



Advisory Centre on WTO Law
Centre Consultatif sur la Législation de l'OMC
Centro de Asesoría Legal en Asuntos de la OMC

WTO-ACWL-ICTSD WORKSHOP ON WTO DISPUTE SETTLEMENT

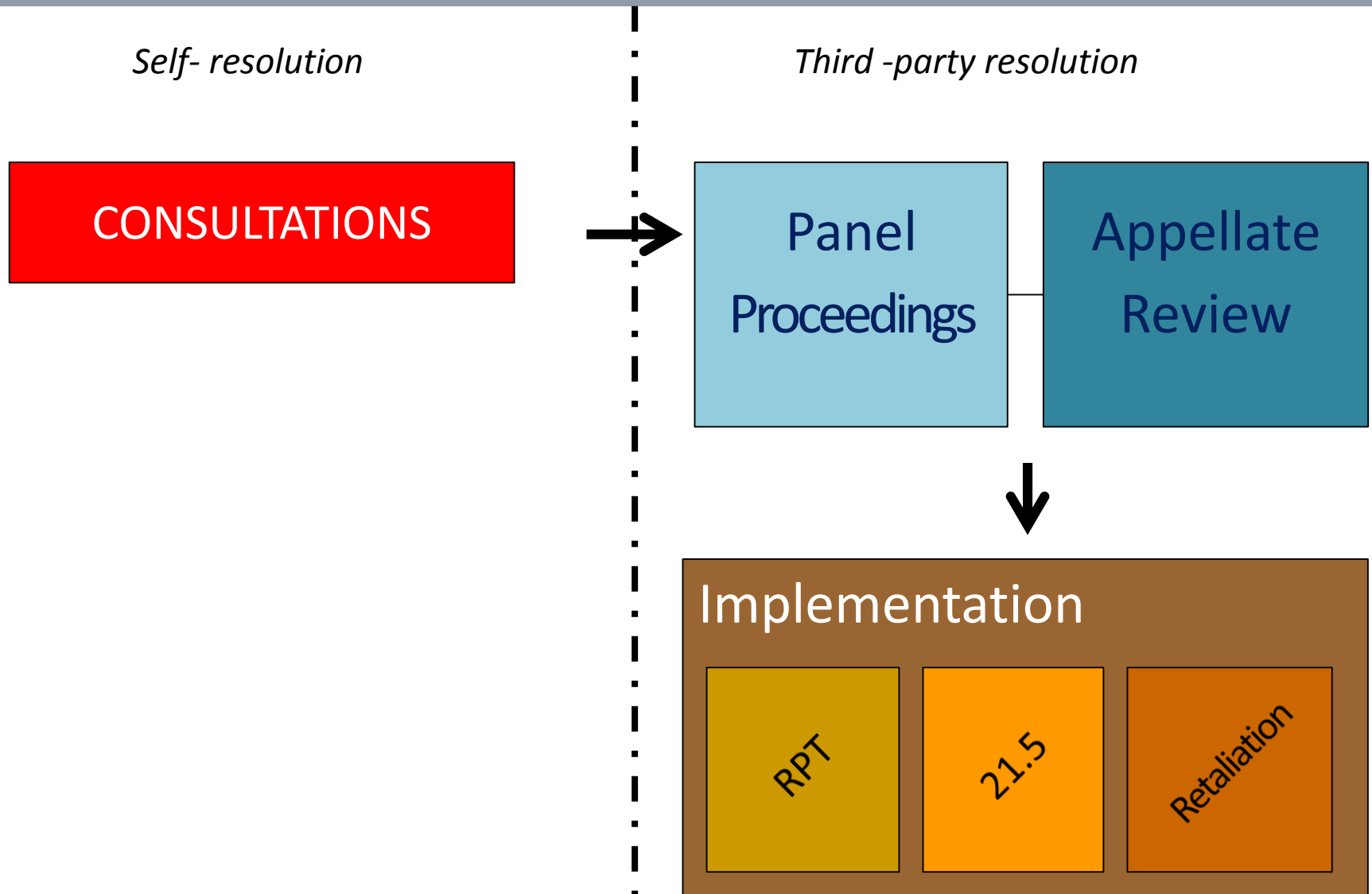
Consultations

New Delhi, 26-28 November 2012

OUTLINE

1. Consultations in the context of dispute settlement
2. Purpose of consultations
3. Consultations request – basic requirements
4. Issues for consideration in consultations
5. Information obtained in consultations

CONSULTATIONS IN THE CONTEXT OF DISPUTE SETTLEMENT



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WHAT IS THE PURPOSE OF CONSULTATIONS?

CONSULTATIONS



Assist in preparing/defending the case



Facilitate the resolution through diplomatic means



Informing other WTO Members of the dispute

WHAT IS THE PURPOSE OF CONSULTATIONS?

Facilitate resolution through diplomatic means.

- Understand the hurdles the responding party faces
- Explore flexibility for settlement - political considerations.
- Clarify facts and operation of the measure.

Assist in preparing/defending the case.

- Obtain further information about the measure
- Explore the extent of the claims/arguments or potential defences of the parties.

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CONSULTATION REQUIREMENTS AND ISSUES FOR CONSIDERATION

What should your consultations request contain? Article 4.4

1. It must be in writing.
2. Introductory paragraph (procedural provisions and Article XXII or XXIII of GATT).
3. Description of measure (facts/ factual background).
4. Identification of relevant legal provision at issue.
5. Notified to DSB and relevant Councils and Committees.
6. (Prohibited subsidies: statement of available evidence on existence and nature of subsidies (SCM Agreement, Article 4.2)).

ARTICLE XXII OR XXIII?

Should you request Article XXII or Article XXIII consultations?

“Open” consultations in Article XXII allows allies to join the consultations.

“Closed” consultations may allow political considerations to be raised

e.g. Turkey – Textiles, EU - GSP

TIMETABLE FOR CONSULTATIONS

TIMETABLE (DSU ARTICLE 4.3)

- | | |
|-----------------------|--|
| Day 0 | A makes request for consultations |
| By Day 10 | B must reply to request |
| By Day 30
consent) | Consultations must be held (may be extended by consent) |
| Day 60 + 1 | If no solution found, A can request establishment of a panel. Must put the request on the agenda of the DSB meeting. |

TIMETABLE FOR CONSULTATIONS

TIMETABLE (DSU ARTICLE 4.3)

Article 4.8 Urgent matters

Hold consultations within 10 days, can establish panel within 20 days, not limited to perishable goods.

Article 4.9 Expedited consideration. *Canada – Patents*

Article 12.10 Possible extension of time for consultations involving measure taken by developing country.

TIMETABLE FOR CONSULTATIONS (SCM AGREEMENT)

TIMETABLE (SCM AGREEMENT)

Article 4.3

Upon request for consultations, responding Member shall enter into consultations as quickly as possible.

Article 4.4

If no mutually agreed solution with 30 days, can request immediate establishment of a panel.

ISSUES FOR THE COMPLAINANT:

- Venue
- Composition of delegation
- Should you provide questions in advance?
- What the types of questions to ask and what to avoid?

PRACTICAL ASPECTS OF CONSULTATIONS

Venue: Can be in venue other than Geneva, depending on whether third parties involved.

Order of proceedings: Complainant can prepare agenda. No WTO officials present.

No interpretation provided by the WTO.

Composition of delegations: ensure attendance of responsible government officials.

ISSUES FOR CONSIDERATION IN CONSULTATIONS

ISSUES FOR THE RESPONDENT:

- Decide whether to accept requests from Members that consider they have a "substantial trade interest" to join the consultations (if consultations requested under Article XXII). Commercial or systemic interest?

(Can block request to join consultations but cannot reject claim of interest to be a third party.)

- Decide how much information to disclose. "All parties engaged in dispute settlement must be fully forthcoming... Claims must be stated clearly. Facts must be disclosed freely. ... especially necessary during consultations." *India- Patents*

ISSUES FOR CONSIDERATION IN CONSULTATIONS

ISSUES FOR THE RESPONDENT:

Decide whether to pose question of the complaining party *i.e.*, level of their trade affected.

Consider consequences of refusing to participate. *Turkey – Textiles.*

ISSUES FOR CONSIDERATION IN CONSULTATIONS

ISSUES FOR MEMBERS SEEKING TO JOIN CONSULTATIONS:

- Must request to be joined within 10 days of circulation of consultation request.
- Must refer to your substantial trade interest in the request.
- No need to take sides during the consultations.
- Joining consultations does not allow that Member to request a panel. If that Member wishes to be a complaining party, it must request consultations itself.

ADEQUACY OF CONSULTATIONS

EC – Bananas III - Panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultations process functions, but could only determine whether consultations, if required, did in fact take place.

Panel in *Korea – Alcohol* stated that the adequacy of consultations is not an issue for panels, only need to examine whether consultations have been held.

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INFORMATION OBTAINED IN CONSULTATIONS

What can you do with information obtained during consultations?

Article 4.6 "consultations must be confidential, and without prejudice to the rights of any Member in any further proceedings"

What does the confidentiality requirement mean?

Can you use the information obtained during consultations?

- Can use evidence (even verbatim reports);
- Cannot use settlement offers.