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A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations

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A PROBLEM OF PROCESS IN WTO JURISPRUDENCE: IDENTIFYING DISPUTED ISSUES IN PANELS AND CONSULTATIONS

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I. INTRODUCTION

One stumbling block in the WTO Dispute Settlement Understanding[1] has been the question of exactly when, how, and with what effect disputed issues are to be identified. Must a party make its claims explicit in its request for a panel or in its written submissions to a panel? Must it make them in its request for consultations or in the consultations themselves? How do such statements shape the terms of reference for a panel? Can a party refine and revise its claims as the proceedings evolve? At first blush, one might reasonably conclude that the DSU answers such questions unambiguously in its provisions on Consultations (Article 4),[2] the Establishment of Panels (Article 6),[3] and the Terms of Reference of Panels (Article 7).[4] However, an examination of those provisions in light of some Appellate Body decisions suggests that the jurisprudence of these and related questions is so far unsettled. In particular, is a party bound by the claims it has made in its request for consultations, or the consultations themselves, in the same way that it is bound by its panel request?[5]

II. WHAT THE DSU PROVISIONS PROVIDE

A. *Consultations: Requests and Replies*

The WTO dispute settlement process, as spelled out in the DSU, begins when one Member makes a written request of another to enter

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1. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *in* RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 1 (1994), 404 (1994), 33 I.L.M. 1226 [hereinafter DSU].

2. *Id.* art. 4, at 407, 33 I.L.M. at 1228.

3. *Id.* art. 6, at 410, 33 I.L.M. at 1230.

4. *Id.* art. 7, at 410, 33 I.L.M. at 1230.

5. Under GATT practice, the analogous question was also much debated, though we will hold historical discussion in abeyance here.

consultations. According to DSU Article 4.4, that request "shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."[6]

Any 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]."[7]

Under ordinary circumstances, a Member receiving such a request must reply "within 10 days" and enter into consultations within "no more than 30 days" after receiving the request.[8] These time periods are shortened in urgent cases (for example, where perishable goods are involved),[9] in which case Members must enter into consultations no more than ten days after the request is received, and a panel may be requested when the consultations fail to settle the dispute within twenty days.[10]

Members are obliged to enter into consultations "in good faith"[11] and "attempt to obtain satisfactory adjustment of the matter."[12] Furthermore, the consultations "shall be confidential, and without prejudice to the rights of any Member in any further proceedings."[13]

B. *Panels: Requests and Terms of Reference*

Once the request for consultations has been made, parties may reach the panel process in three ways. First, if a Member simply does not respond within ten days of receiving the request, or does not enter into consultations within thirty days, then the Member requesting consulta-

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6. DSU, *supra* note 1, art. 4.4., at 408, 33 I.L.M. at 1229 (stating that the Member making the request must also notify the Dispute Settlement Body and the relevant Councils and Committees).

7. *Id.* art. 4.2, at 407, 33 I.L.M. at 1228. The duty to consult is a strict one. In *Desiccated Coconut*, Brazil refused to consult with the complaining party, the Philippines. In its report, the panel asserted 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." WTO Panel Report, Brazil—Measures Affecting Desiccated Coconut, WT/DS22/R, ¶ 287 (Oct. 17, 1996).

8. DSU, *supra* note 1, art. 4.3, at 408, 33 I.L.M. at 1228.

9. However, it appears that both parties must agree, which seems unlikely. *See* United States—Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974, WT/DS6/1 (May 22, 1995).

10. *See* DSU, *supra* note 1, art. 4.8, at 408, 33 I.L.M. at 1229.

11. *Id.* art. 4.3, at 408, 33 I.L.M. at 1228.

12. *Id.* art. 4.5, at 408, 33 I.L.M. at 1229.

13. *Id.* art. 4.6, at 408, 33 I.L.M. at 1229.

tions "may proceed directly to request the establishment of a panel."[14] Second, if the consultations "fail to settle a dispute within 60 days" after the original request for consultations is received, "the complaining party may request the establishment of a panel."[15] Third, if the parties jointly conclude that the consultations have failed to settle the dispute, the complaining party may request establishment of a panel even within the sixty-day period.[16]

Like the request for consultations,[17] the request for a panel must also be in writing.[18] It must indicate "whether consultations were held," identify "the specific measures at issue," and provide a "brief summary of the legal basis of the complaint" that is "sufficient to present the problem clearly."[19] If the Member requesting a panel wishes, a panel will be established after a successful request at the meeting of the Dispute Settlement Board (DSB), immediately following the meeting at which the request initially appears as an agenda item.[20]

Unless the parties to a dispute agree otherwise within twenty days of the establishment of a panel, the terms of reference of the panel shall be:

> To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).[21]

If the Member requesting a panel wishes non-standard terms of reference, the panel request "shall include the proposed text of special terms of reference."[22] Moreover, in establishing a panel "the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute."[23]

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14. *Id.* art. 4.3, at 408, 33 I.L.M. at 1228.
15. *Id.* art. 4.7, at 408, 33 I.L.M. at 1229.
16. *See id.*
17. *See id.* art. 4.4, at 408, 33 I.L.M. at 1229.
18. *See id.* art. 6.2, at 410, 33 I.L.M. at 1230.
19. *Id.*
20. *See id.* art. 6.1, at 410, 33 I.L.M. at 1230.
21. *Id.* art. 7.1, at 410–11, 33 I.L.M. at 1230–31.
22. *Id.* art. 6.2, at 410, 33 I.L.M. at 1230.
23. *Id.* art. 7.3, at 411, 33 I.L.M. at 1231.

III. DSU PRACTICE

Within the framework of Articles 4, 6, and 7, DSU jurisprudence has listed some important constraints as to when, how, and with what effect disputed issues are to be identified. Put one way, the rub lies in the difference between Article 4.4, which spells out the legal requirements for making a request for consultations, and Article 6.2, which does the same for panel requests. The key question is perhaps how these two sets of requirements bind the future conduct of the complaining parties.

A. *How Claims Determine Terms of Reference*

The Appellate Body has limited the "matter" that is the proper subject of a panel's attention to the claims expressed by a complaining party in the terms of reference. In *Desiccated Coconut*, for example, the Appellate Body asserts that:

> [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.[24]

This intuitively appealing proposition is supported by a predictable argument of fairness. "[T]erms of reference," writes the Appellate Body, "fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case."[25]

Subsequently, this view was elaborated upon in three important ways in *EC—Bananas*.[26] First, while anchoring the claims expressed in the terms of reference firmly in the request for a panel, the Appellate Body distinguished the requirement that claims be stated in the panel

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24. WTO Appellate Body Report, Brazil—Measuring Affecting Desiccated Coconut, WT/DS22/AB/R, at 21 (Feb. 21, 1997).

25. *Id.*

26. *See* WTO Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, ¶¶ 142–46 (Sept. 9, 1997) [hereinafter *EC—Bananas*].

request from the fact that a complainant will subsequently make arguments in support of its claims—developing and clarifying them—in various written submissions:

> In our view, there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second Panel meetings with the parties.[27]

Second, *EC—Bananas* presented the fairness argument of *Desiccated Coconut* (which focused on the terms of reference) in terms of the panel request.

> [I]t is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.[28]

Third, *EC—Bananas* stated flatly that partially expressed or otherwise defective claims could not, once they had been presented in a panel request, be amended or rehabilitated in arguments offered in later written submissions. The *EC—Bananas* panel stated, "[i]f a claim is not specified in the request for establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[29]

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27. *Id.* ¶ 141. In *Cement*, the focus on the panel request as the essential vehicle for the expression of claims was reinforced as well. According to the Appellate Body, Article 6.2 of the DSU requires that both "the 'measure at issue' and the 'legal basis of the complaint' (or the 'claims') be identified in a request for the establishment of a panel." WTO Appellate Body Report, Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, ¶ 69 (Nov. 2, 1998).

28. *EC—Bananas*, *supra* note 26, ¶ 142.

29. *Id.* ¶ 143.

B. *The Comeuppance and the Pettifogger*[30]

Given the details of Articles 4, 6, and 7, and the jurisprudence of *Desiccated Coconut* and *EC—Bananas*, few would be surprised to find less than generous treatment for any party attempting to fudge the requirement that a complainant's claims be stated fully in the panel request. This impulse to correct the misconduct of pettifoggers is part of the general desire to ensure fair treatment for defending and third parties by putting them on notice as to the terms of reference in a given proceeding. A complainant received its comeuppance on this score in *Salmon*:

> [The] request for the establishment of a panel did not include a claim of violation of Article 6 of the *SPS Agreement*. The Panel's terms of reference are determined by [the] request for the establishment of a panel. We, therefore, agree with Australia that Article 6 of the *SPS Agreement* is not within the terms of reference of the Panel.[31]

Likewise, another Member came up short in *India—Patent*.[32] After noting that "a claim *must* be included in the request for the establishment of a panel to come within a panel's terms of reference," the Appellate Body focused on the language of the request, which contended that "India's legal regime appears to be inconsistent with the obligations of the TRIPS Agreement, including but not necessarily limited to, Articles 27, 65 and 70."[33] The Appellate Body roundly condemned the notion that such language could be used to introduce subsequent claims:

> With respect to Article 63 [of the TRIPS Agreement], the convenient phrase "including but not necessarily limited to", is

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30. The *Oxford English Dictionary* defines a "pettifogger" as a "rascally attorney" who "employs mean, sharp, cavilling practices," a "legal practitioner of inferior status." The prefix "petti-" is derived from "petty" meaning "little-minded," while the noun "fogger" is of somewhat obscure origin though generally believed to be derived from the surname of a renowned family of merchants and financiers (namely, "Fugger") of Augsburg in the 15th and 16th centuries. OXFORD ENGLISH DICTIONARY V:1131, XI:643 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989).

31. WTO Appellate Body Report, Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R, ¶ 110 (Oct. 20, 1998).

32. *See* WTO Appellate Body Report, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997).

33. *Id.* ¶ 89.

> simply not adequate to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the *TRIPS Agreement* does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel.[34]

The Appellate Body's desire to impose a hard procedural constraint by narrowly interpreting the requirements of Article 6.2 is not surprising; rudimentary considerations of due process will seem to most lawyers, not to mention diplomats, to demand as much. It would be surprising, however, to find the same kind of hard constraint applied to consultations. That is, many would not expect, and not want the Appellate Body to require, parties involved only in the consultation phase of WTO dispute resolution to be required to state all of their claims fully—in the consultation request and the consultations themselves—and to be foreclosed from raising additional claims subsequently. Yet, in *India—Patent*, the Appellate Body, making use of the same due process rationale stressed in *Desiccated Coconut* and *EC—Bananas*, opined in *dicta* that:

> *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 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 subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding. But this additional fact-finding cannot alter the claims that are before the panel because it cannot alter the panel's terms of reference.[35]

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34. *Id.* ¶ 90.

35. *Id.* ¶ 94 (emphasis added). Witness, too, Mr. Parlin's observation that Japan has proposed a requirement that all legal claims cited in a panel request must have been raised during the

These propositions would reflect an ideal degree of disclosure by the parties, but they seem at odds with the spirit, if not the letter, of the WTO dispute resolution process. They are also impractical. The consultation portion of the process, along with conciliation, mediation, and good offices, is designed to enable parties to reach settlements of their disputes without reaching the panel stage. Although the panel and appellate processes are heavily formalized, the consultation process is comparatively informal and aims at allowing parties to gather information and, if possible, "jawbone" their way to a solution while avoiding the costs and demands of panels.[36]

Certain attributes of the DSU process vividly demonstrate that it is crafted to facilitate pre-panel resolutions. For example, while consultation requests must state "the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint,"[37] there is no panel-style record of the consultations which might figure into later proceedings. In fact, there is, by design, no record whatever: as an authoritative source has indicated,[38] typically, the consultations last "no longer than two or three hours,"[39] are "generally conducted in English with no interpreters, no transcript, and no taping"[40] and are closed to the public and other WTO Members.[41] Moreover, quite apart from the lack of a record, the content of all consultations is "confidential,"[42] and all consultations are undertaken "without prejudice to the rights of any Member in any

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consultations. *See* Christopher Parlin, *Operation of Consultations, Deterrence and Mediation*, 31 LAW & POL'Y INT'L BUS. 565, 571 (2000).

36. It also allows the parties a greater measure of control in shaping the outcome of their dispute. Presumably, the drafters of the DSU had this in mind when making the observation in Article 3.7 that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." DSU, *supra* note 1, art. 3.7, at 406, 33 I.L.M. at 1227.

37. *Id.* art. 4.4, at 408, 33 I.L.M. at 1229.

38. *See* William J. Davey & Amelia Porges, Comment, *Performance of the System I: Consultations & Deterrence*, 32 INT'L LAW. 695, 705 (1998).

39. *Id.* at 704.

40. *Id.*

41. There is an exception for Members with a "substantial trade interest" who may officially participate under Article 4.11, though this has been a somewhat vexed provision in its own right. For one thing, the respondent exclusively decides if another Member may join the consultations, and, of course, this has led to protests over the fact that a respondent may freely select Members who side with its view. A related but undecided question is whether a Member who joins on the basis of Article 4.11 should be able to bypass the consultations process and go directly to a panel itself. *See* DSU, *supra* note 1, art. 4.11, at 409, 33 I.L.M. at 1229.

42. *Id.* art. 4.6, at 408, 33 I.L.M. at 1229.

further proceedings."[43]

At a minimum, these provisions wisely suppose that the parties will not necessarily know all the claims they will want to make or not make at this relatively early stage. In this connection, the DSU provisions can create an atmosphere in which discussions can evolve and parties can speak and explore ideas freely and in private; in short, an "open" atmosphere conducive to settlement. On the other hand, the *dicta* of *India—Patent*, in effect, treat each party as a pettifogger and, at the end of the day, may only succeed in motivating all parties to be "guarded" rather than "open." Although, as Professor Davey has noted, "totally ignoring how the consultations are conducted could significantly undermine their role,"[44] any rule by which parties are held to account for all they have said or not said in consultations, will likely have a chilling effect on the consultation process. Some parties may stonewall altogether (as some do now), for fear of the longer term adverse panel and appellate consequences of saying anything at all, though they run the risk of having a complaining party seek very broad terms of reference in its panel request.[45] Others, ironically, will see consultations as an opportunity for discovery and will take advantage of Members who naively speak freely in the belief that what they say is completely off the record.[46] The Appellate Body, in recent cases, has shown a sophisticated understanding of the strategies being pursued in consultations; these decisions suggest that the focus has moved from what was discussed in the consultations to what was said in the panel request.[47]

As Mr. Parlin's statistical taxonomy of the DSU results over the past five years shows, forty-one of the seventy-eight complaints (or fifty-three percent) resolved to date have been resolved without resort to a panel,

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43. *Id.*

44. Davey & Porges, *supra* note 38, at 697.

45. *See Question and Answer Summary, Performance of the System I: Consultations & Deterrence*, 32 INT'L LAW. 695, 706 (1998) (summarizing a statement by Gary Horlick).

46. *See* Hyun Chong Kim, *The WTO Dispute Settlement Process: A Primer*, 2 J. INT'L ECON. L. 457, 462 (1999). For example, Mr. Kim reports that "Korea's experience has been that some complainants treat consultations as a discovery stage such as it exists under US civil procedure" and that "[i]n the DSU Review, a Member stated that the consultation stage is used as a 'mere procedural phase in panel processes'." *Id.*

47. *See* WTO Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, ¶¶ 124–31, 139 (Dec. 14, 1999); *See* WTO Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R, ¶¶ 29, 126–33 (Aug. 2, 1999); *See* WTO Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, ¶ 70 (June 5, 1998); *See* WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶¶ 155–56 (Jan. 16, 1998).

of which "thirty complaints have been resolved by bilateral settlements, three by withdrawal of the contested measure, and seven by withdrawal of the request for establishment of a panel or other provable abandonment."[48]

These numbers are encouraging. They also demonstrate that the DSU system—to the extent that it seeks to facilitate pre-panel settlements—is enjoying considerable success. Arguably, that success has been due in part to the separation between the consultation phase and the panel process, as well as the low-cost and potentially great benefits of participation in the consultation phase. However, if the hard constraints on consultations suggested by *India—Patent* were applied, that separation would be sharply reduced, effecting a virtual merger of the consultation and panel processes. In the worst case, the settlement rate would decline significantly as a result.

48. Parlin, *supra* note 35, at 568.