

1 ARTICLE 4	2
1.1 Text of Article 4.....	2
1.2 General	3
1.2.1 Purpose of consultations	3
1.2.2 Members' duty to consult absolute and not susceptible to imposition of any terms or conditions	3
1.2.3 Members' duty to disclose information.....	4
1.2.4 Consultations as pre-requisite for panel proceeding.....	4
1.2.5 Subject-matter of consultations to be determined on basis of written request for consultations	5
1.2.6 Inclusion of a "conditional request" in the request for consultations	5
1.3 Article 4.1	6
1.4 Article 4.2	6
1.4.1 "measures affecting the operation of any covered agreement"	6
1.5 Article 4.3	7
1.5.1 General	7
1.5.2 Duty to enter into consultations in "good faith"	7
1.6 Article 4.4	8
1.6.1 Notification of requests for consultations.....	8
1.6.2 "identification of the measures and an identification of the legal basis of the complaint"	8
1.6.2.1 Generally: no requirement of "precise and exact identity" between consultations request and panel request.....	8
1.6.2.2 "identification of the measures"	13
1.6.2.3 "legal basis of the complaint"	14
1.7 Article 4.5	15
1.7.1 Adequacy of consultations.....	15
1.8 Article 4.6	16
1.8.1 "consultations shall be confidential"	16
1.8.1.1 General	16
1.8.1.2 Information acquired during consultations.....	16
1.8.1.2.1 In the same proceedings	16
1.8.1.2.2 Information obtained in different proceedings	18
1.8.1.2.3 Offers of settlement made during consultations.....	18
1.8.1.3 Relevance of third-party participation to confidentiality of information in consultations	18
1.9 Article 4.7	19
1.10 Article 4.9.....	20
1.11 Article 4.11	20
1.11.1 "Wherever a Member ... considers that it has a substantial trade interest"	20

1 ARTICLE 4

1.1 Text of Article 4

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member 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 former.³

*(footnote original)*³ Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

3. 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 and 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. If the Member does not respond within 10 days after the date of 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 a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

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.

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

7. If the consultations fail to settle a dispute within 60 days after the date of 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.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

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

11. 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 agreements⁴, 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 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.

(*footnote original*)⁴ The corresponding consultation provisions in the covered agreements are listed hereunder:

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 Preshipment 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.

1.2 General

1.2.1 Purpose of consultations

1. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body explained the purpose of consultations:

"Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole."¹

1.2.2 Members' duty to consult absolute and not susceptible to imposition of any terms or conditions

2. The Panel in *Brazil – Desiccated Coconut* considered the importance of consultations in the dispute settlement process and indicated that the Members' duty to consult is absolute and cannot be subject to the prior imposition of any terms and conditions by a Member:

"The Philippines' request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU provides that 'Each Member 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 former'. Moreover, pursuant to Article 4.6 of the DSU, consultations are

¹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

'without prejudice to the rights of any Member in any further proceedings'. In our view, these provisions make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member."²

1.2.3 Members' duty to disclose information

3. In *India – Patents (US)*, the Appellate Body emphasized the importance of disclosing facts in consultations:

"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."³

4. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body stressed the importance of consultations:

"We note that Mexico emphasizes the importance of consultations within the GATT and WTO dispute settlement systems. We agree with Mexico on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.

The practice of GATT contracting parties in regularly holding consultations is testimony to the important role of consultations in dispute settlement. Article 4.1 of the DSU recognizes this practice and further provides that:

'Members affirm their resolve to *strengthen and improve* the *effectiveness* of the consultation procedures employed by Members.'
(emphasis added)

A number of panel and Appellate Body reports have recognized the value of consultations within the dispute settlement process."⁴

1.2.4 Consultations as pre-requisite for panel proceeding

5. In *Brazil – Aircraft*, the Appellate Body observed that "Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."⁵

² Panel Report, *Brazil – Desiccated Coconut*, para. 287.

³ Appellate Body Report, *India – Patents (US)*, para. 94.

⁴ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 54-56.

⁵ Appellate Body Report, *Brazil – Aircraft*, para. 131. See also Appellate Body Report, *US – Continued Zeroing*, para. 222.

6. In *US – Upland Cotton*, the Appellate Body stated that consultations are a "prerequisite to panel proceedings".⁶

1.2.5 Subject-matter of consultations to be determined on basis of written request for consultations

7. In *US – Upland Cotton*, the Appellate Body was faced with the question whether the subject-matter of the consultations is determined by the written request for consultations or by what actually happens in the consultations. The Appellate Body stated that:

"We believe that the Panel should have limited its analysis to the request for consultations because we are inclined to agree with the panel in *Korea – Alcoholic Beverages*, which stated that '[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel'. Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that '[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.' Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed."⁷

8. In *Argentina – Import Measures*, the Panel took guidance from the Appellate Body's ruling in *US – Upland Cotton*, and noted that:

"[F]or the purpose of examining the sufficiency of the request for consultations, a panel should look at the written request for consultations itself and not consider what may have happened in the consultations."⁸

1.2.6 Inclusion of a "conditional request" in the request for consultations

9. In *US – Poultry (China)*, the United States contended that China's claims under the SPS Agreement were outside the Panel's terms of reference. According to the United States, China had failed to request consultations under Article 11 of the SPS Agreement arguing that although China's consultation request referred to Article 11 of the SPS Agreement, China's conditional language meant that consultations were not actually required. The Panel therefore had to determine whether China's use of the conditional tense in its consultations request meant that China had *not* requested consultations under the SPS Agreement and whether that would deprive the Panel of jurisdiction to hear China's claims under the SPS Agreement.⁹ The Panel found that China's SPS claims fell within its terms of reference:

"China's consultation request, after outlining the legal basis for its complaint with respect to Articles I and XI of the GATT 1994, includes, in paragraphs 6 and 7, controversial language where it specifically references the *SPS Agreement*.

It appears to the Panel that China was attempting to challenge Section 727 under the GATT 1994 and the *Agreement on Agriculture*, and, in the alternative, under the *SPS Agreement* in the event the United States argued that Section 727 is an SPS measure within the scope of the *SPS Agreement*. It thus seems to the Panel that China wanted to ensure that the *SPS Agreement* was within the Panel's terms of reference in such a case. Rather than being confusing, this seems consistent with the panel's reasoning in *Korea – Commercial Vessels* that 'if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it *permitted* by Article 6.2 of the DSU to refer to all of those

⁶ Appellate Body Report, *US – Upland Cotton*, para. 287.

⁷ Appellate Body Report, *US – Upland Cotton*, para. 287.

⁸ Panel Report, *Argentina – Import Measures*, Annex D-1, para. 3.3.

⁹ Panel Report, *US – Poultry (China)*, paras. 7.11-7.12 and 7.25

provisions in its request for establishment, but it is *required* to do so.¹⁰ The Panel is of the view that the same logic should also apply to consultations requests.

Given the surrounding context, the Panel is of the view that China's consultations request did 'indicate' an SPS basis for its complaint, even if that basis, seen in isolation, was qualified in somewhat unclear conditional language. ... While the Panel does not wish to be perceived as encouraging WTO Members to present their problems confusingly in their consultations request, it does seem that there is a bit more leeway in how WTO Members phrase complaints in a consultations request *vis-à-vis* the clarity required in a panel request which is the final word on the scope of the dispute"¹¹

1.3 Article 4.1

10. The Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)* noted that Article 4.1 of the DSU recognises the previous practice of GATT contracting parties in regularly holding consultations.¹²

1.4 Article 4.2

1.4.1 "measures affecting the operation of any covered agreement"

11. In *US – Upland Cotton*, the Panel concluded that DSU Article 4.2 did not exclude expired measures from the scope of requests for consultations. The United States appealed this decision arguing that expired measures could not be "affecting" a covered agreement. The Appellate Body upheld the Panel's conclusion because it did not read DSU Article 4.2 as precluding representations on measures with expired legislative bases where the Member believes that the measures are still "affecting" the operation of a covered agreement:

"We agree with the Panel that the word 'affecting' refers primarily to 'the way in which [measures] relate to a covered agreement'. As the Appellate Body stated in *EC – Bananas III*, '[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on' something else. At the same time, we also concur with the United States that the ordinary meaning of the word 'affecting' suggests a temporal connotation. As the United States submits, the present tense of the phrase 'affecting the operation of any covered agreement' denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement. It is not sufficient that a Member alleges that challenged measures affected the operation of a covered agreement in the past; the representations of the Member requesting consultations must indicate that the effects are occurring in the present.

Whether or not a measure is still in force is not dispositive of whether that Measure is currently affecting the operation of any covered agreement. Therefore, we disagree with the United States' argument that measures whose legislative basis has expired are incapable of affecting the operation of a covered agreement in the present and that, accordingly, expired measures *cannot* be the subject of consultations under the DSU. In our view, the question of whether measures whose legislative basis has expired affect the operation of a covered agreement currently is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding it from consultations and dispute settlement proceedings altogether.

We consider that requesting Members should enjoy a degree of discretion to identify, in their request for consultations under Article 4.2, matters relating to the covered agreements for discussion in consultations. As the Appellate Body observed in *Mexico – Corn Syrup (Article 21.5 – US)*, consultations present an opportunity for clarifying factual and legal issues, and for narrowing the scope of a dispute, and for resolving

¹¹ Panel Report, *US – Poultry (China)*, paras. 7.41-7.43.

¹² Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 55.

differences between WTO Members. We do not think it would advance the purpose of consultations if Article 4.2 were interpreted as excluding *a priori* measures whose legislative basis may have expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement. Nor, indeed, do we find textual support in the provision itself for doing so. Thus, we do not read Article 4.2 of the DSU as precluding a Member from making representations on measures whose legislative basis has expired, where that Member has reason to believe that such measures are still 'affecting' the operation of a covered agreement."¹³

1.5 Article 4.3

1.5.1 General

12. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body referred to Article 4.3 in the context of finding that lack of prior consultations is not a defect that necessarily deprives a panel of jurisdiction in respect of a matter. The Appellate Body started out by noting that "as a general matter, consultations are a prerequisite to panel proceedings. However, this general proposition is subject to certain limitations."¹⁴ According to the Appellate Body:

"Article 4.3 of the DSU relates the responding party's conduct towards consultations to the complaining party's right to request the establishment of a panel. When the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. In such a case, the responding party, by its own conduct, relinquishes the potential benefits that could be derived from those consultations.

...

In addition, ... [the requirement in Article 6.2 of the DSU to indicate] *whether* consultations were held ... may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations.

Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had."¹⁵

13. The Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)* thus concluded:

"As a result, we find that the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, such a defect is not one which a panel must examine even if both parties to the dispute remain silent thereon."¹⁶

1.5.2 Duty to enter into consultations in "good faith"

14. In *EC – Bed Linen*, India presented transcripts of the consultation sessions held with the European Communities, so as to demonstrate the "bad faith" of the European Communities during consultations. Although the Panel concluded that the material submitted by India was not related to any specific legal claim and, as a result, not relevant to the case, the Panel decided that it

¹³ Appellate Body Report, *US – Upland Cotton*, paras. 261-263.

¹⁴ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

¹⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 59, 62-63.

¹⁶ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 64.

would not *a priori* exclude this evidence. The Panel recalled, *inter alia*, the findings of the Panel in *Korea – Alcoholic Beverages* that information obtained in consultations may be presented during subsequent panel proceedings.¹⁷

15. In *US/Canada – Continued Suspension*, the Appellate Body observed that:

"The DSU makes reference to 'good faith' in two provisions, namely, Article 4.3, which relates to consultations, and Article 3.10, which provides that, 'if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.' These provisions require Members to act in good faith with respect to the initiation of a dispute and in their conduct during a dispute settlement proceedings."¹⁸

1.6 Article 4.4

1.6.1 Notification of requests for consultations

16. At its meeting on 19 July 1995, the DSB, with regard to the notification requirement contained in Article 4.4 of the DSU, agreed that delegations would send one single text of their notifications to the Secretariat (Council Division), simply specifying in that text, the other relevant Councils or Committees to which they wished the notification to be addressed. The Secretariat would then distribute it to the specified relevant bodies.¹⁹

1.6.2 "identification of the measures and an identification of the legal basis of the complaint"

1.6.2.1 Generally: no requirement of "precise and exact identity" between consultations request and panel request

17. In *Brazil – Aircraft*, the Appellate Body established that there is no need for "precise and exact identity" between the specific measures that were the subject of the consultations and the measures identified in the panel request:

"In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution'.²⁰ We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the *SCM Agreement*, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel'.²¹

18. In *Brazil – Aircraft*, a question arose as to the identity of the measure since regulatory changes relevant to the measure were put in place after consultations were held, but before the panel was established. The Appellate Body determined that the regulatory changes "did not change the essence" of the measure:

"We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments

¹⁷ Panel Report, *EC – Bed Linen*, paras. 6.32-6.35.

¹⁸ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 313.

¹⁹ WT/DSB/6. See also WT/DSB/M/6.

²¹ Appellate Body Report, *Brazil – Aircraft*, paras. 131-132.

that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX."²²

19. In *US – Upland Cotton*, the Appellate Body stated that:

"We emphasize that consultations are but the first step in the WTO dispute settlement process. They are intended to 'provide the parties an opportunity to define and delimit the scope of the dispute between them'. We also note that Article 4.2 of the DSU calls on a WTO Member that receives a request for consultations to 'accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member'. As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise."²³

20. In *Mexico – Anti-Dumping Measures on Rice*, Mexico contended that there was an inconsistency between the measures within the request for consultation and the measures listed in the United States' panel request. The Appellate Body considered that, given the possible evolution in the legal basis of the complaint, differences might validly exist between the claims raised in the request for consultations and the request for establishment of a panel:

"[A] complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations – namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the 'legal basis' that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."²⁴

21. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body recalled its prior pronouncements and emphasized the need for a case-by-case analysis:

"The Appellate Body has recognized the important role that consultations play in defining the scope of a dispute. Not only are they 'a prerequisite to panel proceedings'²⁵, they also serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them.²⁶ Further, 'Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.'²⁷ The Appellate Body has also explained that '[a]s long as the complaining party does not expand the scope of the

²² Appellate Body Report, *Brazil – Aircraft*, para. 132.

²³ Appellate Body Report, *US – Upland Cotton*, para. 293.

²⁴ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138. See also Panel Report, *EU – Footwear (China)*, paras. 7.51-7.61.

dispute, [it would] hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of the consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request'.²⁸ The Appellate Body has also held that a 'precise and exact identity' of measures between the two requests is not necessary, 'provided that the 'essence' of the challenged measures had not changed.'²⁹ In our view, whether a complaining party has 'expand[ed] the scope of the dispute' or changed the 'essence' of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis."³⁰

22. The Panel in *Chile – Price Band System* addressed the issue of whether or not the extension of the duration of identified measures after consultations affected compliance with Article 4.4 of the DSU. Chile argued that none of the safeguard measures challenged by Argentina in the dispute fell within the Panel's jurisdiction. According to Chile, the provisional and definitive safeguard measures concerned were no longer in effect on the date of Argentina's request for establishment of the panel. The Panel responded (on an issue not subsequently appealed) as follows:

"Chile raises two different objections regarding the Panel's jurisdiction with respect to the definitive safeguard measures and the extension of their duration: first, the definitive safeguard measures had 'expired before the request for establishment was made; second, the 'extension measures' were not formally included in the request for consultations. We cannot accept either of those objections, for one and the same reason. Both of Chile's objections are based on the proposition that the extension of the period of application results in a measure distinct from the definitive safeguard measure. We disagree with this proposition. In our view, Article 7 of the Agreement on Safeguards makes it clear that what is at issue is not an extension 'of the safeguard measure', but, rather, an extension 'of the period of application of the safeguard measure' or of 'the duration of the safeguard measure'. Article 7 is entitled '*Duration and Review of Safeguard Measures*'. ...

...

This language is sufficiently clear for us as to conclude that the 'extensions' are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired. For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU.

We note, moreover, that the 'extension' did not in any way amend the content of the safeguard measures and that there were, in fact, exchanges between Argentina and Chile during the period of consultations regarding the 'extension'. Chile must therefore have been fully informed about Argentina's intention to challenge the safeguard measures, *as extended in time*. Thus, even if the 'extension' were to be considered a separate measure, *quod non*, Chile's due process rights would not have been impinged upon."³¹

23. In *EU – Footwear (China)*, the Panel recalled that the DSU does not contain a provision that directly addresses the question of the relationship between a complaining party's request for

³⁰ Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

³¹ Panel Report, *Chile – Price Band System*, paras. 7.116 and 7.119-7.120.

consultations and the panel's terms of reference. The Panel noted the importance of the requirement in Article 4.4 of the DSU that "a request for consultations has to identify the measures at issue and indicate the legal basis of the complaint".³² Recalling the reasoning developed by the Panel in *Brazil – Aircraft*, the Appellate Body in *US – Upland Cotton*, and the Panel in *Mexico – Anti-Dumping Measures on Rice*, the Panel stated that:

"[T]here does not have to be precise identity between China's request for consultations and its panel request either with regard to the specific measures at issue or with regard to the legal basis of the complaint. As long as the request for consultations and the panel request concern 'the same matter' or, put differently, as long as the legal basis of the panel request 'may reasonably be said to have evolved from the legal basis identified in the request for consultations', a claim, even if not specifically identified in the request for consultations, may be found to have been properly identified in the panel request and within the scope of the request for consultations, and therefore within a panel's terms of reference."³³

24. In *China – Broiler Products*, the Panel recalled the established line of reasoning that it must determine whether a claim included in the panel request may reasonably be said to have evolved from the claims included in the request for consultations. In this context, the Panel stated that:

"Although necessarily dependent upon the specific circumstances of each case, the application of this test in prior disputes reveals that at the very least, some connection must exist between the claims set forth in the panel request and those identified in the request for consultations in terms of either the provisions cited, the obligation at issue or issue in dispute, or the factual circumstances leading to the alleged violation."³⁴

25. In *US – Countervailing Measures (China)*, China contended that "the Wind Towers and Steel Sinks investigations [were] the 'measures at issue' in the sense of Article 4.4 of the DSU".³⁵ China argued that the inclusion of two preliminary affirmative countervailing duty determinations in those investigations, which were not subject to the consultations in this dispute, did "not 'expand the scope of the dispute' or change 'the essence of the challenged measures'".³⁶ The Panel observed that "investigations" are not measures themselves, but "lead to the adoption of measures, and specifically the initiations and preliminary and final determinations."³⁷ Guided in its assessment by the Appellate Body's pronouncements in *Mexico – Anti-Dumping Measures on Rice* and *Brazil – Aircraft*, the Panel based its determination of whether the inclusion of a claim in the panel request would amount to a change in the "essence" of the challenged measures on the question whether the nature, purpose and effects of the claim in the panel request are different to those of the claim in the request for consultations.³⁸

26. In *Argentina – Import Measures*, the Panel explained how the test established in *Brazil – Aircraft*, *Mexico – Anti-Dumping Measures on Rice*, and *US – Shrimp (Thailand) / US – Custom Bond Directive* could be applied:

"One approach for conducting this type of analysis is to consider whether there is an explicit reference in the request for consultations to a measure included in the panel request. If no such reference exists, a panel may proceed to consider whether the measure in question is separate and distinct from the measure or measures included in the request for consultations. Finally, a panel should take into account that the consultations may legitimately lead to the reformulation of a complaint, since during consultations a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure. Nevertheless, the right to

³² Panel Report, *EU – Footwear (China)*, para. 7.54.

³³ Panel Report, *EU – Footwear (China)*, para. 7.61.

³⁴ Panel Report, *China – Broiler Products*, para. 7.224.

³⁵ Panel Report, *US – Countervailing Measures (China)*, para. 7.20.

³⁶ Panel Report, *US – Countervailing Measures (China)*, para. 7.20.

³⁷ Panel Report, *US – Countervailing Measures (China)*, para. 7.25.

³⁸ Panel Report, *US – Countervailing Measures (China)*, paras. 7.23-7.29. See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132).

reformulate a complaint is qualified by the requirement that complainants not expand the scope of the dispute or change its essence."³⁹

27. The Panel in *Ukraine – Ammonium Nitrate* found certain claims to fall outside its terms of reference on the ground that, while such claims appeared in the complainant's panel request, they could not reasonably be said to have evolved from the complainant's consultations request.⁴⁰

28. In *Morocco – Hot-Rolled Steel (Turkey)*, Türkiye, the complainant, included in its panel request claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement that it had not included in its consultations request. Morocco, the respondent, argued that these claims fell outside the Panel's terms of reference because they had not been subjected to consultations. Türkiye submitted that the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement had evolved from the claim under Article 3.1 of the same Agreement, identified in Türkiye's consultations request.⁴¹ In ascertaining whether there was a connection between the claims set forth in the consultations request and those identified in the panel request, the Panel made the following observation:

"In respect of a 'connection' in terms of the obligations at issue, Article 6.5 contains the requirement that any information which is by nature confidential or which is provided on a confidential basis shall be treated as confidential upon good cause shown. According to Article 6.5.1, an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof. Articles 6.5 and 6.5.1 thus relate to *procedural* obligations concerning the treatment of confidential information in anti-dumping investigations. In contrast, Article 3.1 concerns the obligation that a determination of injury shall be based on positive evidence and shall involve an objective examination of the volume and price effects of dumped imports and their impact on the domestic industry. This provision establishes a *substantive* obligation concerning the determination of injury. It follows that the obligations of the claims in the panel request and in the request for consultations are of different nature and apply in respect of different actions of the investigating authority.

... We are thus not convinced that Turkey has established, in this case, a 'close connection' between the obligations in Articles 6.5 and 6.5.1 and the 'objective examination' obligation under Article 3.1."⁴²

29. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* also rejected Türkiye's contention that the claims at issue had naturally evolved from Turkey's injury claims identified in its consultations request because during consultations the important role of the break-even threshold in the Moroccan investigating authority's injury determination became clear. The Panel limited its assessment of this jurisdictional matter to the text of the request for consultations, and declined to take into account what happened during the actual consultations. On this basis, the Panel concluded that the claims under Articles 6.5 and 6.5.1 of the Anti-dumping Agreement changed the nature and substance of the dispute and fell outside the Panel's terms of reference.⁴³

30. The Panel in *US – Pipes and Tubes (Turkey)* found that claims identified in Türkiye's panel request regarding an alleged practice on the benefit determinations made by the US investigating authorities in countervailing duty investigations fell within its terms of reference even though the mentioned practice had not been identified with the same level of precision in Türkiye's consultations request:

"Therefore, we disagree with the United States that Turkey's panel request improperly expanded the scope of the dispute by including as a new measure, an alleged 'practice' of rejecting in-country prices as benchmarks 'based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good'. Rather, we consider that, while the panel request identifies the

³⁹ Panel Report, *Argentina – Import Measures*, Annex D-1, para. 3.11.

⁴⁰ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.58.

⁴¹ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.32-7.33.

⁴² Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.37-7.38. See also *ibid.* paras. 7.39-7.42.

⁴³ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.43-7.45. See also *ibid.* para. 7.53.

challenged 'practice' measures with greater specificity, the manner in which this was done did not expand the scope or essence of the dispute as these 'practice' measures were set forth in the request for consultations. Accordingly, we reject the United States' request to exclude the alleged benefit practice measure from our terms of reference.

...

We also recall that the 'legal basis' for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint. In our view, the basis for Turkey's 'as such' claim against the alleged benefit practice measure reasonably evolved from the description and reference to Articles 1.1(b) and 14(d) in the section discussing the 'Legal Basis of the Complaint' in Turkey's consultations request, as well as reference to 'ongoing practices' therein, demonstrating that Turkey's 'as such' claim in its panel request is clearly connected to its request for consultations."⁴⁴

1.6.2.2 "identification of the measures"

31. In *EC and certain member States – Large Civil Aircraft*, the Panel emphasized the difference in wording between Article 4.4 and Article 6.2, observing that:

"Article 4.4 of the DSU requires only that the request for consultations must identify 'the measures at issue', as opposed to the '*specific* measures at issue' as required by Article 6.2 of the DSU."⁴⁵

32. The Appellate Body in *Argentina – Import Measures* explained the difference in the degree of specificity required in Articles 4.4 and 6.2 of the DSU:

"Thus, while a consultations request must identify the 'measure at issue', a panel request must identify the 'specific measure at issue'. This difference in the language between Articles 4.4 and 6.2 makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request.

This difference in the degree of specificity with which a measure at issue must be identified reflects, and is in keeping with, the underlying distinction between the consultations process and the panel process themselves. The request for consultations must provide the reasons why consultations are sought, including the identification of the measure at issue and an indication of the legal basis of the complaint. The consultations process is 'the first step in the WTO dispute settlement process', and provides parties the opportunity to 'define and delimit the scope of the dispute'. Parties to consultations 'exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution', or otherwise refine the contours of the dispute to be subsequently set out in the panel request. Consultations may lead to the narrowing or reformulation of a complaint to the extent that the 'measure at issue' and the 'legal basis' identified in the panel request may be 'expected to be shaped by, and thereby constitute a natural evolution of, the consultations process'.⁴⁶

33. The Appellate Body in *Argentina – Import Measures* further emphasized the function and importance of the "identification of the measures" as required under Article 4.4:

"The effectiveness of consultations and the opportunity provided for the parties to reach a mutually agreeable solution to the dispute will be compromised if the consultations request fails to identify the measures at issue, as required by Article 4.4 of the DSU. At the same time, the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings. This is because 'the claims that are made and the facts that are established during consultations do much to shape the substance and the

⁴⁴ Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.94-7.97.

⁴⁵ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.126.

⁴⁶ Appellate Body Report, *Argentina – Import Measures*, paras. 5.9-5.10.

scope of the subsequent panel proceedings.' The contribution that consultations can make to the refinement of the dispute, in turn, makes it 'especially necessary' for parties to be fully forthcoming during this phase of the WTO dispute settlement process."⁴⁷

34. The Appellate Body in *Argentina – Import Measures* further considered that the specificity in the identification of the challenged measure in the complainant's panel request does not guarantee that the measure would fall within the panel's terms of reference if that measure was not identified in the consultations request:

"With respect to the measure at issue, in particular, even if such measure is identified with sufficient precision in a panel request, it may nevertheless fall outside the panel's terms of reference if that measure was not referred to in the request for consultations, and is separate and legally distinct from the measure that were identified therein."⁴⁸

1.6.2.3 "legal basis of the complaint"

35. In *US – Poultry (China)*, the Panel found that, due to the similarity in the language used in Articles 4.4 and 6.2 of the DSU, the Appellate Body's interpretation of Article 6.2 could be applied to the term "legal basis of the complaint" in Article 4.4:

"We note that the term 'legal basis of the complaint' has not been interpreted in respect of Article 4.4 of the DSU. The Appellate Body has, however, interpreted the same term as used in Article 6.2 of the DSU to mean the claim made by the complaining party. The Appellate Body has also clarified that a claim sets forth the complainant's view 'that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement.' Given the nearly identical language in Article 4.4 of the DSU, we consider that this understanding could also be applied to the term 'legal basis for the complaint' in Article 4.4.

Article 4.4 of the DSU however requires the consultations request to include an 'indication of the legal basis of the complaint' while Article 6.2 of the DSU requires the panel request to 'provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly'.

...

In describing how a panel must examine a panel request for consistency with the obligations in Article 6.2 of the DSU, the Appellate Body has noted that the panel request must be examined as a whole and in light of attendant circumstances. Given the relationship between the consultations request and the panel request, the shared language in Article 4 and Article 6.2 of the DSU, the similar purposes of the two requests, i.e. to delimit the scope of the dispute, and the need to interpret both provisions in a harmonious way, we find the Appellate Body reasoning pertinent for the analysis of the consistency of consultations requests with the obligations of Article 4.4 of the DSU as well."⁴⁹

36. However, the Panel in *US – Poultry (China)* observed that the language in Article 4.4 imposed a lesser burden than that imposed by Article 6.2

"In that respect, it is important to note that although there are many similarities between Articles 4.4 and 6.2 of the DSU and they should be interpreted in an harmonious way, the obligation on a Member in its consultations request is to 'indicate' the legal basis for the complaint whereas the obligation in the panel request is to provide a 'brief legal summary of the legal basis of the complaint sufficient to

⁴⁷ Appellate Body Report, *Argentina – Import Measures*, para. 5.12.

⁴⁸ Appellate Body Report, *Argentina – Import Measures*, para. 5.13.

⁴⁹ Panel Report on *US – Poultry (China)*, paras. 7.30-7.31 and 7.34.

present the problem clearly.' Therefore, an indication is something less than a summary sufficient to present the problem clearly."⁵⁰

37. The Panel in *EC – Fasteners (China)* said the following in respect of the reference to "the legal basis of the complaint" in Article 4.4:

"While the Appellate Body has indicated that a mere listing of legal provisions alleged to be violated may not be sufficient to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in the context of a panel request, it is not clear to us that a similar approach should be taken with respect to a request for consultations. Unlike Article 6.2 of the DSU, which requires that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Article 4.4 of the DSU requires only that a request for consultations contain 'an indication of the legal basis for the complaint'. In our view, this is a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated."⁵¹

1.7 Article 4.5

1.7.1 Adequacy of consultations

38. In *EC – Bananas III*, the Panel indicated that the function of panels as regards consultations is only to ascertain whether consultations, when required, were held:

"Consultations are ... a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. 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 the consultations, if required, were in fact held."⁵²

39. In *Korea – Alcoholic Beverages*, Korea argued before the Panel that the complaining parties violated Articles 3.3, 3.7 and 4.5 of the DSU by not engaging in consultations in good faith to reach a mutually agreed solution. Korea maintained that there had been no meaningful exchange of facts because the complainants treated the consultations as one-sided question and answer sessions. Korea asserted that such an approach frustrated any reasonable chance for a settlement and considered the non-observance of specific provisions of the DSU as a "violation of the tenets of the WTO dispute settlement system". The Panel considered that it did not have a mandate to investigate the adequacy of the consultation process that took place between the parties:

"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. The point was put clearly by the Panel in *Bananas III*[.] ...

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."⁵³

⁵⁰ Panel Report on *US – Poultry (China)*, para. 7.43.

⁵¹ Panel Report, *EC – Fasteners (China)*, para. 7.207.

⁵² Panel Report, *EC – Bananas III*, para. 7.19.

⁵³ Panel Report, *Korea – Alcoholic Beverages*, para. 10.19. See also Panel Report, *Turkey – Textiles*, para. 9.24.

1.8 Article 4.6

1.8.1 "consultations shall be confidential"

1.8.1.1 General

40. In *Canada – Wheat Exports and Grain Imports*, Canada requested that, pursuant to DSU Article 4.6, the Panel redact from the final report specific references to discussions and events that occurred during consultations between the parties. At the outset, the Panel stated:

"[W]e do not disagree with Canada that Article 4.6 of the DSU establishes an obligation to maintain the confidentiality of consultations. In our view, such obligation is imposed on the Members that participated in the consultations, and refers to information that is not otherwise in the public domain and is disclosed by the other party."⁵⁴

41. The Panel in *US – Poultry (China)* emphasized the confidential nature of the consultations process:

"The Panel is aware that in making its analysis of whether a particular claim was included in the consultations request, it should not inquire as to what actually occurred during consultations. The panel in *Korea – Alcoholic Beverages* correctly noted that '[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel'. ... Finally, the Appellate Body noted that, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed.

Therefore, the Panel will inquire whether China indicated the *SPS Agreement* as a legal basis for its complaint in its consultations request and in doing so will look at that consultations request as a whole and in light of the attendant circumstances. However, the Panel will not use as a basis for its determination what either party alleges took place during consultations. Therefore, while we will consider the exchange of letters in April 2009 – which are precisely about the scope of China's consultations request – we will not consider any questions posed or answers given during the consultations."⁵⁵

1.8.1.2 Information acquired during consultations

1.8.1.2.1 In the same proceedings

42. In *Korea – Alcoholic Beverages*, Korea argued before the Panel that the complainants breached the confidentiality requirement of Article 4.6 of the DSU by making reference, in their submissions, to information supplied by Korea during consultations. The Panel held that while confidentiality in consultations between parties to a dispute was "essential", it also found that "parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations":

"We note that Article 4.6 of the DSU requires confidentiality in the consultations between parties to a dispute. This is essential if the parties are to be free to engage in meaningful consultations. However, it is our view that this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. We are mindful of the fact that the panel proceedings between the parties remain confidential, and parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations. Indeed, in our view, the very essence of consultations is to enable the parties gather correct

⁵⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 5.6.

⁵⁵ Panel Report, *US – Poultry (China)*, paras. 7.35-7.36. See also Panel Report, *EU – Energy Package*, para. 7.45.

and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the panel. It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings. We find therefore, that there has been no breach of confidentiality by the complainants in this case in respect of information that they became aware of during the consultations with Korea on this matter."⁵⁶

43. In *EC – Bed Linen*, India presented transcripts of the consultation sessions held with the European Communities, so as to demonstrate the "bad faith" of the European Communities during consultations. Although the Panel concluded that the material submitted by India was not related to any specific legal claim and, as a result, not relevant to the case, the Panel decided that it would not *a priori* exclude this evidence. The Panel recalled, *inter alia*, the findings of the Panel in *Korea – Alcoholic Beverages* that information obtained in consultations may be presented during subsequent panel proceedings.⁵⁷

44. In *US – Lamb Safeguards*, the United States opposed the admissibility and the relevance to panel proceedings of information obtained from bilateral, confidential consultations (under Article 12.3 of the Safeguards Agreement and Article 4 of the DSU), when ascertaining whether the specificity requirements stipulated under Article 6.2 of the DSU. The Panel agreed with the United States that the very purpose of consultations – arriving at a mutually agreed solution to the dispute – could be jeopardised if parties were permitted to hold against each other concessions or compromises made in the context of consultations. However, the Panel found that this purpose would not be defeated by merely taking note of documentary evidence concerning the purely factual question of whether certain issues were raised during consultations:

"The United States has not expressly contested (nor confirmed) the authenticity of the lists of questions that the complainants claim to have submitted during the consultations under SG Article 12.3 and DSU Article 4. The United States does, however, seriously question the admissibility and the relevance to panel proceedings of information from bilateral, confidential consultations – for which usually no neutral witnesses or written records exist – when ascertaining whether the specificity requirements stipulated by DSU Article 6.2 for *panel requests* are met.

We are conscious of the US argument that reliance in contentious panel proceedings on information from consultations could jeopardise their very purpose. Consultations are held with the intention of reaching a mutually agreed solution to a dispute. This purpose is not served if, in litigation before a panel, parties hold against one another concessions they have made or compromises they have achieved in the context of consultations. But we do not consider that the very purpose of consultations could be defeated if we were merely to take note of documentary evidence concerning the purely factual question of whether certain issues were raised during consultations. This is different from relying on arguments about the substance or the WTO-consistency of views expressed by parties during consultations. We believe that our approach is compatible with the requirement of DSU Article 6.2 that a panel request must indicate 'whether consultations were held.' In any event, such concerns are probably less pertinent to consultations held pursuant to SG Article 12.3 than to consultations held pursuant to DSU Article 4, given the requirement in SG Article 12.5 that the results of the Article 12.3 consultations be notified to the Council for Trade in Goods (implying circulation thereof to all Members)."⁵⁸

45. During the interim review period in *Indonesia – Chicken (Article 21.5 – Brazil)*, the Panel agreed to Indonesia's request to include additional language in the panel report to note that Indonesia had provided Brazil with copies of two questionnaires. Brazil had opposed this request because it considered that including this additional language would result in the disclosure of confidential bilateral discussions concerning the reasonable period of time (RPT) for implementation.⁵⁹ The Panel drew parallels from Article 4.6 of the DSU to reach the conclusion

⁵⁶ Panel Report, *Korea – Alcoholic Beverages*, para. 10.23.

⁵⁷ Panel Report, *EC – Bed Linen*, paras. 6.32-6.35.

⁵⁸ Panel Report, *US – Lamb Safeguards*, paras. 5.39-5.40.

⁵⁹ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.12.

that information submitted by a party during bilateral RPT discussions conducted pursuant to Article 21.3(b) is not subject to confidentiality:

"We see some parallels between Brazil's argument and the discussion on the confidentiality of consultations in Article 4.6 of the DSU which, in contrast to the provision relevant here, namely Article 21.3(b) of the DSU, contains an explicit requirement regarding confidentiality. Taking guidance from past panels regarding the confidentiality requirement in Article 4.6, we note that while the discussions between the parties may be subject to confidentiality, information submitted by the other side during the consultations is not, much less information submitted by the party itself. Therefore, even accepting Brazil's argument that the confidential nature of bilateral RPT discussions needs to be preserved, we see no grounds to treat as confidential information that Indonesia submitted in the context of such discussions and has now submitted in this proceeding as evidence of its own actions. We thus refer to this evidence and have added a slightly modified version of the text proposed by Indonesia in a new footnote. As we discuss further below, we have also included here additional text that Indonesia proposed for paragraph 7.59."⁶⁰

1.8.1.2.2 Information obtained in different proceedings

46. In *Australia – Automotive Leather II*, Australia demanded that information which the United States had obtained during consultations in connection with a previous panel requested by the United States (a panel which had been established, but never composed and, as a result, never became active) be declared inadmissible in the second proceeding. The Panel, after referring to the findings of the Panel in *Korea – Alcoholic Beverages* considered that:

"Given that, in this case, the parties and the dispute are the same, no panel was actually composed or considered the dispute in the first-requested proceeding, and there are no third parties involved in either proceeding who might have learned information in the course of consultations, we cannot see any reason to exclude the United States Exhibit 2 from our consideration, merely because it was developed in the course of the consultations held pursuant to the first request. Australia has failed to specify what other, if any, facts might have been derived by the United States from the earlier consultations, and so there is no basis for us to exclude any such facts."⁶¹

1.8.1.2.3 Offers of settlement made during consultations

47. In *US – Underwear*, Costa Rica submitted to the Panel information concerning bilateral negotiations that took place between Costa Rica and the United States before and after the imposition of the restriction at issue in the dispute. Specifically, Costa Rica submitted information relating to settlement offers made by the United States concerning the level of the restriction to be imposed. The Panel chose not to base its findings on such information noting that "the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned".⁶²

1.8.1.3 Relevance of third-party participation to confidentiality of information in consultations

48. The Panel in *Mexico – Corn Syrup* considered, *inter alia*, the effect of third party participation when referring to consultations and concluded that "the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations":

"[I]t would seriously hamper the dispute settlement process if a party could not use information obtained in the consultations in subsequent panel proceedings merely because a third party which did not participate in the consultations chooses to

⁶⁰ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.13.

⁶¹ Panel Report, *Australia – Automotive Leather II*, para. 9.34.

⁶² Panel Report, *US – Underwear*, para. 7.27.

participate in the panel proceedings. As Mexico points out, third party participation in the panel proceedings cannot be vetoed by the parties to the proceeding. In our view, it would be anomalous if the decision of a Member to participate in a panel proceeding as a third party when it did not, or could not, participate as a third party in the underlying consultations had the effect of limiting the evidence that could be relied upon in the panel proceeding by precluding the introduction of information obtained during the consultations. Third parties are subject to the same requirement to maintain the confidentiality of panel proceedings as are parties. We therefore conclude that the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations."⁶³

1.9 Article 4.7

49. In *Turkey – Textiles*, the Panel found that India complied with the requirements of Article 4.7:

"Consultations are a crucial and integral part of the DSU and are intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU. However, the only function we have as a panel in relation to Turkey's procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant. We consider that India complied with these procedural requirements and therefore we find it necessary to reject Turkey's claim."⁶⁴

50. In *US – FSC*, the United States contended that the European Communities' request for consultations failed to include a "statement of available evidence" as required by Article 4.2 of the SCM Agreement. Because the European Communities allegedly failed to comply with this "mandatory" requirement, the United States argued that the Panel should dismiss the European Communities' claims under Article 3 of the SCM Agreement. The Panel, in rejecting the United States' arguments, discussed the relationship between Articles 4.2 and 4.4 of the SCM Agreement and Article 4.7 of the DSU.⁶⁵ The Panel noted:

"Even assuming that the European Communities' request for consultations does not contain a statement of available evidence, the question remains whether we are required to dismiss the European Communities' claims under Article 3 of the SCM Agreement for this reason. In considering this question, we note that a Member generally has a right to request establishment of a panel under Article 4.7 of the DSU if consultations 'fail to settle a dispute within 60 days after the date of receipt of the request for consultations'. Where, as here, the claim relates to a violation of Article 3 of the SCM Agreement, Article 4.4 of the SCM Agreement authorizes a Member to request establishment of a panel if no mutually agreed solution has been agreed within thirty days of the request for consultations. Although these provisions differ with respect to timing and in certain other respects, we consider that they both embody the principle that the sole prerequisite to requesting establishment of a panel is that consultations have been held or requested to be held and that the relevant specified time-period has elapsed. We found no specific provisions either in the DSU or Article 4 of the SCM Agreement requiring a panel to dismiss a claim under Article 3 of the SCM Agreement because the complaining Member failed to respect the requirement that the request for consultations contain a statement of available evidence."⁶⁶

51. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body referred to Article 4.7 when explaining the limitations on consultations being a prerequisite to panel proceedings:

⁶³ Panel Report, *Mexico – Corn Syrup*, paras. 7.41.

⁶⁴ Panel Report, *Turkey – Textiles*, para. 9.24.

⁶⁵ Panel Report, *US – FSC*, paras. 7.1-7.7

⁶⁶ Panel Report, *US – FSC*, para. 7.7

"Article 4.7 also relates the conduct of the responding party concerning consultations to the complaining party's right to request the establishment of a panel. This provision states that the responding party may agree with the complaining party to forgo the potential benefits that continued pursuit of consultations might bring. Thus, Article 4.7 contemplates that a panel may be validly established notwithstanding the shortened period for consultations, as long as the parties agree. Article 4.7 does not, however, specify any particular form that the agreement between the parties must take."⁶⁷

52. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body thus concluded that, since the DSU recognises situations where the absence of consultations does not deprive the panel of its authority, such absence is not a defect which, by its very nature, would deprive a panel of its authority. More importantly, the Appellate Body considered that the lack of consultations is not a defect a panel must examine even if both parties to the dispute remain silent thereon:

"Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.

As a result, we find that the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, such a defect is not one which a panel must examine even if both parties to the dispute remain silent thereon. We recall that, in this case, Mexico neither pursued the potential benefits of consultations nor objected that the United States had deprived it of such benefits."⁶⁸

1.10 Article 4.9

53. In *Canada – Patent Term*, the United States submitted a request for expedited consideration of the dispute under Article 4.9 of the DSU on the grounds that the premature expiration of patents during the dispute settlement procedure caused irreparable harm to the patent owners. It referred to the alleged simplicity of the issues in dispute, the absence of third parties and other circumstances. The Panel indicated that due to other demands on its members' time, it could not accelerate the timetable prior to the first substantive meeting; however the Panel stated that it undertook to make every effort to issue its report as soon as possible after the second substantive meeting.⁶⁹

1.11 Article 4.11

1.11.1 "Wherever a Member ... considers that it has a substantial trade interest"

54. In *EC – Bananas III*, the European Communities argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. The Appellate Body stated that no provision of the DSU contains any such explicit requirement:

"We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the

⁶⁷ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 61.

⁶⁸ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 63-64.

⁶⁹ Panel Report, *Canada – Patent Term*, para. 1.5.

WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard."⁷⁰

55. The Appellate Body in *EC – Bananas III* went on to underline the self-regulating nature of members' decision on whether to bring a case:

"[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'.

We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

'... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.'

We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case."⁷¹

56. The Appellate Body in *EC – Bananas III* thus concluded:

"Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994."⁷²

57. In *Korea – Dairy*, the Panel considered Korea's argument that there is a requirement for an economic interest to bring a matter to the Panel and that the European Communities had failed to meet that requirement:

"In *EC – Bananas*, the Appellate Body stated that the need for a 'legal interest' could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in the DSU any requirement for an 'economic interest'. We also note the provisions of Article 3.8 of the DSU, pursuant to which nullification and impairment is presumed once violation is established."⁷³

Current as of: December 2024

⁷⁰ Appellate Body Report, *EC – Bananas III*, para. 132.

⁷¹ Appellate Body Report, *EC – Bananas III*, paras. 135-137.

⁷² Appellate Body Report, *EC – Bananas III*, para. 138.

⁷³ Panel Report, *Korea – Dairy*, para. 7.13.