XXII consultations. Under the GATT, there is no necessary connection between these two articles. Each article can stand alone and procedures under Article XXIII do not stem from the fulfillment of procedures under Article XXII. A decision by the CONTRACTING PARTIES in 1960, however, drew the practical conclusion that consultations under Article XXII:1 would be considered as fulfilling the consultation requirements of Article XXIII:1

17 Jackson (1969)
for the reason that the provisions are very similar. Article XXII:1 calls for “consultation” between concerned contracting parties, while Article XXIII:1 states that a complaining contracting party may “make written representations or proposals to the other contracting party” and that the latter “shall give sympathetic consideration.”¹⁸

**Consultations under Article 4 of the DSU**

Under the WTO, the DSU sets the foundation of the new dispute settlement system. While the system establishes a more judicial, rules-based approach to the settlement of disputes between Member states, the DSU adopts certain elements of diplomacy and negotiations during the GATT days, through the consultations requirement and the preference for mutually agreed solutions. Article 3.7 sets out the means by which disputes are to be handled,

[…]A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. […]

The request for consultations, as provided for by Article 4.3 and 4.4 of the DSU may be regarded as equivalent to a letter of formal notice. The written request for panel, set out in Article 6.2, is the last pre-panel document in the pre-litigation procedure under the WTO. The functions of a similar procedure in the EC identified by Lasok¹⁹ may be taken as a good comparison: a) the *jurisdiction function* – defines the scope of the claims which are in dispute, b) the *due process function* – places the Member State in a position to defend itself, as well as provides both parties an insight into the strong and weak points of each other’s case, and the c) the *litigation avoidance* function – there is better chance of remedying the situation and reaching a settlement when parties are given better insight into the merits of the dispute.

¹⁸ Jackson (1969)
¹⁹ As mentioned in Kuijper (2000)
Article 4 consultations serve the jurisdiction function by allowing the parties to determine the scope of their claims if the consultations do not lead to a mutually agreed solution, but would proceed to the panel stage. Relatedly, the Panel’s terms of reference beyond which it cannot exercise its authority, must be based on the document stating the request for the establishment of panel. The request may only cover claims which have been the subject of consultations. On the other hand, the due process function is served by consultations because this phase allows the defendant Member to defend itself in a proper manner, and the gives third parties the opportunity to exercise their right to be joined in the consultations, as provided for in Article 4.11. The objective of the consultation phase, meanwhile, reflects the litigation avoidance function of the pre-panel stage, as provided for in Article 4.5

In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

Prior consultation is the norm, as evidenced in this process being mandatory in the Agreements. The footnote to Article 4.11 lists the consultation provisions in the covered agreements, which are as follows: Agreement on Agriculture, Article 19: Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11: Agreement on Textiles and Clothing, paragraph 4 of Article 8: Agreement on Technical Barriers to Trade, paragraph 1 of Article 14: Agreement on Trade-Related Investment Measures, Article 8: Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17: Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19: Agreement on Pre-Shipment Inspection, Article 7: Agreement on Rules of Origin, Article 7: Agreement on Import Licensing Procedures, Article 6: Agreement on Subsidies and Countervailing Measures, Article 30: Agreement on Safeguards, Article 14: Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.
IV. STATISTICAL PROFILE OF WTO CASES PENDING CONSULTATIONS UNDER ARTICLE 4 OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

The statistical analysis presented in this chapter is derived from a database prepared by the researcher using information contained in requests for consultations and notifications of mutually agreed solution submitted to the WTO Secretariat from 01 January 1995 to 02 May 2001. The main data source was the listing provided in the Overview of the State-of-Play of WTO Disputes (as of 02 May 2001) prepared by the Secretariat. Ninety-eight (98) requests for consultations and 26 notified mutually agreed solutions were examined.

For information related to consultations, the database records the date of the request, the complainant, the respondent, the relevant WTO agreement(s), the measure at issue, and the type of good/service involved. For information related to mutually agreed solutions, the database includes the date of notification of the mutually agreed solution, the date of the request for consultations, the complainant, the respondent, the relevant WTO agreement(s), the measure at issue, the type of good/service involved, the negotiated settlement, indication if the document specifies details of the settlement, and, if any, compliance mechanism agreed upon.

Annexes 1 and 2 may be referred to for details of the summary tables presented hereunder. Annex 1 lists all pertinent information taken from requests for consultations pending consultations while Annex 2 details all relevant information taken from notifications of mutually agreed solution as of 02 May 2001.

The table below presents a picture of how cases have progressed in the WTO days. Herein and in succeeding tables, reference will be made to some conclusions reached by Hudec in a 1991 survey of GATT Dispute Settlement cases from 1948-89.20 This is to provide a rough comparison of profile of cases between procedures under the WTO dispute settlement as against dispute settlement under the GATT.

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20 Hudec (1991)
Table 1. Statistical summary of WTO cases, from 01 January 1995 to 02 May 2001

<table>
<thead>
<tr>
<th>Statistical summary of WTO cases</th>
<th>As of 02 May 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cases (distinct DS numbers)</td>
<td>337</td>
</tr>
<tr>
<td>Cases in which panels were established</td>
<td>172</td>
</tr>
<tr>
<td>Panel and Appellate Body reports adopted</td>
<td>49</td>
</tr>
<tr>
<td>Settled or inactive cases</td>
<td>37</td>
</tr>
<tr>
<td>Pending consultations</td>
<td>92</td>
</tr>
</tbody>
</table>

Table 1 shows the number of cases with distinct DS numbers\(^{22}\) which as of 02 May 2001 reached 337. Panels were established for 172 of these cases. Forty-nine (49) Panel and Appellate Body reports were adopted. In this data, the settled or inactive cases deserve careful attention. It must be qualified that this data takes into account only those which reached mutually agreed solution and were notified. Among the 37 stated cases, 20 were settled without reaching the stage where panel was requested (26 if distinct requests for a measure are counted separately), eight (8)\(^{23}\) were settled after request for the establishment of a panel had been made (in effect, complaining party withdrew its request or contested measure has been terminated), and the rest remain inactive.\(^{24}\) The section below on mutually agreed solution further expands on those cases that have been settled.

From 01 January 1995 up to 02 May 2001, 231 requests for consultations have been filed with the WTO.\(^{25}\) Cases which are pending consultations number 92. According to the

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\(^{21}\) Overview of the State-of-Play of WTO Disputes, 02 May 2001

\(^{22}\) DS numbers are the reference numbers indicated in each WTO document and in this case, refers to the numbers on the upper right hand side of each document. A particular complaint may have more than one DS number, and this happens when the complaint is submitted to one or more appropriate Committees.

\(^{23}\) Two (2) cases which are not included in the eight (8) mentioned are the US - Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea (WT/DS99/1) which notified mutually agreed solution after panel work pursuant to Article 21.5 was suspended upon request of the parties; and Australia – Measures Affecting the Importation of Salmonids (WT/DS21) for similar reason. Among the eight (8) cases mentioned, the EC was able to reach mutually agreed solution with one complainant, the US in EC- Duties on Imports of Grains but consultations over the same measure, filed by Thailand and Uruguay, however remain inactive. Detailed figures, therefore, do not add up to total because of such cases.

\(^{24}\) Includes cases for which authority for the establishment of panel has lapsed, or panel’s authority has lapsed since the suspension of the panel’s work.

\(^{25}\) This number encompasses all requests for consultations notified to the WTO, including those which have led to panel and appellate body rulings. Some requests for the establishment of panel were not preceded by requests for consultations under the DSU. They are, however, counted in this figure since consultations were held pursuant to the Agreement on Textiles and Clothing.
WTO Legal Division, in its experience, only one out of three requests for consultations usually reach panel stage and becomes a full-blown case. Presumably, the rest of the cases get settled at the consultations stage, are still being negotiated, or were simply discontinued for reasons known only to the concerned parties.

Hudec’s survey shows that of the 207 cases examined covering a 42-year period of the GATT (from 1948 up to early 1990), 139 were valid claims that had known results. This figure, equivalent to 67 percent of all cases, is remarkably high, and while it is not fair to compare the performance of the system in that stretch of time to what figures of status of complaints brought to the WTO in its 5 or so years of existence indicate, the information is still useful in providing a general idea of how Members have utilized the system. The percentage of complaints that ended up with legal rulings, during the four (4) decades of the GATT was remarkably constant over the period. In the 1950s, the 1970s, and the 1980s, there were formal legal rulings in 40 percent, 47 percent, and 41 percent of all complaints, respectively. These findings would seem to disprove a widely-held perception that disputes in the GATT days were mostly settled by informal diplomacy between just a few key countries.

Interestingly also, the same survey showed that the percentage of cases that led to a ruling was quite high during the GATT days, around 43 percent of the total number. Hudec attributes this to two possible explanations. Governments probably wait longer before taking the public step of filing a GATT complaint, thus, the sample may be limited to the more intractable cases. On the other hand, defendant governments may find it difficult to settle once the complaint is filed because of high political costs of agreeing to modify or remove a measure. These governments may find it better to go through litigation and lose definitively, because the subsequent corrective action that will be required can then be blamed wholly to GATT law, and thus reduce domestic resistance to any adjustment necessary.
The GATT legal tradition, however, values highly positive outcomes achieved through settlement or other kinds of concessions. GATT governments preferred settlement to litigation, believing that agreed solutions are always the most durable and also produce the best long-term relations between members. From this viewpoint, the number of settled cases is important in any overall evaluation of success.

A study by Busch (2000) attempts to explain why some cases are resolved in the consultations stage, why others go to a panel, and how escalation shapes the prospects for resolving disputes under GATT 1947. He identifies two variables which could influence paneling of cases: legal reform and the disputants’ political regime type. Legal reform refers to improvements introduced to the system specifically through the 1989 Dispute Settlement Procedures Improvements (“Improvements”), the result of which was to give parties the right to a panel. The right to a panel effectively gets rid of the threat of delay or blocking its formation, elements of which rendered the previous dispute settlement weak and subject to political pressure. One side of the debate argues that as such, more of the cases are expected to reach the panel stage, with complainants wanting to escape the “power politics” of consultations. The other side to the debate is that this reform should result in more early settlement of cases. Some argue that this should result in defendants being expected to concede “strong” cases and complainants to withdraw “weak” ones. The reform, however, might have also encouraged concessions since the right to a panel made the threat of retaliation more credible and likely to underpin a strategy of “reciprocity.”

On the second factor – the disputants’ political regime, Busch found that democracies use dispute settlement institutions more than other regimes. One side of the debate argues that democracies are more likely to adhere to legal norms of conflict resolution given their commitment to these norms domestically. As such, parties with political regimes such as this prefer the greater formality of a panel to the informality of consultations. The other view argues that democracies more likely “tie their hands” by raising the domestic (and foreign) costs of backing down in a dispute and that they rarely “bluff” in this respect, which actually places them at greater risk of conflict as a result.
The results of Busch’s study show that the right to a panel did not influence the way the cases brought before GATT were prosecuted or resolved, and that highly democratic regimes are more likely to succeed in resolving disputes through concessions compared to other regimes, although only at the consultations stage. The same regimes, however, also escalate more of their disputes, yet once the case is at the panel stage, they are no more likely to settle through concessions than other regimes. He attributes this to signaling than with legal norms of conflict resolution. On the other hand, the ability of democratic regimes to more likely achieve concessions prior to a panel suggest that the informality of consultations seem to facilitate negotiations even if the threat of escalation is present. 26

With respect to the informal mechanisms to settle disputes, that is, Good Offices, Conciliation, and Mediation (Article 5), no requests have been made by any Member to avail of such approaches. This suggests that Members may have found this process too informal.

Requests for Consultations

The following tables (Table 2 to 4) show information gleaned from requests submitted by Members to the WTO pending consultations as listed by the WTO Secretariat in the pertinent report.

Table 2 shows which WTO Agreements were most frequently cited by complainants in their request for consultations. The GATT 1994 was cited 59 times in the requests submitted, followed by the Agreement on Subsidies and Countervailing Measures which was mentioned 24 times. On the other hand, the Agreement on Implementation of Article VI of the GATT 1994 (or the Antidumping Agreement) was cited 18 times. The Agreement on Agriculture followed closely with 15 citations. The Agreements on the Application of Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade each were mentioned nine (9) times, as well as the Agreement on Trade-Related Aspects of Intellectual

26 Reinhardt, 1999b as cited by Busch (2000)
Property Rights (TRIPS). The Agreement on Safeguards was cited eight (8) times, while the Agreement on Import Licensing Procedures was cited seven (7) times. The General Agreement on Trade in Services (GATS) was mentioned five (5) times. Other Agreements which were mentioned in the requests examined included the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Agreement on Implementation of Article VII of the GATT 1994 (or the Agreement on Customs Valuation), Agreement on Rules of Origin, Agreement on Trade-Related Investment Measures (TRIMS), the Marrakesh Agreement Establishing the WTO, and the Agreement on Textiles and Clothing (ATC).

Table 2. WTO Agreements most cited in request for consultations

<table>
<thead>
<tr>
<th>WTO Agreement</th>
<th>Number of times cited</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT 1994</td>
<td>59</td>
</tr>
<tr>
<td>SCM Agreement</td>
<td>24</td>
</tr>
<tr>
<td>Antidumping Agreement</td>
<td>18</td>
</tr>
<tr>
<td>Agreement on Agriculture</td>
<td>15</td>
</tr>
<tr>
<td>SPS Agreement</td>
<td>9</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>9</td>
</tr>
<tr>
<td>TRIPS</td>
<td>9</td>
</tr>
<tr>
<td>Agreement on Safeguards</td>
<td>8</td>
</tr>
<tr>
<td>Agreement on Import Licensing Procedures</td>
<td>7</td>
</tr>
<tr>
<td>GATS</td>
<td>5</td>
</tr>
</tbody>
</table>

Table 3 shows the number of requests for consultations filed with the WTO Secretariat from 1995 to April 2001. From 1995 to 1998, an increasing trend in the number of requests was noted, with the highest increase being recorded for 1996. From one (1) request in 1995, the number of requests increased to 10 the following year. Seventeen (17) requests were filed with the WTO Secretariat in 1997, which further increased to 24 the next year. A drastic decline was observed in 1999 wherein the number of requests fell to 13. This may be attributed to a deliberate restraint adopted by Members in pursuing disputes with other Members in anticipation of the upcoming Ministerial Conference late that year. The following year, the number dramatically increased almost to the level of 1998. As of April 2001, 10 requests have already been submitted suggesting that the degree of complaints
being raised within the framework of the WTO Dispute Settlement has intensified, even with an upcoming Ministerial later in the year. Such trend is opposite that reflected in 1999.

Table 3. Frequency of requests for consultations, 1995-April 2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>1</td>
</tr>
<tr>
<td>1996</td>
<td>10</td>
</tr>
<tr>
<td>1997</td>
<td>17</td>
</tr>
<tr>
<td>1998</td>
<td>24</td>
</tr>
<tr>
<td>1999</td>
<td>13</td>
</tr>
<tr>
<td>2000</td>
<td>22</td>
</tr>
<tr>
<td>2001 (up to April)</td>
<td>10</td>
</tr>
</tbody>
</table>

The table below shows which Members were frequently party to complaints raised within the WTO dispute settlement system. The left column shows those which were most frequently complained against, and the right column shows countries who filed the most number of requests for consultations between 1995 and April 2001. From the following information, three (3) countries ranked consistently in the list of top respondent and complainant countries namely, the United States, the European Communities (EC), and Brazil. The US led Members in being the most complained against by other Members, as well as being the most frequent user of the system in complaining against other Members. The US was a respondent in 21 of the requests submitted by various Members, while being a complainant in 27 of the cases. The EC came next, both in being respondent and complainant. Within the period, 15 requests complained of measures being implemented by the EC. Brazil follows with eight (8) requests naming it as respondent. Mexico and Argentina each were complained against in five (5) instances. On data referring to complaining countries, the EC followed the US closely in being a complainant, having submitted 24 requests to the WTO. Brazil ranked third but had significantly less number of complaints, with 10 requests filed. India ranked fourth, with six (6) requests submitted. Canada followed with five (5) requests.
It is interesting to note that in terms of countries involved in WTO cases, the list has expanded from the number of traditional users during the GATT times. While the table below details only the frequent users, the list of complainants and respondents contained in Annex 1 show that as opposed to GATT days where most cases were filed by a few developed countries, there is now a growing number of developing countries who increasingly resort to the use of the WTO system. This may be indicative of the confidence of members in the ability of the system to resolve disputes, and in the case of developing countries, the belief that the rules-based system is fair and works for the benefit of its Members regardless of the political and economic power of the parties involved, factors of which were believed to strongly influence the outcome of cases in the previous GATT days.

Table 4. Members who have been involved in the most number of requests for consultations, 1995-April 2001

<table>
<thead>
<tr>
<th>Top Respondent Members</th>
<th>Top Complainant Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States (21)</td>
<td>United States (27)</td>
</tr>
<tr>
<td>EC (15)</td>
<td>EC (24)</td>
</tr>
<tr>
<td>Brazil (8)</td>
<td>Brazil (10)</td>
</tr>
<tr>
<td>Mexico (5)</td>
<td>India (6)</td>
</tr>
<tr>
<td>Argentina (5)</td>
<td>Canada (5)</td>
</tr>
</tbody>
</table>

Mutually Agreed Solutions

The following table lists Members who reached mutually agreed solutions with parties involved in cases. Table 5 shows that India, among respondent countries, reached mutually agreed solutions with complaining parties the most number of times, in at least six (6) instances. Japan and Korea followed, being a party to at least (3) cases which were concluded amicably between parties concerned. The US, EC, and Australia followed, with 2 cases each reaching settlement as respondent Member. Other countries which were principal parties to cases that concluded in mutually agreed solutions included Portugal, Sweden, Turkey, Philippines, Greece, Pakistan, Poland, and Argentina. As complainant, the US was able to settle cases amicably with other Members in at least ten (10) cases. The EC followed, with six (6) of its cases having reached amicable solution. Canada and Switzerland, on the

27 Data refer only to those which were notified to the Secretariat.
other hand, each reached settlement in two cases. Japan, India, Australia, Brazil, and New Zealand each was able to settle their complaints bilaterally in at least one case.

Table 5. Members who notified mutually agreed solutions, 1995-April 2001

<table>
<thead>
<tr>
<th>Respondent Members</th>
<th>Complainant Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>India (6)</td>
<td>United States (10)</td>
</tr>
<tr>
<td>Japan, Korea (3 each)</td>
<td>EC (6)</td>
</tr>
<tr>
<td>US, EC, Australia (2 each)</td>
<td>Canada, Switzerland (2 each)</td>
</tr>
<tr>
<td>Portugal, Sweden, Turkey, Philippines, Greece, Pakistan, Poland, Argentina (1 each)</td>
<td>Japan, India, Australia, Brazil, New Zealand (1 each)</td>
</tr>
</tbody>
</table>

Table 6 lists the WTO Agreements most frequently mentioned in cases where mutually agreed solutions were reached and notified to the Secretariat. Provisions in GATT 1994 were cited 14 times in the cases which had satisfactory solution. From the available information, it seems that Members chose to settle bilaterally issues which involved intellectual property as suggested by the high number of settled cases citing TRIPS Agreement relative to those covering other areas. TRIPS Agreement was cited eight (8) times in various notifications. The Agreement on Import Licensing Procedures was mentioned seven (7) times in the notifications. The Agreement on Agriculture was also cited a number of times (6 times). Other agreements which were cited included SPS Agreement, Agreement on Textiles and Clothing, TBT Agreement, Agreement on Rules of Origin, TRIMS, Agreement on Government Procurement, and the Antidumping Agreement.

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28 Herein referring to notifications with distinct DS numbers.
Table 6. WTO Agreements most frequently cited in cases with notified mutually agreed solutions, 1995-April 2001 (out of 26 notifications filed)

<table>
<thead>
<tr>
<th>WTO Agreement</th>
<th>Number of times cited</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT 1994</td>
<td>14</td>
</tr>
<tr>
<td>TRIPS</td>
<td>8</td>
</tr>
<tr>
<td>Agreement on Import Licensing Procedures</td>
<td>7</td>
</tr>
<tr>
<td>Agreement on Agriculture</td>
<td>6</td>
</tr>
<tr>
<td>SPS Agreement</td>
<td>4</td>
</tr>
<tr>
<td>Agreement on Textiles and Clothing</td>
<td>3</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>3</td>
</tr>
<tr>
<td>Agreement on Rules of Origin</td>
<td>2</td>
</tr>
<tr>
<td>TRIMS</td>
<td>1</td>
</tr>
<tr>
<td>Agreement on Government Procurement</td>
<td>1</td>
</tr>
<tr>
<td>Antidumping Agreement</td>
<td>1</td>
</tr>
</tbody>
</table>

Among the type of measures complained against in cases where mutually agreed solutions have been reached, tariffs and quantitative restrictions ranked highest, being the measure at issue in nine (9) cases. Protection of intellectual property rights, or more aptly, the lack of protection, was the alleged violation of WTO Agreements being complained about in seven (7) cases. Discriminatory practices, on the other hand, were the subject of a relatively significant number of cases, six (6) out of the 26 reported. Rules of origin, meanwhile, was the subject of two (2) cases as well as trade remedies (Table 7).

Table 7. Measures in cases where mutually agreed solutions have been reached, 1995-April 2001 (out of 26 notifications filed)

<table>
<thead>
<tr>
<th>Measure</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tariffs and quantitative restrictions</td>
<td>9</td>
</tr>
<tr>
<td>Protection of intellectual property rights</td>
<td>7</td>
</tr>
<tr>
<td>Discriminatory measures</td>
<td>6</td>
</tr>
<tr>
<td>Rules of origin</td>
<td>2</td>
</tr>
<tr>
<td>Trade remedies</td>
<td>2</td>
</tr>
</tbody>
</table>

The following table shows the frequency of the types of solutions that have been agreed between Members who notified the solutions. Withdrawal of measure was the most frequent type of solution reached, consistent with Article 7 of the DSU which clearly
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specifies the withdrawal of the contentious measure as the first objective of the dispute settlement system. Amendment of domestic legislation was the next type of solution arrived at by notifying Members, and was the settlement reached in seven (7) cases. Enactment of law and enforcement of procedures already supposed to be established were the next type of solutions applicable to the cases which were notified to have reached solution. Termination of proceedings, in the unique case to which this applied – antidumping investigation proceedings, was also a type of solution reached. Cooperation programmes and similar activities formed the last type of solution among the cases which have been notified. Only one case did not specify the type of solution that was agreed by the concerned parties. The notification merely stated in general terms that a mutually agreed solution had been reached.

Table 8. Types of mutually agreed solutions, 1995-April 2001 (out of 26 notifications filed)

<table>
<thead>
<tr>
<th>Solution</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawal of measure</td>
<td>8</td>
</tr>
<tr>
<td>Amendment of legislation/policy</td>
<td>7</td>
</tr>
<tr>
<td>Enactment of law</td>
<td>4</td>
</tr>
<tr>
<td>Enforcement of procedures</td>
<td>4</td>
</tr>
<tr>
<td>Termination of proceedings</td>
<td>1</td>
</tr>
<tr>
<td>Cooperation programmes/activities</td>
<td>1</td>
</tr>
<tr>
<td>None stated</td>
<td>1</td>
</tr>
</tbody>
</table>

The following table lists the compliance mechanisms that concerned parties agreed to in order to ensure that the respondent Member carries out the mutually agreed solution. These mechanisms specify either the actions that the responding party must implement or the actions that the complaining party may undertake if the implementation of the agreement does not fully satisfy the terms of the agreement. A significant number, or 6 out of the 26 notifications, specified regular monitoring and an annual review of the implementation of the responding Member. Four (4) of the cases mentioned the reservation of the right to request panel or in cases where panel work was suspended, the resumption of panel procedures. Three (3) cases mentioned the notification and/or publication of the elimination of measures, and an equal number specified the enactment of legislation. Two (2) notifications stated that
exchange of information between the parties regarding the implementation of the mutually agreed solution must be made. It is noteworthy that a third of the notifications did not mention any means by which the carrying out of the solution may be monitored or assessed. It is perhaps understood by the parties that any deviation from what has been mutually agreed in good faith will risk the resumption of the case this time through the request for the establishment of a panel, relying on the automaticity of the WTO dispute settlement process.

Among the notifications submitted, 17 set out in detail the settlement reached. In some cases where legislation was involved, the text was attached to the notification. In other cases, letters between parties constituted the agreement document, and were attached. Otherwise, the notification simply mentioned what the negotiated settlement was.

Table 9. Compliance mechanisms built into the mutually agreed solutions, 1995-April 2001 (out of 26 notifications filed)

<table>
<thead>
<tr>
<th>Compliance Mechanism</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monitoring/Annual review</td>
<td>6</td>
</tr>
<tr>
<td>Reservation of right to request/resume panel procedures</td>
<td>4</td>
</tr>
<tr>
<td>Notification and/or publication of the elimination of measures</td>
<td>3</td>
</tr>
<tr>
<td>Enactment of legislation</td>
<td>3</td>
</tr>
<tr>
<td>Exchange of information regarding implementation of solution</td>
<td>2</td>
</tr>
<tr>
<td>None</td>
<td>9</td>
</tr>
</tbody>
</table>

Table 10 outlines the duration of consultations for cases which were notified as having concluded on a settlement. Majority of the cases or about 62 percent were concluded between a period of 7 to 18 months, or between half a year to 1.5 years. Four (4) of the 26 notifications were resolved in a relatively short time, between 2 to 6 months. The same number of cases reached conclusion between a period of 19 to 24 months. One (1) case took almost three (3) years to be completed, while another took more than three (3) years to reach a conclusion. This was the Australia Salmonid case which took five (5) years for a mutually agreed solution to be reached.
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Table 10. Duration of consultations, from filing of request for consultations to notification of mutually agreed solutions, 1995-April 2001

<table>
<thead>
<tr>
<th>Duration of consultations</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 6 months</td>
<td>4</td>
</tr>
<tr>
<td>7 to 12 months</td>
<td>8</td>
</tr>
<tr>
<td>13 to 18 months</td>
<td>8</td>
</tr>
<tr>
<td>19 to 24 months</td>
<td>4</td>
</tr>
<tr>
<td>25 to 36 months</td>
<td>1</td>
</tr>
<tr>
<td>More than 3 years</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 11 lists the frequency of mutually agreed solutions being reached. The year wherein most number of cases reached solution was in 1998 when a little over a third of those which notified solutions over the period 1995-2001 were satisfactorily settled. A relatively high number of disputes was also settled in 1997 and 2000, wherein five (5) cases were resolved bilaterally for each year. Data also shows that three (3) cases reached mutually agreed solution in 1996 as well as in 1999. Only a single case reached settlement in 1995.

Table 11. Frequency of mutually agreed solutions reached, 1995-2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>1</td>
</tr>
<tr>
<td>1996</td>
<td>3</td>
</tr>
<tr>
<td>1997</td>
<td>5</td>
</tr>
<tr>
<td>1998</td>
<td>9</td>
</tr>
<tr>
<td>1999</td>
<td>3</td>
</tr>
<tr>
<td>2000</td>
<td>5</td>
</tr>
</tbody>
</table>

Again, a qualifier must be made on information regarding mutually agreed solution, especially those in Tables 10 and 11. A further look into individual cases, verified moreover by Members who have been interviewed by the researcher, show that the circumstances surrounding each case were unique, elements of which encompass technical difficulty of the measure at issue as well as economic and political considerations so that no simple or uniform approach may be adopted across cases, even seemingly similar or related ones. Depending on the interplay of these factors, the duration of consultations vary in each case.
V. PROCEDURAL RULES AND PRACTICE GOVERNING ARTICLE 4 CONSULTATIONS

An attempt to answer the question, “How do existing rules and procedures on Article 4 consultations contribute to the objective of the dispute settlement system to secure a positive solution to the dispute?” would guide the analysis presented in this section. Interviews by the researcher with the representatives of a number of WTO Members provided the insights and information on which the analysis is based.

Attributes of the consultation process show that this phase is designed to facilitate pre-panel resolutions. While requests for consultations must state “the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint,”29 no record of the consultations is available that might figure in subsequent proceedings. The meeting is closed to the public and the WTO Secretariat, and the content of consultations is “confidential and without prejudice to the rights of any Member in any further proceedings.”30 The provisions of the DSU, therefore, create an atmosphere where parties feel free to explore ideas, and discussions can evolve, thereby facilitating settlement.

The preferred method to settling disputes is through the use of GATT’s traditional approach of using diplomacy, whether prior to or during formal dispute settlement proceedings, to reach a mutually agreed solution. The alternative approach is to submit the dispute to a panel and obtain a ruling with regard to the applicable WTO obligations, and a recommendation on the action to be taken concerning the measure.

The diplomatic means to settling dispute through a mutually agreed solution, however, is directly affected by the stage in which the dispute is at.31 Its usefulness, in fact, is inversely related to the progressive stage of a dispute, which is increasingly adversarial as the

29 Article 4.4 DSU
30 Article 4.6 DSU
dispute progresses. The use of diplomatic means, however, is not prevented with the establishment of a panel. Throughout the course of the dispute settlement procedures, the possibility of both parties reaching a mutually agreed solution is continuously sought. The panel is even mandated in Article 11 DSU to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”

A. Formal Consultations (Article 4 DSU)

The Role of Consultations

Consultations under Article 4 of the DSU perform the following functions: 32

a) Provide the parties an opportunity to seek a mutually satisfactory solution. The decision of the complaining party to subject the matter to the WTO framework serves a signaling function. It is an unambiguous statement that leaves to the respondent country no doubt about the other party’s serious intent of pursuing the matter, if necessary, toward its conclusion in the judicial stages of the dispute settlement procedures.

b) Where resolution of a dispute is not possible without recourse to a panel proceeding, consultations also provide the defending party notice of the measures at issue and claims raised by the complainants.

c) Fact-finding which will lead to clarification of issues and positions which may facilitate better understanding of the issues at hand, and could lead to the following outcomes: may lead to the complaining party withdrawing the complaint if it is convinced that the measure may be WTO-consistent, and that it has not impaired the benefits accruing the Member, or may force the respondent party to resolve the issue domestically, thus avoiding the litigation and political costs that legal proceedings entail.

32 Observation of the Representative of Japan (in Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members, Rev. 3)
Aside from bringing bilateral discussions into the WTO context thus raising the discussion to a more serious level, the value of consultations under Article 4 also lies in its being able to force attention to the issue, internationally and domestically. Most perceive that the permanent likelihood of an escalation to the panel stage puts sufficient pressure on governments to exhaust all possible alternatives to settle the complaints bilaterally. Consultations bring both parties to the table, sends a message to the domestic industry, and influences public opinion with regard to the measure. What is achieved on a bilateral level, however, is an outcome of decisions and actions taken internally. The internal decisions, on the other hand, are influenced by the following: the relationship between the two trading countries, internal dynamics between government and the industry concerned, the sophistication of relationships between and among government agencies concerned, especially that of the trade ministry and those who ultimately decide whether to settle amicably or pursue a case to panel, including the level of trade experience in these ministries, and the nature of the dispute.

Consultations help both parties build their case for later proceedings, should the case progress to that stage. By providing the venue for the elaboration of facts of the case and parties’ position vis-à-vis each other, better understanding on points of contention and points of agreement is achieved. This is essential in narrowing down differences, and in instances where differences are too wide, will lead to appreciation of panel ruling later on. A word must be said, however, with regard to the fact-finding role of consultations. Information technology has dramatically increased the availability of and access to information, and as such, diminishes the role of consultations as a forum for information exchange. Holding back information, a practice by disputing Members in many cases despite requests for more information, then does not serve any practical purpose as there will always be other sources. Easy access to and the availability of information indeed aid transparency, but this has been used as a justification of some members to refuse to accommodate requests for information by the other party.

Relatedly, there have been recommendations to turn the consultation phase into a sort of pre-trial discovery mechanism. This view is being opposed for the reason that the
consultation process is a political process and should be divorced from the more legalistic panel and appeals process. 33

*Duty to Consult*

The member receiving a request,

[…] undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the [requesting party].

The duty to consult is a strict one. In *Brazil – Measures Affecting Dessicated Coconut*, Brazil refused to consult with the complaining party, the Philippines. The panel, in its report, stated that “[c]ompliance 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” and that the “Members’ duty to consult is absolute.” 34

All 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 the 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 panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts 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. 35

33 Davey (2000)  
34 *Brazil – Measures Affecting Dessicated Coconut*, WTO Panel Report (WT/DS22/R)  
35 *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, (WT/DS50/AB/R), para. 94.
To facilitate meaningful consultations, the party requesting the consultations usually prepares a set of questions that is given to the respondent party in advance of the meeting. While the practice is intended to provide the opportunity for substantive discussion, the usefulness of this questionnaire still depends on how the other party responds to the questions stated therein. For the complaining party, this exemplifies the ‘fact-finding’ function of the consultations process. This ‘fact-finding’ eventually makes it possible for what one diplomat terms “visibility” to change, which may lead to softening of positions, and withdrawal of the complaint. In such instances, representatives agree that consultations become very helpful toward the resolution of disputes.

Horlick and Butterton (2000), however, regard this “ideal degree of disclosure” as expressed by the panel in Brazil – Measures Affecting Dessicated Coconut to be at odds with the spirit, if not the letter, of the WTO dispute settlement process. The consultation phase, compared to the panel and appellate processes which are heavily formalized, is informal and designed to allow parties to gather information and “jawbone” their way to a solution while avoiding the costs and demands of panels. As such, the process enables parties to reach settlement of their dispute without having to resort to the panel stage.

It is observed, however, that Members have started to view consultations as a *pro forma* step rather than as an opportunity to resolve disputes. While this goes against the objective of consultations to facilitate the process of reaching an amicable solution bilaterally, representatives insist that this view must be qualified since the approach to cases cannot be uniform.

When the consultations process is viewed as just a procedural step, it reduces the scope for meaningful discussions between parties. On the part of the complaining party, the filing of a request under Article 4 of the DSU may be a signaling device of its serious intent to pursue a case to the panel, and if need be, to the Appellate Body stage. The concept of credible threat applies in the situation where a responding party interprets such action to be indicative of the complainant’s willingness to expend time and resources to be able to obtain
a solution to the issue at hand even through a long legal battle, and as such, responds in a manner that the complaining party prefers – that is, ‘cooperatively’. The discussions that then follow is a bargaining process wherein factors that first justified the imposition of the measure, and for the complaining party, factors that affected its decision to complain are again considered by the individual parties now within the light of the possibility of a challenge before the courts, should the negotiations fail.

The treatment of consultations also depends on the objective of the complaining party. It is observed that governments are increasingly pursuing strategic litigation to seek to establish precedents and enforcement of rules which protect and promote the interests of their domestic industries.  

Practitioners of WTO law and observers indeed identify the effectiveness of the system’s ability in helping resolve cases prior to going to a panel as a key issue of this phase of the dispute settlement. And while there is some sentiment that the system in this area is working adequately, there is stronger sentiment that improvement is still necessary.

**Participation of third parties**

Once the request for consultations has been filed, Members who feel that they have an interest in the dispute may signify their interest to be joined. Art. 4.11 states that

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations.[…]

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36 Palmeter and Mavroidis (1999)
37 Cameron and Orava (2000)
According to many of those who were interviewed, the presence of third parties would be perceived differently by the parties, depending on whether the Member is a complainant or a defendant. Viewed by the complainant, having third parties is beneficial because it would help build support for its position thus serving as critical pressure, and may even enable it to gain “allies” who could, should the case reach the judicial stage, become complainants as well to the dispute and, thus, add “weight” to the opposition to the measure. As a respondent, the opposite would more likely be the view taken. This is perhaps the rationale for why it is the respondent, as explicitly stated in the relevant article in the DSU, who will assess the justifiability of the requests of third parties to be joined.

While the presence of third parties creates more of a psychological impact for the principal parties, rather than the substantial impact of a legal right, their participation at the initial stage of the formal process is important for considerations of due process. The point of the exercise of joining for purposes of information and guidance, however, is nullified when the principal parties choose to steer clear from substantive discussions during meetings where third parties are present. While the conduct of formal discussions does not prevent the principal parties from meeting “informally”, that is, on the side without third parties present and which are, in fact, the “real” meetings, the question of transparency arises when such practice occurs.

In practice, third parties do not usually speak unless being invited to do so. Any position, or any opinion raised by them during the consultations, are merely treated as expressions of their views and do not have legal implication. Principal parties can benefit from such exercise because it enables them to identify possible “allies” and perhaps clarify their own positions. On the other hand, the exercise benefits third parties because, when conducted in a constructive and progressive way, may clarify doubtful issues, and bring to perspective their own concerns against the bigger picture.
Third parties, however, have very limited rights in the consultations stage. Their request to join may even be denied since it is possible for the concerned party\textsuperscript{38} to reject the claim of substantial trade interest. The requirement of the claim being “well-founded” is a subjective requirement, and Members who face a complaint may adopt a more stringent standard, depending on how it perceives the presence of third parties would affect the discussions.

**Duration of consultations**

Parties to a dispute are given 60 days to settle. Article 4.7 states that

> If the consultations fail to settle the dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel.[...]

It would appear from a comparison between the number of requests for consultations, the cases that went to panel, and the notifications of mutually agreed solution presented in Chapter 4 of this study that a large number of cases are still under consultations, and many have exceeded 60 days. Representatives who were interviewed believe that more cases have reached mutually agreed solution than is otherwise known based on notified solutions. Reasons suggested by representatives on why Members deliberately do not notify include the following: a) the parties prefer not to make the information public, an action tantamount to an announcement, in order to preserve sensitive business interests, b) the issue is linked to political and diplomatic considerations and does not lend itself to straightforward resolution through the WTO framework.

Commentators, however, point out that the 60 day-period after the receipt of the request for consultations is too short to enable countries to get a good insight into the strengths and weaknesses of one’s respective cases, and in complicated cases being brought to litigation without having been sufficiently considered in all their aspects by both sides.\textsuperscript{39}

\textsuperscript{38} the party “to which the request for consultations was addressed”

\textsuperscript{39} Kuijper (2000)
**Good Faith in Consultations**

Members entering into consultations are obligated to proceed in good faith, as mentioned in Article 4.3,

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made...shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.[…]

The importance of acting in good faith in regard to settlement of disputes is further underscored in Article 3.10 which provides

It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

**Issues affecting good faith in consultations**

*a) Refusal to enter into consultations*

In the *EC-LAN cases*[^40], this issue was addressed. The report of the Panel mentions that although Article 4 does not have specific rules in this regard, it should be considered whether or not refusal to consult by the defending party should be deemed as a failure to settle a dispute, and the complaining party should be entitled to immediately request the establishment of a panel accordingly.

[^40]: WT/DS62/R
This issue arose too in the *EC-Trade Description of Scallops.*\(^41\) The parties to consultations must attempt to obtain a mutually satisfactory solution until the end of the consultation period, unless otherwise agreed by the, and the complaining party should not prejudge the outcome of consultations in light of the spirit of the DSU which clearly prefers a solution mutually acceptable to the parties to the dispute.

*b) Lack of meaningful discussions*

Inadequate provisions in the DSU for compelling the complaining party to hold meaningful discussions during the consultation process together with the automaticity of the dispute settlement system grant considerable discretion to the complaining party, which, in turn, could lend itself to misuse of the process. Under the present provisions, the complaining party knows that whether it is engaged in meaningful consultations or not, automaticity of the system will lead to panel establishment. The existence of such a possibility does not promote efforts to be made on either party to mutually conduct consultations in good faith and attempt to obtain satisfactory adjustment of the matter.

The perception of lack of meaningful discussion may come from either complainant or respondent. For the respondent, the sentiment that the other party is not cooperative and makes no effort to positively contribute to the speedier resolution of the dispute arises when the complainant does not respond to requests for further information in order to clarify the issues at stake, or when it does, dismisses it in a perfunctory manner stating that relevant material or documents are publicly available anyway and it is the requesting party’s responsibility to obtain it, and when requests for further meetings are ignored. Some Members believe that the burden of proof lies on the complaining party, and if consultations fail from the view of the complaining party, it is because it did not do its “homework.”

Some interviewees feel that it is the right of a party to withhold information, or to obstruct a solution at the consultations stage. The refusal by one party to divulge information has been justified by the apprehension that such could be used to support arguments in favor

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\(^41\) WT/DS7/R, WT/DS12/R and WT/DS14/R
of the other party and thus, undermine the position of the former should the case reach the panel stage, and that questions are leading to legal clarification which should be made only before a panel. It is observed that when a political decision has been made by a Member to proceed to the panel stage for its own reasons, and parties harden their stance, the consultations phase usually produces very little additional information.

When there is reluctance in disclosing additional information, questions posed lead to legal clarification (which should be made before a panel), and when the discussion is essentially limited to confirmation of what is already publicly available information, these are indications that the consultations phase is treated as a mere formality, a procedural step or preparatory phase to the panel proceeding. This lack of meaningful discussions is also manifested in instances where there is rejection by the other party of further discussions/meetings once initial meeting has been held, or when indeed a meeting is held, it is extremely brief and there is no substantive exchange (there have been cases when the meeting would last a mere 15 minutes). That such situations occur could be attributed to the fact that the right to request for the establishment of a panel is reserved for the complaining party and that the only prerequisite for requesting a panel is “the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations.”

c) Imbalance in the obligation to consult in good faith

The language of the relevant provision requires that “the Member to which the request is made…shall enter into consultations in good faith…” Some representatives feel that this points to an imbalance in the obligation to proceed in good faith, suggesting that this is more an obligation of the respondent party. The provision being silent on how the complainant must proceed is a gap which the complaining party could take advantage of, especially in cases where there are other objectives beyond obtaining a satisfactory solution that are being sought.42
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d) Adequacy of consultations

According to WTO case law, it is not necessary for a complainant to establish the adequacy of consultations, only that they have been held or at least requested. In the panel report on EC – Regime for the Importation, Sale, and Distribution of Bananas,43

[…] disputing parties should consult in good faith and attempt to reach a solution. Consultations are, however, 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.

With respect to the issue of consultations having to ensure adequate explanation of the complainant’s case, the same panel says

Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfillment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result of which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have “fail[ed] to settle a dispute within 60 days of receipt of the request for consultation…” Ultimately, the function of providing notice to a respondent of a complainant’s claims and arguments is served by the request for establishment of a panel and by the complainant’s submissions to that panel.

42 Such as seeking to establish a precedence through judicial ruling.
43 WT/DS27/ECU
The panel in *Korea – Taxes on Alcoholic Beverage*\(^{44}\), on the same issue, expounds that

In our view, the WTO jurisprudence so far has not recognized any concept of “adequacy” of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. What takes place in those consultations is not the concern of a panel[…]. We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case.”

The Panel sticks to the language of the request for the establishment of panel. It is assumed that consultations would have covered the claims and the issues specified in the request. In cases where there is disagreement by parties on the claims being adequately covered by consultations, or being subject of consultations, it has been suggested by some interviewees that the use of a questionnaire during consultations would help in presenting proof to the Panel that indeed these claims were addressed during the bilateral discussions.

**Transparency in Consultations**

*a) Joining of third parties*

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held…, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not

\(^{44}\) WT/DS75/R and WT/DS84/R
accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.\(^{45}\)

A Member requesting to be joined in the consultations is not automatically joined. First, the Member requesting must have substantial trade interest. Second, the claim of substantial interest is well-founded. Two points in the conditions that must be met are however, vague, opens the possibility of arbitrary rejection, and impacts on transparency of the process. First, on those who may request consultations. It is not clearly understood why different language is used in Article 4.11 referring to who may request to be joined in the consultations. The first line refers to those with “substantial trade interest” while the second line uses the term “substantial interest”.\(^{46}\) Second is the assessment by the “Member to which the request for consultations was addressed” of whether the claim is “well-founded.” This second point necessarily stems from the lack of distinction between the terms “substantial trade interest” and “substantial interest.” As such, even if the Member requesting to be joined in the process does fulfill the requirement of having “substantial interest” as defined by Article XXVIII, there is no objective criteria on which a Member to which the request is addressed can base the validity of the claim or its being “well-founded.” The assessment is subjective and could lead to denial of third parties even if reasons for joining are, on their face, reasonable.

A Member filing a request for consultations may invoke either Article XXII or Article XXIII. While Article XXII:1 fulfills GATT’s consultation requirement, the language of Article XXIII:1 is more focused on “violations.” Complainants, therefore, who choose to conduct consultations under Article XXIII are likely to have grievances that are more

\(^{45}\) Article 4.11 DSU

\(^{46}\) In Ad Article XXVIII, “The expression “substantial interest” is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.” No precise definition for “substantial interest” has ever been agreed. During the meeting of the Committee on Tariff Concessions in July 1985, it was stated that the “10 per cent share” rule had been generally applied for the definition of “substantial supplier. (Guide to GATT Law and Practice)
contentious, and better defined with respect to GATT rights. Disputes under this provision, may therefore be predisposed to reaching panel stage, but may also more likely to end with concessions. Findings, however, show that the article’s more specific language about violations does attract more contentious cases. A case brought for consultations under Article XXIII:1 is 40 percent more likely to proceed to panel, than one that is not conducted under this provision.\(^{47}\) Those who were interviewed observe that as a practice, under GATT 1947, Article XXIII served as a litigation type of signal and was invoked if there was intention to go to panel. Then, Article XXII was regarded as less formal, less judicial, although the distinction does not anymore hold in the WTO.

The joining of third parties depend on whether consultations were requested under Article XXII or Article XXIII. Third parties may be denied participation if consultations are conducted under Article XXIII. While none of those interviewed could elaborate on the reasons why, it is believed that it has always been the practice even during the GATT days, and that perhaps the sensitivity and the degree of difficulty of the issue or the case warrant more private discussions (and as indeed supported by the statistics mentioned above). The practice, however, to systematically deny third parties by invoking consultations under Article XXIII (observed to be happening in the WTO), is not well received by many Members, and goes against the principle of transparency.

On the issue of strengthening third party rights in the consultations stage, there are opposing views. Some of those interviewed feel that cooperation is impeded by the number of parties. This view is supported by bargaining literature which holds that the more complainants in a dispute, the less likely a defendant is to meet the many and likely conflicting demands being made of it. The problem of balancing these demands in turn lowers the possibility of reaching concessions, and leads complainants to request a panel to sort through the issues.\(^{48}\) Some, however, maintain that bringing the case under the WTO is taking the complaint to the multilateral system, hence, to all the membership. Keeping the system closed by denying third parties is, in effect, “bilateralizing” the system.

\(^{47}\) Von Bogdandy (1992) and Petersmann (1994) as mentioned by Busch (2000)
\(^{48}\) Petersmann (1997) as noted by Busch (2000)
b) Absence of records of the consultation proceedings

As in the previous issue, this relates to impact of the proceedings on third parties. There are suggestions to maintain records, at least of the general flow of the discussions, in order for third parties to ascertain if indeed the substance of the meetings will not have potential to affect them adversely. This, however, is in conflict with the confidentiality requirement of the consultations as provided for in Article 4.6

Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

Setting procedural rules on maintenance of records, moreover, might discourage parties from being “open” and forthcoming, as the Appellate Body requires in India-Patent. Rules by which parties are held to account for what they have said or not said during consultations will likely have a chilling effect on the consultation process. Some parties are reluctant to engage in this type of discussions for fear of the longer term adverse panel and appellate body implications of the substance of what they say. Such situations encourage complaining parties to seek very broad terms of reference in their request for the establishment of panel. On the other hand, some parties regard consultations as an opportunity for discovery and take advantage of Members who speak freely in the assumption that all discussions are completely off the record.

Approach to Consultations

Do developing countries approach consultations differently than developed countries? Interestingly, those interviewed, representing Members, both developed and developing, who have been most active in filing complaints with the WTO, offer different views. All agree that the consultations phase is useful, but not all do on its degree of usefulness. Developed countries are perceived to be more litigious because of their wherewithal and experience in WTO law, and thus, can afford to litigate even small and seemingly unimportant cases at huge political expense to the other party. Those representing developed
country Members, however, do not subscribe to this. According to them, it is politically difficult for them to decide when to bring a case to the panel because of considerations of strong and well-established domestic constituencies representing conflicting demands, and the political structure.

Overall, no distinct pattern can be discerned from the WTO cases that have so far been settled at the consultations stage. The approach to each case varies, and governments decision to pursue a case to its litigious phase or to settle a case outside the judicial phase through continuous consultations without resorting to the establishment of a panel, or continue to seek solutions bilaterally in parallel to the work of the panel, all are motivated by a number of considerations. Each case, in the experience of Members who have had the most occasion to use the system, is different, and should be viewed as such.

The effectiveness of the consultations phase in serving the three (3) functions outlined in a previous section\textsuperscript{49}, however, depends on the approach or strategy taken by the parties to the dispute. Members agree that there is no single approach in handling disputes because each case is unique and must be treated on its own merits. Based on their experience, representatives identified the following to have influenced the manner in which they approached the consultations process:

1. *Importance of industry to the national economy*. For smaller economies who are dependent on fewer industries, this is a more compelling reason to approach consultations more seriously. Representatives who were interviewed generally feel that the relative importance of the industry to the economy, and the degree of dependence on it by these countries relative to the risks faced by bigger trading partners when bringing a dispute to the WTO, make smaller countries more enthusiastic about coming to a bilaterally negotiated settlement, and hence, avoid the further risks and demands of bringing a case to the panel. Once the consultations, though, do not conclude in a mutually agreed solution, the same countries are observed to adopt a tougher stance and are less flexible in comparison with developed country complainants.
2. Strength of trading relations between the parties. This is similar to the notion of bilateral trade dependence which suggests that the greater the ratio of the complainant’s to the defendant’s bilateral trade dependence is, the less bargaining power the complainant has relative to the defendant, whose costs to “non-agreement” are lower.

3. Difficulty of discussions in the informal consultations. Countries usually have a range of ongoing matters of concern to their trading partners. As such, Members carry on informal consultations on trade regulations. The filing of an Article 4 request for consultations is not the actual commencement of discussions between the parties concerned. Rarely do Members being complained against hear about the complaint for the first time when the filing of a request is made. Usually, informal contacts and bilateral discussions on the measure at issue have already been initiated by the complaining party. When these informal talks have not been fruitful or have not progressed in the view of the complaining party, the recourse to formal consultations (Article 4 consultations) serves as a signal or threat.

4. Political and other considerations. When parties are assymetrical, and the stronger party chooses to link the resolution of the trade conflict to a political or another non-trade issue, the weaker party would most likely opt to give in to stronger states’ demand, whether for the withdrawal of a complaint or for concessions, whichever applies. The bargaining power of each side would also reflect the power otherwise existing in international negotiations. At this stage, even with a strong case of violation that would favor a complaining party bringing the matter to a panel, both sides would have the incentive to settle in order to save time and resources that would be expended if the case should go through the panel process.

49 Refer to The Role of Formal Consultations, page 40.
50 For example, those resulting from amendments to statutes or regulations, executive actions, decision of courts, or actions of administrative tribunals responsible for enforcing trade remedy laws.
Many, however, view the outcomes of consultations to be dictated by the relative political power of the parties, and this is regarded as the downside of the consultations process. It is argued that the less one relies on objective, institutionalized norms as means of resolving conflicts, the more likely it is that outcomes will depend on which side has the strongest power position.

5. **Reliance on other avenues to negotiate.** This is more applicable to the developed economies. For countries with more established trade relations or in cases where parties are symmetrical, bilateral processes or informal consultations are regarded as more helpful. Hence, once the dispute reaches Article 4 consultations which trigger the formal process, it serves a signaling effect. During informal consultations\(^{51}\), parties do not feel pressured by having to meet deadlines (period required when invoking the formal procedures under Article 4), and therefore, more likely to engage in active discussions regarding the measure at issue, its effects, the political and other underlying reasons for the imposition of such measure, and perhaps, the inclusion in the discussion of matters not always directly affecting the relevant sector, but likely to have a discernible effect on overall relations between the parties. The latter would include political and other considerations that reflect the level of diplomatic relations between the two parties.

Representatives of Members admit that in most instances, parties do come to the table already with an idea of what is the likely outcome of the process of consultations, after taking into account the above considerations. Moreover, they point out that experience, and not just resources, help complainants articulate grievances in a manner that produces outcomes at the WTO.

\(^{51}\) Informal consultations refer to the bilateral consultations that occur outside of the WTO dispute settlement procedures, and which take place prior to the decision of either party to request consultations under Article 4 DSU or any other provisions on consultations under the covered agreements.
B. Mutually Agreed Solutions

Article 3.7 DSU states that

[…The 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 clearly to be preferred. […]

In the hierarchy of preferred outcomes, mutually acceptable solution comes first, followed by withdrawal of the measures if found inconsistent with the covered agreements, compensation, and suspension of concessions. This objective is evident in the following provisions,

In the course of consultations…before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter (Article 4.5).

Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution (Article 11).

Consultations, with a view to achieving mutually agreed solution, could continue while Panel proceeds with its work.

Implementation of Mutually Agreed Solution

A few insights into the implementation of mutually agreed solution may be gathered from some of the notifications submitted and the interviews conducted. The relevant notifications for this information are those which indicated that the other party had satisfactorily implemented the solution. Apparently, the difficulty of implementing a mutually agreed solution, 52 is determined by

52 Here, based on the length of period between the request of consultations and notification of solution.
a) *Domestic institutions.* This is exemplified in cases where enactment of or amendment to legislation is necessary, and in countries where the legislative process is relatively more difficult and cumbersome (e.g. in the US), the satisfactory implementation takes a much long time.

b) *Technical difficulty of cases.* When cases involve measures that require sophisticated scientific testing of goods in order to establish satisfactory compliance with certain standards, the duration is longer than for most cases.

When parties to the dispute perceive that the process is useful, that there is progress, however slow, owing to the aforementioned factors, the consultations process could take years but nevertheless produce a positive outcome, that is, a mutually agreed solution.

**Issues Relating to Mutually Agreed Solutions**

1. *Compliance with the mutually agreed solution*

   Members adopt different approaches in ensuring that parties respect what has been mutually agreed. Some of those interviewed hold the view that Members rely on good faith. Once agreement is reached by the principal parties, the party complained against is expected to carry out the terms of the agreement, be it the removal or the modification of a measure, the enactment or amendment of legislation, or some other appropriate action. The complaining party, on the other hand, is expected to refrain from pursuing the complaint whether in informal settings or in the WTO framework. Both parties are expected to carry out their side of the bargain.

   Even if parties did not notify the mutually agreed solution, in most cases, there is always a written agreement, regardless of whether it is consistent with WTO Agreements or not. The complaining party knows that when the agreement is not notified and effectively, is a ‘secret’ bilateral deal, i.e. outside the framework of the WTO, it accepts the risk of the other party not complying with the terms. Those interviewed admit that
international diplomacy plays a significant role in discouraging Members from reneging on their commitment. The motivation not to deviate from the agreed solution does not only come from the ‘threat’ of the case being brought to the panel, but comes as well from the favorable impression that a Member wants to maintain among the WTO membership. It is also in the interest of the parties, particularly the respondent Member, to fully comply and maintain credibility and thus, not risk its chance of settling amicably with another Member should it be involved in any future complaint, whether on the same measure or a new one.

Some Members ensure that any issue regarding compliance with the solution is properly addressed by specifying rules on complaints under the bilateral agreement. Some notifications indeed specify the condition that if an agreed action is not carried out within a certain period, the complaining Member reserves the right to request the establishment of panel. While it is not explicit in the notification, it is presumed that the ruling of a panel is being sought on the original measure, not the violation of (or non-compliance with) the solution agreed upon, based on the Panel’s authority to rule only on WTO-covered agreements.

2. **Legal status of the mutually agreed solution**

The matter for consideration here is determining the bindingness of a mutually agreed solution. The Agreement is not clear on this point. Several questions may be raised in relation to this issue: Can it be considered an agreement that is legally binding on the parties, wherein one of the parties may pursue legal action, or specifically, bring a case before a Panel on the ground that the other party did not comply with the terms of the agreement? What is the status of the agreement in international law? Does the agreement assume the status of a bilateral treaty? If it does, does provision on dispute resolution fall within the legal framework of the WTO? How is it possible to secure compliance within the WTO legal framework if the solution reached goes beyond trade, as is often the reality?
Most of the interviewees recognize the merit of the question and suggest that it could be subject of serious consideration by the membership. The alternate view held by a few is that the complainant is not prevented from having recourse to the dispute settlement process through a formal complaint provided that the solution has been reported and is compatible with the WTO agreements. Pursuing this view leads to the question of whether the complaint will be against the non-implementation or violation of the terms of the agreement, or the original measure which presumably is still being implemented. In the latter case, a complainant may need to file another request for consultations on the same matter. Some interviewees feel that the fact that the solution is reported to the membership and the notification made public, confer to the agreed solution an element of bindingness. The argument posited is mainly the same as that for Members having an incentive to comply rather than deviate to protect its credibility within the international community. The inclusion of a condition in the notified mutually agreed solution to bring the matter to a panel (as mentioned in the previous subsection), is one way some Members address the need to monitor or check the compliance to the agreement themselves, for lack of a mechanism in the DSU to ensure this.

While a mutually agreed solution is presumably an agreement between the two Members, its status under international law is vague. It has been suggested that this is a matter creating an estoppel. Literature provides the essentials of estoppel to be: (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. There is, however, still a debate on whether indeed estoppel as a ‘principle’ is applicable in international law, its incidence and effects not being uniform.53

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53 Brownlie (1998)
Transparency in Mutually Agreed Solutions

1. Notification procedures on content and timing of notification

Although consultations between parties are confidential in accordance with Article 4.6, there is a notification requirement with respect to mutually agreed solution. Members are obligated to notify mutually agreed solutions as provided for in Art. 3.6

Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

This is to ensure transparency, one of the principles that underlie the implementation of the Agreements.

There is, however, a recognized problem of Members failing to seriously observe this provision. Representatives of Members agree that there seems to be a necessity to put timeframes with regard to notification. There is, however, still a strong sense that having no explicit provisions on timeframe thus, leaving to the parties the decision when to notify, is more consistent with the principle behind consultations, which is to allow the parties to handle their dispute in a pace and manner that is mutually acceptable and without external pressure. Moreover, it is argued that “…The aim of the dispute settlement mechanism is to secure a positive solution to a dispute…”, and where parties are mutually satisfied with an arrangement that had been reached bilaterally, then the aim of the dispute settlement mechanism shall have been achieved, whether a solution had been notified or not. Using this as a justification to avoid the obligation to report the solution, however, brings into question the transparency of the process.

54 Article 4.7 DSU
Members may choose not to notify immediately for any of the following reasons: parties prefer to continue working on the solution, adopting a let’s-see-how-it-goes attitude, or the complaint is overtaken by a different dispute, e.g. there is a panel working on a similar measure which is the politically ‘more important’ one.

The rather slack manner with which reporting of solutions has been approached does not help in determining if cases indeed are still pending consultations, or just have been simply abandoned. The latter scenario may occur because of any of the following: the measure was found to be WTO-consistent after all, is not causing harm, can be dealt with by other means or there are other venues which would facilitate a solution more effectively, and the measure was terminated for internal legal reasons.\(^5\)

The provision on reporting to the Dispute Settlement Body (DSB) and the relevant Councils and Committees is not explicit about the extensiveness of the reporting. A Member may opt to report extensively on the matter, or may choose to provide only minimal information. Representatives who were interviewed for this study observe that even if questions are raised by other Members requiring more detailed information and scrutiny of the subject, the reporting Member may respond only to the extent that it is willing to. There is a view, however, that Members, in general, adhere to a certain practice in international diplomacy of deferring to what parties to the dispute have agreed to, respecting the solution as a ‘gentleman’s agreement’. As such, a description of the solution in general terms is regarded as acceptable, and Members are not likely to question the validity or the WTO-consistency of the agreement even if they had the opportunity to do so in the DSB.

When notification procedures are not properly followed and delay or non-notification occurs, other Members lose the chance of evaluating the potential impact of the solution on their interests. Worse, the absence of information may result in the resumption of a complaint against the respondent party by a third party who was not in any position to know the substance of the solution reached by the original principal parties, and who feels that its
Article 4 Consultations: Role of Non-Litigious Approach in Settling Disputes

rights and benefits under the WTO are being impaired. Representatives generally opine that while there has never been a complaint brought against a Member for a solution that is perceived to affect the rights and benefits of another Member, there is no rule preventing a third party from bringing forward such a complaint.

The outcomes of cases which have not been reported as reaching mutually agreed solutions, therefore, can only be speculated on. It is not improbable to conceive of situations of impasse wherein the complainant stops pursuing the matter either by discontinuing bilateral talks within the context of informal consultations or by deciding not to move the case forward to the litigious phase, after defendant refuses to change the supposedly illegal measure. The second situation is when what Hudec (1993) calls ‘arm-twisting’ occurs. Hudec contends that the potentially negative outcome occurs when, after filing the complaint, the complaining government subsequently gives in to the arm-twisting, accedes to the demand, and then withdraws the complaint because the ‘arm-twisting’ restriction, having served its purpose, has been terminated by the defendant government. The following variants to Hudec’s ‘arm-twisting’ situation are also possible: when the responding government exercises its economic and political muscle to appease the other, who is the weaker party, by making concessions which may not be fully consistent with WTO agreements but politically difficult to reject, and thus enable it to maintain the illegal measure; and when the complaining party is the bigger country, the reverse would be the case.

The situations so far described have only referred to those where the outcome would be the maintenance of the illegal measure, as such, negative outcomes, at least with reference to compatibility with WTO agreements. Such variants, however, may also result in positive outcomes, that is, the withdrawal or the modification of measure to the satisfaction of the complaining party, which also implies the elimination of an otherwise WTO illegal measure.

Cases where parties have reached mutually agreed solution could be regarded as successful outcomes of consultations. The small number of cases where mutually agreed

55 The last could be the case with short-term measures that elapse before the WTO procedures could apply, e.g. temporary import restrictions on agriculture after a very good cropping season which makes importation of
solution have been reached, however, must be viewed with caution because it is not indicative of failure to settle disputes amicably.

2. Compatibility of mutually agreed solutions with the WTO Agreements

Article 3.5 DSU states:

All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

The Agreement is very clear with regard to compatibility of the mutually agreed solution with WTO Agreements. Representatives, however, admit that in practice, solutions accommodate some kind of violation, and that it is reasonable to believe that not all mutually agreed solutions are fully compatible with WTO Agreements, although none of the parties will acknowledge this. The justification offered for this is that the purpose of the DSU is to settle disputes between Members, and not the enforcement of the Agreements. Moreover, if the volume of trade of a third country affected by the implementation of the solution is very small, it may not justify the huge political costs of bringing it to dispute.

Reporting the mutually agreed solution to the DSB has no effect on the substance of the solution nor prevent the parties from implementing it to the full even if Members do not feel comfortable with the agreement reached, or even, perceive that the solution is not wholly WTO-compatible and has the potential to affect other Members’ rights. At this point when no complaint has so far been raised by other parties with regard to a mutually agreed solution, the concern regarding its possible adverse impacts on the rights and benefits of third parties is purely academic. The issue, however, may arise at any time in the future, and Members must begin to consider ways to address this. Any debate that may come up on this will necessarily be tied to the procedures on notification of mutually agreed solution, specifically with regard to its content and timing.

usual quantities unnecessary.
Some interviewees reason that the WTO is a political organization and was not established to police the actions of its Members. Members are bound by their commitments and are expected to act in good faith. The mechanism to bring into conformity any perceived violation is only through a formally raised complaint. Until such time, therefore, that a measure implemented by one Member is not brought to the attention of the membership through the formal procedures, the measure will continue to be implemented by the Member at no cost to itself, but presumably at a cost to another Member.

**Incentives to Settle**

Members prefer to settle disputes bilaterally for the following reasons: settling is perceived to be less costly financially and more accommodating of the interests of both parties (which is not the same in a ruling). In the case of a ruling, while the losing party is understandably not going to be satisfied with the outcome, there is no guarantee that the other party is going to be satisfied as well. Representatives add that the benefits of the diplomatic approach include less visibility and less political attention (parties prefer to avoid the pressure associated with high profile cases which could even delay or block the resolution of the dispute).

As mentioned in the previous chapter, Busch (2000) identified several variables having influence on the decision of parties to settle or escalate disputes. He suggests that the “openness” of the complainant’s and the defendant’s economies, respectively, may affect a country’s stance with respect to disputes. The more open to trade their economy, the more likely a party is to fear retaliation (whether as complainant or defendant to the case), suggesting that they should be more keen to resolve a dispute and panel more cases perhaps also with the objective of seeking to establish a precedent with respect to future cases. On the other hand, findings show that the codification of norms, contrary to what is commonly supposed, has no significant effect on the operation of the GATT dispute settlement.
Busch also observes that concessions are observed in 68 percent of the disputes for which data are available at the consultation stage. This implies that legal reform (right to a panel) had minimal effect on the approach adopted by Members toward dispute settlement under the GATT. The legal reform did not lead complainants to panel more of their disputes, cases were no more likely to settle in the consultations stage, and did not affect the degree of concessions made whether in the consultation or the panel stages. In terms of regime type, findings show that democratic regimes are more likely to resolve disputes through concessions, but only at the consultation stage. They are prone to escalating their disputes, but are no more likely to make concessions at the panel stage than other regime types.

An interesting finding is that defendants with more open economies are less likely to achieve resolution through concessions at the consultation stage. This may be explained by the fact that since more open economies are protected by fewer restrictions, cases brought against them are likely to be less clear-cut, and defendants finding it difficult to make further concessions. This, however, runs counter to the idea that more open economies try to avoid retaliation because of their dependence on trade. Complainants with more open economies, however, might prefer a panel because given their dependence on trade, the party may derive greater utility from a ruling that sets a precedent, therefore, constraining future actions of the other party.

There also is evidence that highly democratic regimes are more likely to achieve resolution through concessions at the consultation stage, but are also more likely to escalate to a panel where they are no more willing to make concessions than other regimes. Democracies are able to secure greater concessions in the consultations stage where there is less “paper trail”, facilitating deals that might otherwise be politically costly with respect to domestic and foreign audiences. But where settlement is difficult, countries with these regimes escalate more readily, and are no more likely to make concessions at the panel stage than other regimes. The tendency for democracies to achieve concessions at the consultation stage suggest that the lack of “paper trail” helps facilitate concessions, which affords disputants some cover from audiences. Busch suggests that investments in this stage should be made to ensure that this latitude is preserved, a point that gets lost in discussions of the
need for greater legalism in dispute settlement. So that while informal and formal mechanisms work in tandem, both require institutional investments tailored to their differences. The payoff to doing so is that the process of getting to the table may reduce the need for the disputants to ever get to the table.

Representatives interviewed for this study mentioned several factors that determine the ease or difficulty with which a mutually agreed solution is reached: a) political strength/importance of stakeholder/domestic industry, b) technical difficulty or difficulty of legal issues of the measure at issue, c) broader political relations with the other party, d) political structure of the country implementing the solution (e.g. domestic legislation is at issue) which affects the ease of its withdrawal, modification or implementation, and e) the economic impact, both on the producers and the consumers.

With regard to the value of a negotiated settlement over a ruling, respondents of this study believe that the diplomatic approach enables the parties to strike a balance in their interests, that is, to settle on a compromise, allows solutions to be tailor-made with shorter timeframes. On the other hand, if a case is brought to the judicial stage, during the two (2) or three (3) years that a case is ongoing, defending country can continue to implement the illegal measure, and simply withdraw or modify the measure when the ruling comes out. For the complaining country, the issue is whether the benefit when the ruling comes out after such length of time (and damage caused) is worth the cost of litigating. A disadvantage, however, of cases ending in mutually agreed solution is that the legal question is not settled. Bringing the case to panel sets precedence and builds jurisprudence.

C. Consultations and Panel Procedures

Escalation of Disputes

Members decide to escalate disputes by bringing the case before a Panel when there is an impasse (one of the parties does not appear to be interested in facilitating a bilateral solution) or the discussions, rather than softening the positions, accentuated the gap between
the opposing views that no mutually agreed solution could bring together. While the process is still Member-driven, that is Members, themselves trigger or suspend the judicial process through requests made by them, once the panel process starts, the parties are not left with much control over the matter. Consultations parallel to the panel proceedings, however, may still continue, allowing parties the option to settle bilaterally midway of the proceedings. The avenue to settle through diplomatic means, therefore, is never closed, thus supporting the notion that there is no conflict between the diplomatic approach and the judicial approach, and in fact, complement each other.

Busch’s findings show that escalation is more typical of developing countries filing against developed countries, complainants with more open economies, and complainants seeking consultations under Article XXIII:1. His findings also support the hypothesis that developing countries typically do not have sufficient resources or political influence to determine outcomes favorable to them during consultations with advanced industrial countries. They instead prefer to seek a ruling from a panel. In politically motivated cases, respondent countries may even prefer that the case be taken to the panel, just to be able to convince their industries that withdrawal or modification of measure is necessary for compliance with WTO rules.

What data in the previous chapter bear out, that is, a bigger number of cases not ending up in the panel stage must not lead to the conclusion that those cases were all settled bilaterally and hence, is contrary to the findings of Busch. The weak reporting mechanism of status of cases in the consultations stage as described elsewhere in this study leads to a gap in the information available, and therefore does not accurately reflect the real situation.

Factors that affect a Member’s decision to forgo settlement and escalate disputes to the judicial stage include domestic politics, the size or significance of trade of the good/service at issue, and an interest to clarify provisions or obtain interpretation of the WTO and the covered agreements through judicial ruling. Representatives, both from countries with long experience in dispute settlement, and those who have only recently made active use of the system, all agree that it is never an easy decision for Members to move the
case to the Panel stage. Other considerations when a member becomes involved in a dispute are the following:

1. *Competence of domestic authorities and agencies to attend to technical detail and handling legal matters.* The degree of competence of a Member in these areas affects the manner in which a dispute is handled.

2. *Interactions between the government agencies.* This refers to the level and the degree of interaction between concerned agencies.

3. *Interactions between the private industries (domestic constituencies) and the government.*

They observed that Members, in the early years of WTO, were very wary about bringing cases to the Panel for fear that the dispute would impact on the whole economy and overall relations with the other party. These days, however, disputes may take place without necessarily affecting overall relations with the other party. They add, however, that when Members increasingly opt to adopt the defensive variant, that is, taking cases to panel instead of attempting to reach a mutually agreed solution, it opens the possibility of countercomplaints. Such escalation of disputes would not only strain, but also, undermine the system.

**The Request for Establishment of Panel**

The case that has been subject of consultations may reach the panel stage in three (3) ways.

Article 4.3 provides for the first two ways:

[...]If the Member does not respond within 10 days after the date of its receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the
Member that requested the holding of consultations may proceed directly to request the establishment of panel.

Article 4.7 sets the third possibility:

If the consultations fail to settle a dispute within 60 days after the receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

**Claims of Parties**

How does the consultations stage shape the substance and the scope of the next stage? The substance of the relationship between these two phases of the dispute settlement system lies in the claims of parties to the dispute as submitted in the request for the establishment of panel. The question of when, how, and with what effect disputed issues are to be identified, however, is viewed as one stumbling block in the DSU.56 The concerns are mainly procedural such as, should a party make its claims explicit in the request for consultations or in the consultations themselves, and how do such statements shape the terms of reference of the panel, and can claims be refined and revised by a party as the proceedings evolve? Are parties bound by the claims it has made in its request for consultations, or the consultations themselves, in the same way it is bound by its panel request? More specifically, how does the consultation requirement affect the future conduct of the complaining parties?

A fundamental principle for any legal procedure, whether under national or international law, is that the party bringing the dispute should at the outset clearly define the scope of the procedure. This is to ensure due process and respect of defense of the respondent.

56 Horlick and Butterton (2000)
Article 4 Consultations: Role of Non-Litigious Approach in Settling Disputes

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which is Annex 2 of the WTO Agreement reflects this principle through the provision of minimum requirements on requests for consultations and for the establishment of a panel.

Article 4.4 states that the request for consultations,

 [...]shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

Article 6.2 provides that, with respect to requests for the establishment of a panel, the request

shall [...] identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

Setting stricter requirements for the request for the establishment of a panel as compared to that for requests for consultations as evident in the word “specific”, and the more detailed indication of the legal basis of the complaint, is also recognition of the fact that at the outset, a broader scope of discussions is necessary in order to fully accommodate the divergent positions yet clarify issues related to the measure and enable the parties to come to an understanding of each other’s position.

Examination of Claims by Panel

The request for establishment of panel determines the terms of reference of the panel, and only claims raised therein may be examined by the panel. In India – Patent Protection for Pharmaceutical and Agricultural Chemical Products[^57], the Appellate Body notes that “a claim must be included in the request for the establishment of a panel to come within a panel’s term of reference.” As opposed to the conditions for raising claims in consultations, strict procedural constraint is imposed by such an interpretation of the coverage of claims in
the panel stage. Considerations of due process require as much. Requiring similar conditions in the consultations stage, that is, requiring parties to state all of their claims fully both in the request for consultations and the consultations themselves effectively forecloses them from raising additional claims subsequently, the appreciation of which might have been gained by the parties only during the process of consultations. This is because the consultations provisions suppose that the parties will not necessarily know all the claims they will want to make or not make at this early stage.

The case law on procedural requirements under the DSU, however, does not seem to clarify or interpret these provisions in a very convincing manner. This may be attributed to the reluctance of panels and of the Appellate Body to throw out cases based solely on procedural grounds.\textsuperscript{58}

The question of how the substance of consultations can influence or input into the subsequent proceedings, or alternatively, can the panel refer to the substance of the consultations with regard to certain claims is not clearly addressed by the provisions. The only reference is “whether consultations were held”, as set out in Article 6.2 pertaining to request for establishment of panel. The issue in this is with regard to whether all claims indicated in the request were indeed subject of consultations. While the “quality” of the consultations cannot be ascertained from the request itself, it is likewise not within the authority of the panel to assess if the consultations conducted were sufficient to enable the parties to exhaust all possible avenues to settle the dispute amicably.

It is perceived by most of those interviewed that any matter before the panel is assumed to have satisfactorily fulfilled the requirement of consultations, so that it is not necessary that the panel examine the sufficiency of the consultations conducted. Moreover, the terms of reference of the panel is based solely on the document requesting the establishment of a panel, which would focus on the substantive claims of the complainant, and not on matters of

\textsuperscript{57} WT/DS50/AB/R
\textsuperscript{58} Jansen (2000)
procedure. A requirement on considering content or substance of discussions during the consultations stage will go against the confidentiality requirement in Article 4.6

Moreover, the Appellate Body has stated

[...]there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfillment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU.”

Other issues that may arise during panel procedures:

a) *New claims raised in the request for panel that have not been subject of consultations*

The wording of the request for consultations can be crucial because it identifies the issues that may be addressed by a panel, should the case proceed to this phase. The failure to raise a claim or to put forward a particular objection to the measure at issue has resulted in the respondent’s successful objection to its consideration by the panel. GATT panels have agreed with the respondent that a matter not raised in consultations was not properly before the panel.\(^{60}\) In the *EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, the Panel declined on the ground of inequity to allow the inclusion of an additional product item in the dispute because the respondent had not been formally advised of that item prior to the commencement of proceedings.

A number of those who were interviewed for this study suggests that request for consultations could be stated in general terms, so as not to limit scope of discussion which later on may give rise to new issues, and may require conducting another set of

\(^{59}\) European Communities – Regime for the Importation, Sales and Distribution of Bananas, as modified by the Appellate Body, adopted on 25 September 1997, WT/DS27/R, para. 7.20.

\(^{60}\) Thomas (1996)
consultations as a strict interpretation of the procedures would require. This should, however, be complemented with written documents that may be evidenced before the panel. Even if both parties render their best efforts to reach a mutually agreed solution, the availability of those documents must not be regarded as hindering the flexibility and the confidentiality that are expected of the process of consultations, but merely a support document for later reference. It could, moreover, serve as a mechanism to avoid the inconvenience of establishing the scope of the discussion in the consultations phase should the case proceed to the panel phase.

While there is no rigid requirement that the wording of claims in the request for the establishment of panel must be exactly as stated in the request for consultations because as mentioned elsewhere in this study, the language in the first request must provide sufficient scope for discussions that could lead to elaboration or narrowing of claims, there should at least be consistency in the claims mentioned in both requests. That is, how close is the measure to what has been discussed in the consultations?

The Appellate Body has limited the “matter” that is the proper subject of a panel’s attention to the claims explicitly stated by the complaining party in the terms of reference.

[T]he “matter” referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel’s terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.”

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61 WTO Appellate Body Report, Brazil – Measures Affecting Dessicated Coconut, WT/DS22/AB/R
b) Modification or replacement of measure at issue during the course of the panel proceedings

This is a situation wherein defending party improperly modifies the measures complained about, while maintaining the underlying policy, or replacing them with similar measures during the panel proceeding, in effect, still maintaining the violation. If the modified or new measure is deemed not to be properly addressed before the panel, the complaining party would be forced to start new dispute settlement proceedings again, that is, request consultations this time for the new measure. If a measure is introduced after consultations, i.e. new regulation substantially changed the matter, the Panel could say that the matter is not before them. Moreover, if conditions have changed in the course of consultations but if there still exists a violation of the Agreements, then consultations have to be conducted all over again. Such attempts by the respondents to defer the matter is contrary to the principle of prompt settlement of disputes stipulated in Article 3.3 DSU and is prejudicial to the effectiveness and credibility of the system.
VI. CONCLUSION AND RECOMMENDATIONS

Perception on the role of consultations vary among Members, varying from this phase being regarded as merely a procedural phase to stepping up the dispute to the litigious phase, to the view that it is a highly important phase that must be seriously taken by the disputants.

Procedures Governing Consultations

According to Hudec (1977), during the GATT days, it was generally agreed that consultation procedures were effective in settling disputes and that GATT should put emphasis on such procedures. Consultations, however, must not be perceived as a separate mechanism, beyond the realm of GATT rules and adjudicatory procedures. Rather, this effectiveness may be attributed to the larger framework of rules and adjudicatory procedures within which consultations operated. The rules themselves provided the normative standard – the starting point for the consultation, the relevant data, and the objective against which arguments, explanations and compromise solutions can be measured.

Adjudication procedures assure that rules are implemented effectively. Hudec argues that the mere existence of credible adjudication procedures will deter some of these spurious claims or at least discourage governments from maintaining them to impasse. For Hudec, the most important contribution of adjudication procedures lies in their impact on the respondent government’s willingness to cooperate. The incentive to cooperate is increased when failure of a consultation proceeding will expose the respondent government to the risk of a lawsuit. Paradoxically, the more credible the risk of that lawsuit, the better the consultation machinery will work, and the less the adjudication procedure will appear to be needed.

Some observers view that extraneous events, rather than the consultation process itself, are the primary factors in whether a case is settled or not, and the timing of such a settlement. The consultation process, however, may expedite the settlement process. On the other hand, it is observed by many that the consultation phase is important but misused
recently. For politically difficult cases, the practical effect of consultations is almost nil. It is pointed out that if a resolution had been possible, the informal consultations before the case is officially open (once it is brought to the WTO), is supposed to take care of this. The Article 4 consultations, then, is a formality because even this stage adopts the rigidity of the whole dispute settlement process. Article 4 is now regarded by Members as just the start of a contentious procedure. Formerly, the DSU was regarded as the last resort. Now, it is the first step (especially with countries whose political relationships are similar).

As suggested by findings of Busch, informal mechanisms such as consultations are not just a preamble to formal ones. And it suggests that while GATT legal reform has emphasized the importance of the panel stage, the “real action” is still to be found in the consultation stage. There are some implications to this: institutional resources should be invested directly in the consultation stage, rather than depending on indirect benefits from investments in the panel stage. Another implication is the direct investments to improve transparency at the consultation stage may be counterproductive, especially as more measures become “actionable” at the WTO.

There is a strong perception among representatives who were interviewed that adding more requirements, and having strict rules on the conduct of consultations would make the process more rigid, and being more structured will hinder the flexibility that Members at this stage prefer to adopt. As a general sentiment, the present rules are seen as adequate by many because it facilitates the diplomatic approach that allows Members to conduct consultations at their own pace, and in a manner that is mutually “acceptable”. Conducting consultations at their own pace is important because each party has to take into consideration a host of factors when approaching the negotiating table including those which are not possible to be addressed immediately, which, if thoroughly considered might lead to settlement.

This study submits that the significance of consultations does not lie in whether a case was successfully resolved bilaterally through a mutually agreed solution. While the chance of a positive outcome through consultations declines as a case progresses to the litigious stage, the importance of consultations is not diminished. The value of consultations is in making
available the opportunity to discuss the issue between concerned parties towards eventual resolution.

A review of the effectiveness and the role of the consultations phase of the WTO dispute settlement procedures, as attempted by this study, brings into focus several issues which Members may need to consider if indeed the objective of reaching a positive solution to the dispute through mutually agreed solution consistent with WTO Agreements which is the stated preferred approach, is to be achieved. Several recommendations that could help strengthen the present procedures and practice are put forward in the next subsection.

**Strengthening the Consultations Phase and Informal Mechanisms for Dispute Settlement**

1. *Complainant must be required to hold initial consultations with the other party to the dispute and have at least one subsequent meeting, if requested, within the 60-day period required by Article 4.7.*

   This is to address the situation where the other party refuses to enter into consultations, or if it does enter into consultations, refuses to accept a request by the other party for another meeting, and in doing, reduces the chance for parties to explore possibilities toward attaining an amicable solution.

2. *Strengthening participation of third parties through the following:*

   a) clarification of the language in Article 4.11 on who are the third parties, b) removing the option to deny third parties by invoking consultations procedures under Article XXIII thus making the acceptance of third parties automatic, c) determination of third parties to be strictly based on substantial trade interest, and d) indicating a general criteria for assessment of whether a such claim of interest is well-founded, and e) adding the requirement that third parties be present in at least the initial meeting of the parties.
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In the current provisions, third parties wishing to join may be denied at the consultations stage either through the complaining party’s making a request for consultations under Article XXIII, or if the request to be joined is not deemed to be well-founded by the party to whom the request was addressed. The view on this issue is somewhat divided. Some Members feel that transparency is not the only virtue of the dispute settlement system. Its ability to solve disputes bilaterally through mutually agreed solution is another, and if that requires flexibility and closed negotiations where the principal parties do not feel constrained by the presence of other Members especially on highly sensitive cases, then it must be so. Members who feel that the matter affects them as well, are anyway free to request consultations with the same Member on the same matter. Many, however, opine that each Member has the right to know more about a matter that affects or has the potential to affect them, whether directly or indirectly.

On the seeming imbalance in third party rights during consultations stage and the panel stage, it has been suggested by some that the system must be looked at as a continuum, and the automaticity of third parties joining in the panel stage must apply as well to the consultations stage. Perhaps the clarification of the language of the relevant provision is first necessary, and a qualification to the automaticity be introduced in order to take into account the fundamentally different approach to the dispute that each stage in the dispute signifies.

Clarification is needed in order to differentiate the two conditions in Article 4.11 on who may join the consultations: substantial trade interest and substantial interest. It is generally taken that the first one adopts the Article XXVIII ‘definition’ of substantial interest, while the second one refers to an interest which is of a systemic nature. It is not clear whether the omission of the word “trade” in the second line of the article was deliberate, and to what purpose. While so far no Member has challenged the validity of a denial of its being joined by the disputants, the vague and confusing wording lends itself to individual interpretations that may be used to unjustly deny valid and indeed, well-founded, requests by third parties.
In fact, even during the early GATT days, the importance of opening discussions to third parties having ‘substantial trade interest’ was already recognized. At the Thirteenth Session of the GATT 62, the Chairman noted that

The principal purpose of these procedures was to provide the framework within which a consultation initiated by a contracting party could be broadened, so as to include other contracting parties having a ‘substantial trade interest’ in the matter under discussion and which wished to be joined in the consultation. …It was intended that such multilateral consultations on questions affecting the interests of a number of contracting parties would facilitate the observance of the basic principles and objectives of the General Agreement. Thus, the procedures proposed by the Committee were not intended to relate only to consultations between contracting parties and Members of the European Economic Community, but for any consultations under Article XXII on matters affecting the interests of more than one contracting party. 63

In order to ensure as well that there is no arbitrary denial of requests for joining, it is suggested that a general criteria for assessment of whether a such claim of interest is well-founded be introduced.

To accommodate the interests of Members who feel that the matter affects or has the potential to affect them, and to give consideration to the concern of principal parties in maintaining an environment that is conducive to attaining a mutually satisfactory solution, it is suggested that the initial meeting must be open to interested parties who have substantial trade interest. 64 Principal parties, however, who feel that the sensitivity of discussions necessitate more private meetings, may have the option to deny further third party participation in subsequent meetings. While the level of discussions at the initial meeting will expectedly not reach very sophisticated levels and perhaps, will only be on general terms, the

62 By a Decision of 10 November 1958
63 Guide to GATT Law and Practice Analytical Index
64 In Ad Article XXVIII, “The expression “substantial interest” is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.
principal parties must be obliged to inform and assure third parties at least of the scope of the claims and preliminary positions during this meeting.

A few issues relating to third party rights that need to be considered include whether a Member who signifies intent to join consultations and is denied by the respondent, can bypass consultations and directly request the establishment of a panel. Another issue is whether it is worthy to consider a rule that only those third parties who joined in consultations may join in the panel phase.

3. *Flexibility in timetable for developing countries should be exercised.*

Article 4.10 states

During consultations Members should give special attention to the particular problems and interests of developing country Members.

While consideration of particular problems and interests of developing countries is supposed to be given during consultations, representatives admit that this particular provision holds no legal meaning and thus, is not seriously observed. It is pointed out by some that the differential treatment should be reflected in the substantive provisions, referring to rights and obligations outlined in the Agreements, and that all Members, regardless of economic power, should be governed by the same rules in dispute settlement. If the dispute is between a developed and a developing country, it is now left to the developed country to adopt more flexibility at least in the procedures or the modalities of the consultations, e.g. deadlines for requests for information, number of meetings. This sentiment is reflected in the fact that while many view the provision as weak and non-operational, there is very little by way of concrete recommendations. The only specific proposal that is being forwarded in relevant forums has to do with the timetable, and this study supports the suggestion.
Adoption of the proposed 30-day timetable for consultations for developed countries which may be extended to 60-days for developing countries, but retain the provision allowing the parties to mutually agree on a time period.

There is a proposal on reforms in the DSU which includes a proposal by a number of countries to reduce the number of days from 60 to 30. The recommendation adds 30 days to post-panel procedures, perceived to be a more complex stage requiring more time to be devoted by parties, without having to increase the total number of days for the dispute settlement process. The argument posited is that it is possible to reduce the number of days for consultations without affecting the intent of this phase of the dispute settlement for parties to reach a mutually agreed solution since they are free to extend their consultations beyond the 60 day period, provided it is mutually agreed.

Art. 4.3 provides

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt….

The language of this provision creates no legal obligation for Members to limit consultations within a certain time period. In fact, the parties may agree to extend the timetable by deferring the date of the initial consultations (“or a period otherwise mutually agreed”). The flexibility built into the language by the drafters may be based on the cognition that, even if prompt settlement of disputes is preferred, cases cannot be categorized to neat timeframes when discussions are still at the bilateral level because Members would choose to move their discussions at their own pace perhaps taking into account other factors that

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65 The proposal is worded as follows, “In paragraph 7 of Article 4, the numeral “60” shall be deleted wherever it occurs and the numeral “30” shall be inserted in its place. Insert at the end of this paragraph the following footnote: “Where one or more of the parties is a developing country Member, the time period established in paragraph 7 of Article 4 shall, if the parties agree, be extended by up to 30 days. Any other Member shall accord sympathetic consideration to a request by a developing country Member for such an extension.” (WT/MIN(99)/8)

66 Canada, Costa Rica, Czech Republic, Ecuador, the European Communities and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela, WT/MIN(99)/8
impinge on their diplomatic relations with each other. While some Members are of the opinion that bilateral talks are better undertaken outside the framework of the formal consultations, at least based on available relevant information from the WTO secretariat and anecdotal information from the representatives themselves, such does not seem to have any impact on their observance of the pace of the consultations. Members consult with each other at their own pace, whether within formal consultations under Article 4 DSU or within informal bilateral talks.

4. **For transparency and procedural efficiency, institute improvements in notification procedures:** a) require reporting of status of consultations on a periodic basis, and b) for mutually agreed solutions, procedures on who is responsible for reporting, the timing, and the content of the notification.

Not strictly adhering to the present notification requirements provided in the Agreement seems to be the current practice. The argument posited that the objective of the DSU being the settlement of disputes between Members is justification for this phase of the dispute settlement process to remain as flexible and as accommodating of the Members’ preference, hence, the comfortability of most of those interviewed, with the current provisions of the Agreement relevant to consultations, stands in contrast to the principle of transparency, and works against predictability which is supposed to be a goal of the trading system. How the consultations procedures outlined in the DSU have been utilized by Members so far, as evident in the statistics presented in the previous chapter, show that there is generally a lack of deliberate effort on the part of Members to ensure that the manner with which the consultations phase is handled does not compromise strongly held notions of transparency and good faith.

For matters that are subject of consultations, it is suggested that a reporting requirement be instituted. This is the updating by the Secretariat of the status of consultation proceedings of all matters that were subject of consultations on a periodic basis, say every June and December. Having parties submit notifications only after a reasonable time from the start of consultations has elapsed is more difficult to monitor because one always has to go
back to the date of the request for consultations because no reference period is established. The recommendation for a regular update, on the other hand, makes it possible to see the landscape of consultations at a certain point in time. It is suggested that the notification only require a statement of whether the matter is still under consultations, or has expired before the reporting date. This simple information requirement will neither compromise the stance of both parties nor jeopardize the sensitivity of the discussions, but is sufficient information for Membership and Secretariat to address concerns of efficiency and transparency.

For mutually agreed solutions, improvements must be specified in the language of the Agreement, in terms of who is responsible for filing notification with the WTO Secretariat, when it must be filed, and what should be contained in the notification document. From the mutually agreed solutions notifications available on the WTO website, it was observed that there was no discernible pattern in who notified. In some instances, it was the respondent party, and in others, the complainant, either case of which would still result in a single notification. There are some notifications which duplicate notifications submitted previously by the other party, only this time it is the other party notifying. This results in two notifications for the same mutually agreed solution. The confusion and double counting that may occur could be avoided if the provisions specify the obligation on both parties to jointly notify the mutually agreed solution. Not only is it a matter of procedural efficiency, but also of consistency with the idea of an amicable settlement being viewed and presented in a form acceptable to both parties.

Members are obligated to notify their mutually agreed solutions, but there is no specific provision on the exact timing of notification. As such, Members feel free to interpret this obligation loosely, and thus, notify at their convenience. The timing vary, from those which were immediately notified upon agreement (prior to implementation) to those which were notified only after implementation of the solution has been achieved to the satisfaction of the complainant. The timing thus range from within a few months after the commencement of formal consultations, to several years. The argument that imposing deadlines or timetable for notification would add unnecessary pressure to the parties who may opt to proceed with the discussions as ‘quietly’ as possible, especially in sensitive cases,
is valid and consistent with the idea of consultations providing the necessary flexibility to parties. Taking this into account, it is still possible to achieve procedural efficiency and more important, transparency, if there is an obligation to report the status of consultations on a periodic basis. The recommendation is to specify a provision that requires mutually agreed solutions to be immediately notified, at least within a month of the parties’ reaching agreement.

The current practice with regard to content of notification varies. Some Members submit detailed notifications and in some cases, with pertinent documents attached. There are notifications which simply stated that an agreement has been reached, no more. Again to ensure transparency, Members must be obligated to specify the following: the solution or agreement reached by both parties, a summary or description of the solution and, if possible, the attachment of the particular document setting out the agreement, and a statement declaring that indeed the solution has been evaluated by both parties to be compatible with the WTO Agreements.

The recommendations on improving notification procedures ultimately address the issue of compatibility of solutions with WTO law. The line drawn, however, between achieving solutions through non-litigious approach (consultations) and through judicial approach must remain unambiguous. Strengthening the former approach through stricter compliance with procedural requirements is not the same as the introduction of a legalistic mode into what used to be a wholly diplomatic phase, as some view it.

There is a requirement to report a solution to the DSB, and therein, discussions about the solution may ensue. It is, if properly observed by all Members, an opportunity for other Members to assess the impact of such a solution on their interests, and inadvertently, serves as check against the incompatibility of the solution with WTO law.
5. **Clarification of Art. 4.8** by identifying what are cases of urgency that merit accelerated timeframes.

6. **Availability of recourse by original parties to Article 21.5-type of panels for violation of notified mutually agreed solutions, and for parties whose interests are affected by the implementation of the solution.**

In the absence of specific rules regarding recourse by parties in instances where mutually agreed solutions have not been carried out as stipulated in the terms of agreement between parties to the dispute, the practice of some Members is to include an “enforcement clause”. The condition, mainly, is the reservation by the complaining party of its right to invoke panel procedures if agreement is not carried out within a certain period.

As they stand now, there are mutually agreed solutions which are notified to the WTO (through reporting in the DSB and the filing of a notification of a mutually agreed solution) and those which are not. Among those which are notified to the WTO, there are those which are WTO-consistent solutions and those which are perhaps to a certain degree, incompatible with the Agreements.

With regard to ‘violation’ of notified and WTO-consistent mutually agreed solutions, i.e. the concerned party has not implemented the solution or if the implementation is not in the manner that has been agreed, it is suggested that the complaining Member have recourse to Article 21.5-type of panels. Likewise, third parties who regard the implementation of the solution as affecting their rights and benefits under the WTO may make use of the same avenue.

While the possibility of starting procedures all over again by requesting consultations anew is not foreclosed (if terms of the agreement is not complied with), an alternative by the
complaining party to seek authorization to retaliate or impose countermeasures until such time that the “case has been solved” is proposed.

With respect to solutions that are not consistent with WTO law (and presumably, not notified to the WTO accordingly) and affecting the rights and benefits of a third country, these may be challenged under the formal procedures of the DSU. The question remains however for solutions beyond the scope of WTO, including non-trade elements, which affect Members other than the original parties to the dispute.

7. *Encouraging the use of alternative diplomatic approaches to WTO dispute settlement (Article 5 Good Offices, Conciliation, Mediation).*

In both national and international legal history, the mature judicial process develops out of relatively informal administrative and political procedures. International practice has long included negotiation, good offices, and mediation as informal methods of settling disputes. Treaties establishing machinery for peaceful settlement frequently provide for these methods and also for conciliation. 68

As of this writing, while these approaches are available to WTO Members, these have never been resorted to. The following reasons were suggested: there has been no need to use them; the more regular process is preferred, that is, industries do not want to take the risk of a result that would appear to be more favorable to the other Member. They also reason that the “conventional” way works, and because there is an efficient way to make your point, there is not much rationale to look to other means. There is also the fear by the parties that they might not get the results that they like. Some view that it is precisely the effective dispute settlement of the WTO through the judicial process, that makes Article 5 approaches of less utility, as compared to its wide use in other systems. Mediation is presumed to be effective

67 Article 21.5 DSU, “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. […]

68 Brownlie (1998)
for political matters, but not for commercial matters where private interests are being defended.

Davey (2000), however, views that any improvements to be made in respect of consultations should be in the direction of improving the possibility of mediation during consultations in order to promote settlements. On the other hand, “managed consultation” is being recommended, a hybrid of traditional diplomatic good offices and court appointed mediators. Such an option would help ease cases going through the litigation process and may provide the panel clarification of issues at an early stage. 69 The sense is that the WTO needed to do more to assist parties to resolve disputes at the early stages, and one of the means to do it would be recruiting mediators with professional training.

It is viewed, too, by some that when WTO came into existence, members generally took a more litigious approach to consultations, but with some jurisprudence already developed, it is reasonable to expect Members to be more willing to explore other approaches.

69 Cameron and Orava
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