The Consultation with Experts Procedure in WTO Dispute Settlement System

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Abstract

Followed the rules of WTO covered agreements became more and more technical, and more and more disputes involved the expertise in the field of science or technology, the consultation with experts procedure became increasingly important. However, although the Panel is authorized by the WTO rules to start such a procedure, there are no detailed rules guiding the Panel as how to operate in the practice. Under such a circumstance, the Panel had to establish the temporary rules for this procedure after consultation with the parties to the dispute in each case. Many problems relevant to the due process then arose from such temporary rules. This paper tries to analysis the major problems thereof that receiving the most controversy and accusation, and will give suggestions as for how to reform and perfect this procedure.

Keywords: consultation with experts procedure , expert review group, individual expert due process

With the growing participation in the WTO and its dispute settlement system, the developing countries, including China, gradually become mature in the cognition, understanding and application of the WTO dispute settlement system. However, this does not change the current situation that the developing countries still lag behind the developed countries in using the dispute settlement system, especially in some of the details of the system. For example, with the rules of WTO agreements covering more technological elements, and as more and more of the WTO disputes involving particular knowledge in scientific fields, the consultation with (external) experts in the WTO dispute settlement system has become increasingly important. Yet, the understanding of this procedure in developing countries is still relatively weak. This paper will first propose an overview of this procedure, giving an introduction of the legal basis and the current status of this procedure, and then focus on the analysis of several key issues thereof receiving the most controversy and accusation in practice, and finally try to give the reform and improvement proposals to deepen the understanding of this procedure in developing countries, and help them make better use of this procedure in the future.

I. THE LEGAL BASIS AND CURRENT STATUS OF THE CONSULTATION WITH EXPERTS PROCEDURE

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From 1995, the consultation with experts procedure had been adopted in many cases by the Panel under the WTO dispute settlement system. There are several reasons that can explain this increased adoption. First, the WTO Agreements themselves became more technical, both in the trade/economic sense, and the factual/scientific sense. The examples may be the Customs Valuation Agreement, the Agreement on Agriculture and so forth Further, in Doha Round, it becomes even popular to adopt scientific principles or economic formulas to set up the regulations. Second, a number of WTO obligations adopt an explicit economic/scientific criterion of legality. For example, the sanitary measures are required be based on the "risk assessment", otherwise, it will violate the WTO Agreement. And, to judge whether two products constitute "like products", one of the criteria is whether there exists "competitive relationship" between these two products. Third, the WTO dispute settlement has been legalized. During the GATT, disputes were settled through diplomatic approach where the Panel often had to decide only issues of law, The new rule-based process has increased the number of reluctant respondents as well as the incentive to dispute the facts. Hence, the need to bring in the neutral experts arose.

As generally believed, the legal basis of this procedure is Article 13 of Understanding On Rules and Procedures Governing the Settlement of Dispute (DSU), paragraph 1 of this Article states that "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate....." paragraph 2 further states that" Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group....." In addition to the general provisions of the DSU, the Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), respectively made particular statements on the consultation with experts procedure.

As we all know, the SPS Agreement often implicates scientific principles. It requires that "only sanitary or phytosanitary measures enacted by a member state must be applied only to the extent necessary to protect human, animal or plant life or health" and "based on scientific principles and……not maintained without sufficient scientific evidence". In order to deal with these types of questions, when disputes involve "scientific or technical issues", the SPS Agreement, in Article 11.2, declares "A panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative." Like the SPS Agreement, the TBT Agreement states in Article 14.2 that "At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts."

Besides, the DSU and the TBT Agreement respectively provides detailed procedures in its Annex for the establishment and operation of the expert review group/technical expert group (hereafter together referred as expert review group, except for particular reference) [2]Such procedures include the Panel's control on the expert review group, the qualifications and requirements of the candidate experts, the communication of the documents, the comment of the parties to the dispute on the expert advice, and so forth.

Until now, the Panels totally adopted the consultation with experts procedure in 11

[2] Annex IV of DSU, with the title of"Expert Review Group" and Annex II of TBT Agreement, with the title of "Technical Expert Groups".

cases.[3] Among which, the Panels of *US-Shrimp/Turtle* and *Japan-Photographic Film and Paper* adopted this procedure solely according to Article 13 of the DSU, others were either based on Article 13 of the DSU together with Article 11.2 of the TBT Agreement, or based on Article 13 of DSU together with Article 14.2 of the SPS Agreement. For all these 11 cases, except 2 Panels that selecting to consult certain institutions[4], most of the Panels selected to consult individual experts[5], while doing so, the Panels consistently refused to establish an expert review group, but consulting the experts on the individual basis. The problem is that under such circumstance, the procedures respectively provided by the Annex of the DSU and the TBT Agreement has no space to be used, therefore, the Panels may and have to establish temporary rules for this procedure after consultation with the parties to the dispute in each case. Following the increased adoption of this procedure and more difference occurred in such temporary rules, more and more problems relevant to the due process exposed.

II. THE PROBLEMS EXISTED IN THE CURRENT CONSULTATION WITH EXPERTS PROCEDURE

A. How to Choose between the Individual Expert and the Expert Review Group

As mentioned above, the Panels, when adopting the consultation with experts procedure, almost without exception chose to consult experts on individual basis, even if the TBT Agreement clearly demonstrated the preference to establishment of technical expert groups. On this issue, an intense debate had occurred in *EU-Asbestos*. EU claimed that the Panel in this case should have no choice but to establish an expert review group in accordance with the provisions of Annex IV of the DSU. As the precondition, EU claimed that the dispute measures should be examined in accordance with the terms and references of GATT1994, not that of the SPS Agreement. Therefore, Article 13 of the DSU should be applied when adopting the consultation with experts procedure, paragraph 2 of this Article states clearly: "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.

With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."EU believed that based on the principles of general international law of treaty interpretation, paragraph 1 and paragraph 2 of Article 13 of the DSU should be explained sys-

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[3] According to the materials published in WTO official website, actually there are more than 11 cases adopting the consultation with experts procedure, because EC-Measures Affecting Livestock and Meat (Hormones) (hereafter EC-Hormones) included WT/DS26 (complaint by United States) and WT/DS48 (complaint by Canada), EU-Measures Affecting the Approval and Marketing of Biotech Products (hereafter EU-Biotech Products) included WT/DS291, WT/DS292 and WT/DS293. If calculated as 11 cases, they are: Australia-Measures Affecting the Importation of Salmon (WT/DS18) (hereafter Australia-Salmon, noted that experts were appointed twice: original panel and implementation panel); EC-Hormones; Janpan-Measures Affecting Consumer Photographic Film and Paper (WT/DS44) (hereafter Japan-Films); United States-Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58) (hereafter US-Shrimp/Turtle); Japan-Measures Affecting Agricultural Products (WT/DS76) (hereafter Japan-Varietals); India-Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products (WT/DS90) (hereafter India-Quantitative Restrictions); European Communities-Measures Affecting the Prohibition of Asbestos and Asbestos Products (WT/DS135) (hereafter EC-Asbestos); United States-Section 110 (5) of the US Copyright Act (WT/DS160) (hereafter US-Copyright Act); Japan-Measures Affecting the Impor-

tematically, which means as far as the "scientific issues" is concerned, the most recommended method under the DSU is to set up an expert review group. This is because "scientific issues" appears only in second sentence of Article 13.2, and this sentence was provided specially for the establishment of an expert review group. The drafting history of the DSU also supported this interpretation.

The first sentence of Article 13.2 applied only to such a circumstance that the Panels hoped to obtain factual information beyond the technical or scientific fields. According to the context, the ordinary meaning of the terms, and the object and purpose of Article 13.2, a clear conclusion can be drawn together from the first sentence and second sentence that: the scientific issues in the strict sense must be settled in accordance with the procedure included in Annex IV of the DSU. The preamble of Annex IV also confirms this interpretation, because it states that the rules and procedures provided in Annex IV should be applied to the expert review groups established under Article 13.2, without distinguishing whether it was based on the first sentence or the second sentence.[6]

However, both the Panel and the Appellate Body of this case rejected the EU's argument. As the Panel finally decided to apply the SPS Agreement, it then presented that:"We believe that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU prohibited us from obtaining advice and information from individual experts according to the first sentence of Article 11.2 of the SPS Agreement and Article 13.1 and the first sentence of Article 13.2 of the DSU.[7] Appellate Body gave its support to the Panel: "We agree with the views of the Panel. If the dispute under the SPS Agreement involves scientific or technical issues, the Panel should seek advice from the experts whom will be selected after negotiating with the Parties. To this end, the Panel may establish an advisory technical expert group in the case of appropriate. "In other words, Article 11.2 of the SPS Agreement authorizes the Panel may specifically though not exclusively ask the technical expert group to provide written advisory report on factual issues concerning scientific matters. The Panel deems that this provision allows it to establish such an expert review group both for scientific or other technical problems, but at the same time does not rule out consultation with experts on the individual basis. The Panel believed such an interpretation best suited the text of the said provision, an to reconcile the text is what the Vienna Convention of the Law of Treaties required.[8]

Whether the SPS Agreement or GATT1994 should be applied that respectively resulting in the application of Article 11.2 of the SPS Agreement or Article 13 of the DSU does not matter, because the Panel believed that even if Article 13 of the DSU should be applied, the effect is the same just as Article 11.2 of the SPS Agreement being applied. For the interpretation of Article 13 of the DSU, EU

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tation of Apples (WT/DS245) (hereafter Japan-Apples); EU-Biotech Products; Australia-Measures Affecting the Importation of Apples from New Zealand (WT/DS367) (hereafter Australia-Apples).

4 Respectively, Panel in India-Quantitative Restrictions, consulting with IMF; Panel in US-Copyright Act, consulting with WIPO.

5 In Japan-Films, the Panel consulted a linguistic expert, In the other 10 cases, all the experts came from scientific field.

6 Panel Report, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, para. 5.3, WT/DS135/R, 18 Sep. 2000.

7 Panel Report, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, para. 5.17, WT/DS135/R, 18 Sep. 2000.

8 In addition, since Canada claimed that the dispute should apply TBT Agreement, EU therefore argued that, if the measure at issue should be deemed to fall under the TBT Agreement, Article 14.2 of that Agreement would require the establishment of an expert review group for any scientific or technical matter, and pursuant to Article 1.2 of DSU, that provision would prevail over those of Article 13 of DSU. The Panel rebutted such an argument. The Panel noted that it is only "to the extent that there is a

and the Panel carried out from different emphases. The logic of EU was that Article 13.1 is applied to the consultation with expert for general factual issues, while Article 13.2 is specially suitable for the consultation with experts for scientific issues. The Panel should respect this intention expressed by the contracting members when drafting this treaty. On the other hand, the Panel and the Appellate Body emphasized that when providing the establishment of expert review group for obtaining expert opinion on scientific issues, the exact word used by Article 13.2 is "may", therefore, the Panel is entitled to decide based on the factual circumstances whether to establish an expert review group or not, not being forced to do so.

From the angle of word interpretation, the analysis of the Panel was tenable. However, the Panel's interpretation obviously failed to comply with the original intention of the WTO members when they drafted the relevant provisions. Just look at the provisions once again, it is clear that the expert review group (technical expert group) was explicitly mentioned, while consultation with experts on an individual basis was only derived by reading the relevant provisions.

Perhaps some practical reasons may explain why the Panels made such a choice: the establishment of an expert review group took a long time, and a written report made by all the experts after discussion and compromise will make the Panel fell great pressure to refuse. Therefore, the Panels usually expressed that consulting with experts on the individual basis will make them solicit necessary scientific or technical information more effectively.

However, from the institutional perspective, this approach is open to question. Consulting individual experts may make the information collection more flexible, and the time required is relatively less. But at the same time, it also led to a risk: if the experts' opinions contradicted each other, the Panel was still lacking in the ability of judge. Because most Panel members came from trade and legal fields, and asking them to decide substantive scientific debate was clearly beyond the scope of their abilities. To a certain extent, it will finally affect the legitimacy of the Panel's decision. On the other hand, if an expert review group is established, then the experts with different views may eventually achieve a more consistent opinion after discussion, a result difficult for the Panel to get. Furthermore, establishing an expert review group is in fact more in line with the expressions of the relevant provisions. If, the DSU, the SPS Agreement and the TBT Agreement expressly refer to the establishment of expert review group and even provide detailed procedure for it in its respective Annex, then, it is very difficult to explain why the Panels are only willing to consult experts on individual basis, an approach not being clearly mentioned in the relevant provisions but derived from logic reasoning based on common sense?

In fact, this problem actually came from the strict trial period of the Panel proceedings. Had the Panels not subjected to so great time pressure, it would be willing to establish an expert review group. So, if we want to solve this problem in the future, a feasible approach may be ruling the time needed for the consultation with experts out from the current trial period of the Panel proceedings, that is, if the Panel decides to start the consultation with experts procedure, it may enjoy an additional period to select the members of the expert review group and to determine the scope and contents of the questions, and the time required

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difference between the rule and procedures of the Understanding and a special or additional rule or procedure in Appendix 2 to the DSU that the latter will prevail. Yet, just as stated by the Appellate Body, it is only where the provisions of the DSU and the special or additional rules of Appendix 2 can not be read as complementing each other that the special or additional provisions will prevail over those of the DSU, that is, in a situation where the two provisions would be mutually incompatible. However, Article 14.2 of TBT Agreement and Article 13 of DSU can be read as complementing each other, so there is no such priority of application.

by the expert review group to give diligent and objective answers should also be decided by the Panel according to the circumstances under each case, not subject to the time limit of the trial.

B. How to Select the Appropriate Experts

Annex IV of the DSU and Annex II of the TBT Agreement provide clear criteria for how to select the experts:"Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question; Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances.[9] Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. "However, strictly speaking, these criteria shall apply only when an expert review group is to be established. Therefore, once the Panel decides to consult the experts individually, there is no legal obstacle to prevent the Panel, after negotiating with the parties to the dispute, from developing selection criteria different from the above ones. Yet, just as EU stated:" The Panel's use of experts for obtaining scientific and technical advice should respect general principles of law. In particular, it should be transparent, avoid conflicts of interest, reinforce the integrity of the dispute settlement mechanism and foster public confidence in the outcome of the dispute."[10]

Anyway, for the criteria such as the experts shall have professional standing and experience in the field in question, shall serve in their individual capacities and so forth, there is little dissent. The real controversy lies in how to judge whether the potential experts can act independently and impartially, whether they uphold the principle of no conflict of interests and so forth In other words, how to judge some relationships between the experts and the parties to the dispute may actually impact on the experts' independence and impartiality when they providing the expert advice? From the perspective of legal procedure, this question may further be changed into as how to establish appropriate rules of procedure to guarantee the required independence and impartiality?

For example, to ensure that the candidate experts and the parties to the dispute are without a conflict of interests, is it enough for the candidate expert be required to fill out a disclosure form concerning his interests, relationships and any matters that may affect his independence, or should he has the obligation to prove his impartiality? This paper argues that it is not incumbent upon a prospective expert to prove his impartiality and neutrality. On the contrary, he can only be required to fill out a disclosure form, disclosing any information reasonably be expected to be known by him that may affect or result in suspicious of his impartiality and neutrality. Once the prospective expert fills out the disclosure form, the parties to the dispute may raise objection to this person because of the disclosed information showing a possibility of conflict of interests. The Panel has the right to decide whether such a possibility really exists and then whether the objections of the parties to the dispute should be confirmed.

The approach taken by the Panel in *US-Shrimp/Turtle* should be praised in this instance. Having noted that in their disclosure forms, three of the experts approached had disclosed what might be considered as potential conflict of interests, the Panel nevertheless decided to confirm their appointments "being of the view that the disclosed information

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[9] Such exceptional circumstances may include: the dispute involves certain disease only spreading in the territory of one of the parties to the dispute; there is a need to provide technical assistance to the national legislation of the Respondent, and etc.

[10] Panel Report, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, para. 5.3, WT/DS135/R, 18 Sep. 2000.

was not of such a nature as to prevent the individuals concerned from being impartial in providing the scientific information expected of them. The Panel also took into account the disclosed information when evaluating the answers provided. The Panel underlined that, in making its choice, it had been guided primarily by the need to gather expertise of the best quality and covering as wide a field as possible. In the circumstances specific to this case, it was difficult, if not impossible, to reconcile this need with an agreement by all the parties to the dispute on each and every individual concerned.[11] Then the Panel made the said decision.

In practice, however, it still remains a very subjective problem as how to determine whether there exists a potential conflict of interests. For example, in *Australia-Apple*, Australia opposed to appoint Dr. Cross as the expert, the reason is that this man kept long cooperation with the scholars from New Zealand, and the main purpose of his work is to promote the export of New Zealand's apples. Dr. Cross made an announcement of no conflict of interests in his disclosure form, among that he stated." I have collaborated with scientists at HortResearch New Zealand in the conduct of research into the sex pheromone of apple leaf midge. We have not had any joint funded research projects. I was a guest speaker at a NZ top fruit conference a couple of years ago. But then again I was a guest speaker at the IFTA (International Fruit Tree Association) 50th anniversary conference in Hobart Australia in 2007."[12] The Panel stated that: "As a matter of fact, HortResearch is wholly owned by the New Zealand Government. However, participation in joint research with other scientists who may be affiliated with a government-funded institution does not itself imply a connection with that Government. There is no indication that Dr. Cross has worked for the Government of New Zealand, nor that he has received any monetary compensation from that Government.

If Australia wanted to do a successful objection, it should submit additional arguments or evidences to prove how the impartiality or independence of the said expert is affected then.[13] "It is to be expected that in any specialized area of science, the few knowledgeable experts will frequently engage with each other and may participate in joint research projects, in meetings and conferences, and joint publications. This is particularly true, when, as this Panel's considerable difficulty in identifying experts clearly demonstrates, there are a very small number of experts in the field in question. In such a situation it is all the more likely that all of the world's experts will work and collaborate in some way at one time or other."[14] "In the present case, as the party making an objection to the selection of an expert proposed by the Panel, it was Australia's burden to make the case that Dr. Cross's participation in a joint research project and publication with researchers from HortResearch New Zealand would call into question Dr. Cross's independence and impartiality, or create actual or potential, direct or indirect, conflicts of interest. Yet in this regard Australia does not provide any explanation or evidence."[15] Based on the above facts, The Panel in this case finally decided to appoint Dr. Cross and accept his opinion.

What these two Panels had done are worthy of recognition. After all, the core purpose of the consultation with experts procedure is to provide information and professional advices on scientific or technological matter with best quality. Therefore, the detailed rules

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[11] Panel Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, para. 5.11, WT/DS58/R, 15 May, 1998.

[12] Panel Report, Australia-Measures Affecting the Importation of Apples from New Zealand, para. 1.21, WT/DS367/R, 17 Dec. 2010.

[13] Panel Report, Australia-Measures Affecting the Importation of Apples from New Zealand, para. 6.8, WT/DS367/R, 17 Dec. 2010.

[14] Id.

[15] Id.

of procedure should be designed around this requirement. In the long run, in order to enhance the public's confidence on the result of the WTO dispute settlement and improve its legitimacy, as far as the consultation with experts procedure is concerned, it should make sure that selection of the most suitable experts should always take priority.

On the basis of the above understanding, let's further discuss whether the prospective experts may be the citizens coming from one of the parties to the dispute. As a fact, the cases that need to apply the consultation with experts procedure are often involving very specialized expertise in scientific or technical fields, therefore, the number of appropriate experts to be consulted who should have international professional standing and experience will not be so much. If further considering whether they are available due to the time or schedule or their willingness of providing expert advice, the number of appropriate experts may be even less. Thus, if an proposed expert should be automatically excluded only because he is the citizen of one of the parties to the dispute, the Panel will face a risk of not being able to find the most appropriate experts who have the highest level of the required expertise. In the past practice, the Panels performed quite cautiously and conservatively, trying their best to avoid selecting the citizen of one the parties to the dispute as an expert. However, due to such a limitation, the difficulty of finding the appropriate experts increased a lot and the time needed accordingly increased. In addition, if just as the above supposed, the Panels may establish more expert review groups in the future when adopt the consultation with experts procedure, then the appointment of a citizen from one of the parties to the dispute as the expert will cause less doubt of due process.

This paper then supposes that it is not appropriate to unconditionally and automatically apply the principle of "citizens of the parties to the dispute shall not serve as an expert". The Panel shall select the experts basically based on the qualifications and academic prestige of the candidates. If a citizen of one of the parties to the dispute was proposed based on the above criteria, then the objection will be persuasive only if the parties to the dispute can provide tangible evidences proving an actual or potential conflict of interests exists between the said candidate and that party.

C. How to Solicit and Consider the Expert Advice

According to the current practice, the Panel will usually develop the list of questions needed to consult based on the written documents initially submitted by the parties to the dispute, the parties to the dispute will have opportunity to comment on such list of questions, and the Panel will make adjustments and finalize the list according to the comments of the Parties to the dispute. The selected experts are without the need to answer all the questions in the list, but just those within the scope of their professional fields. In practice, the above approach encountered the following controversies:

First, whether the Panel may draft the questions to be consulted based on the information or issues of concern provided by the third party? In particular, whether the Panel may consult the experts for any scientific issues beyond the complaints raised by the parties to the dispute? As mentioned above, the Panels usually determine the scope to be seeking expert advice based on the initial written documents submitted by the parties to the dispute.[16] However, in *Australia-Apples*, part of the questions to be consulted with the experts in the list were prepared by the Panel according to the issues of concern raised by the United States, a third party to this dispute. Australia objected these questions, and argued that the third party is not the party to the dispute, any

[16] For example, the case of Japan-Varietals, see Panel Report, Japan-Measures Affecting Agricultural Products, WT/DS76/R, 19 Mar., 1999.

documents submitted by the third party does not constitute the evidences and/or arguments that can be invoked by the parties to the dispute to support its own point of view. By the same logic, the third party's submissions do not constitute the basis for the questions to be asked to the experts. Australia also claimed that because the complainant has the obligation to provide prima facie evidences of the respondent's trade measures being inconsistent with the WTO agreements, therefore, if the complainant did not make a claim or the claim has not being supported by enough evidences, then, even if there are some expert testimonies to support this claim, such expert testimonies can not be used as the evidence to support this claim. Australia advocated that New Zealand did not provide evidences for part of its claims, and then tried to use the information provided by experts or third parties to supplement, this is inconsistent with the principles of due process. In addition, Australia also claimed that the Panel, when do its ruling, should not rely on the expert opinion issued for the questions designed by the Panel according to any third party's information.[17]

The Panel considered that in essence, the consultation with experts procedure serviced for its duty of making an objective assessment on the dispute matters by seeking the information and the scientific advices. The dispute matters include the claims raised by the complainant related to the trade measures, and all the other claims and measures within the jurisdiction of the Panel. The Complainant has the obligation to clarify the nature of its claims by legal analysis, should identify which provisions of the WTO Agreements have been violated by the claimed measures. Once a claim has been successfully included in the Panel's jurisdiction, the Complainant should further adduce evidence for this claim. In any case, once a claim was appropriately submitted to the Panel and the complainant also submitted the relevant arguments and evidences, the Panel may have full investigative powers in order to make an objective assessment of the issues in dispute. In this respect, the Panel was not limited by the claims and arguments raised by the parties to the dispute. It may form its own views, or consider or even accept the third party's views. Australia's objection to the Panel's consideration of the third party's information contradicted the Panel's obligation of making objective assessment of the matters in dispute, and also damaged the rights of the third party authorized by the DSU.[18]

In essence, the disagreement between Australia and the Panel lied in the understanding of the nature of the consultation with experts procedure. Australia believed that the nature of this procedure was evidence collection, and then should strictly apply the rules of evidence. According to the adversary system under the common law, the burden of proof borne by the parties, that is, the court may not on its own initiative take investigation or collect evidence for the matters on which the parties to the dispute did not raise a claim, nor the Panel may take investigation or collect evidence as required by any third party or based on the information provided by such third party. Even according to the civil law under which the court has more authorities, although the court may take investigation and collect evidence outside the scope of the parties' claims and use the results thereof as the basis of its ruling, such a practice is only a supplement or exception to the principle of parties' burden of proof.[19]

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[17] Panel Report, Australia-Measures Affecting the Importation of Apples from New Zealand, WT/DS367/R, 17 Dec. 2010.

[18] Panel Report, Australia-Measures Affecting the Importation of Apples from New Zealand, p. 197, WT/DS367/R, 9 August, 2010.

[19] For example, the China's Civil Procedure Law and its judicial interpretation stipulated that the court can not collect evidences on its initiative except on the following situations: (1) The parties and their legal counsels can not collect evidence by themselves

On the other hand, the Panel believed that the nature of the consultation with experts procedure was fact identification, a concept broader than the evidence collection. Just as what the Panel has said, it had the obligation to make objective assessment on the matters in dispute, for which it enjoyed broad powers of investigation.

So, the question may be further changed into as what the nature of expert advice should be in the WTO dispute settlement system? Is this something similar with the expert conclusion under the civil law or something similar with the witness testimony under the common law? The origin of this question boiled down to the difference between the words and expressions of the relevant WTO Agreements and that of the domestic laws. Article 13 of the DSU states that consulting with external experts is the Panel's right to seek information. Such a concept or formulation can not be found in the domestic litigation laws. However, if we apply the concepts under the domestic laws by analogy, then we may find that such a right of seeking information or taking investigation may be more exactly to be recognized as evidence collection. Although the last sentence of paragraph 6, Annex 4 of the DSU states that the final report of the expert review group is only an advisory nature, but this does not preclude the final report constituting the evidence. Of course, since the relevant WTO provisions avoid using those concepts that universally accepted in the domestic laws and preferred to the concepts such as the right to seek information, it was not appropriate to treat them as two equivalent things.

This paper argues that the consultation with experts procedure in WTO dispute settlement system is similar but different with the collection of witness testimony/expert conclusion in the domestic law. The difference is that to some extent, the consultation with experts procedure in the WTO dispute settlement system deviates from the adversary system under the common law, and the Panel should accordingly be authorized relatively greater power of investigation.[20] Therefore, typically, the Panel can prepare the questions to be asked to the experts according to the information provided or concerns raised by the third party. But if such information or concerns are beyond the scope of those claims submitted by the parties to the dispute, the Panel should refuse to take further investigation according to such information or concerns.

Second, whether the Panel can consider the opinion provided by the expert beyond the areas of expertise by virtue of which he/she was selected? This problem firstly occurred in Australia-Apples. During the consultation with experts procedure in this case, Australia claimed that the experts' answer to question 4, 5, 21, 66, 67, 89 and 121 were beyond the areas of expertise by virtue of which the experts were selected.[21]Australia considered that this resulting in a lack of due process in the consul-

due to objective reasons; (2) The court held that it is necessary to collect the evidences on its initiative, such specific circumstances including: for the protection of national interests, public interests and the interests of a third person; due to the procedural requirements, if the court does not collect evidences on its initiative, the litigation will not carry out.

[20] Question 4 and 5 involved the quarantine practice of Australia. Question21, 89 and 121 required the experts should have expertise in waste disposal Although not specifically for the WTO, some scholars on the whole support this view. For example Durward Sandifer: "an international arbitral tribunal can not tolerate the strict rules of evidence, apart from specific exceptions, they are usually willing to collect evidence ex officio beyond those provided by the parties." Durward Sandifer, *Evidence before international tribunals*, Charlottesville: University Press of Virginia, 1975, pp. 3-4; Witenberg: "the judge of international arbitration court not only has the right but the obligation to ascertain the facts ex officio." Witenberg, *"Onus Probandi devant Jes Jurisdictions Arbitrales*," 55 Rev. Gen D. Droit Int'l Pub 321, 335 (1951); Gillian White, *The Use of Experts by International Tribunals*, New York: Syracuse University Press, 1965, ch. VII.

[21] Question 4 and 5 involved the quarantine prac-

tation with experts procedure. Australia therefore requested the Panel not to use the answers to these questions in its report.[22] The Panel once again recalled its extensive rights authorized by the DSU and its working procedures, and then presented that the proposed questions were relevant to the "Apple Import Risk Analysis Final Report" (IRA) and the evidence submitted to it, and the aim of preparing all these questions was to seek professional help for its better understanding of the scientific basis and scientific reasoning of the IRA. In other words, the experts were only asked to assist the Panel to understand the evidence presented to the latter, this was in line with the legal responsibilities of the experts.[23]

Leaving aside the specific conditions of *Australia-Apples*, as far as whether the Panel may consider the opinions provided by the experts beyond the areas of expertise by virtue of which they were selected is concerned, there are different views among scholars. For example, Joost Pauwelyn has stated that: "crucially, unlike many domestic legal systems, WTO procedures do not set out restrictions on the admissibility of evidence.....In WTO proceedings, parties can put whatever evidence they want on the panel record.....The same principle would seem to apply to panel-appointed experts. In reply to panel questions, they can submit whatever they like.....More generally, the reluctance of international adjudicators to exclude evidence from the record stems from the facts that the parties in dispute are sovereign states, not individuals."[24] Joost Pauwelyn also quoted what Durward Sandifer had said to confirm his opinion:"International judicial proceedings derive a distincitve character from the fact that the parties are sovereign states. From this fact it follows that the consequences of error or a failure to ascertain the facts in reaching a decision are, in many instances, more far-reaching in their effect than in litigation between ordinary private parties in municipal tribunals."[25]Therefore, Pauwelyn finally concluded that:"The only genuine restriction on evidence before a WTO panel remains one of timing. Normally, all evidence ought to be submitted during the first round of submissions and hearings (not in the rebuttal stage, let alone, beyond that). But even there, upon a showing of good cause, a panel would be pressed to nonetheless accept the evidence."[26]

As mentioned above, this paper agrees that the expert opinion is better to be treated as the evidence, which means the discussion hereof based on the same precondition as that of Pauwelyn. In such context, this paper can not agree with Pauwelyn's point of view. The reason of little restrictions on the admissibility of evidence in the WTO dispute settlement system is that it is very difficult to get consensus on the evidence rules because of great difference among the Members. There is no way but leave a relatively large discretion to the

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tice of Australia. Question21, 89 and 121 required the experts should have expertise in waste disposal (from Australia's canned-food factory). Question 66 and 67 involved the climate knowledge. However, New Zealand argued that, to answer question 4 and 5 do not require the experts having expertise in the field of quarantine, but just require the experts to give advice based on the arguments of IRA and the parties to the dispute; to answer 66 and 67, the experts were just required to help the Panel analyzing whether the IRA's analysis of climate conditions relating to the diseases is correct, which is within their professional field; to answer question 21,89 and 121, the experts were just asked to assist the Panel to understand the evidence presented to it.

[22] Panel Report, Australia-Measures Affecting the Importation of Apples from New Zealand, p.171 , WT/DS367/R, 9 August, 2010.

[23] Id.

[24] Joost Pauwelyn, "The Use of Expert in WTO Dispute Settlement", *Int'l & Comp. L. Q.* Vol. 51, 347, (2002).

[25] Durward V. Sandifer, *Evidence Before International Tribunals, (*Charlottesville:University Press of Virginia, 1975), p. 4-5.

[26] Joost Pauwelyn, "The Use of Expert in WTO Dispute Settlement", *Int'l & Comp. L. Q.* Vol. 51, 347, (2002).

Panels. Furthermore, even if we acknowledge such little restrictions, it should be understood as having little restrictions on the types and submissions of evidence, not on the requirements of how to constitute a legitimate evidence. For the expert opinion, it is needed only because the experts having prestige and experience in their areas of expertise. Otherwise, there is no need to take such consultation. The key feature and value of the expert opinion will be killed if the information and opinions provided beyond the expert's area of expertise may be considered or even accepted. In fact, the expert does not know much more than the average person outside its expertise field. For example, in *Australia-Salmon*, a consulted laboratory scientist may answer whether the frozen fish can constitute a disease vector, but she can not provide advice for what the costs and benefits of establishing relevant legislations be.[27] Of course, in practice, it is difficult to distinguish what answers are within the experts' area of expertise and what are not. But this kind of practical difficulty shall not constitute the ground for accepting the information or opinions provided beyond the expert's area of expertise at the theoretial level. As will discuss below, such practical difficulties may be overcome by the cross-examination procedure.

In short, from the core features of the expert opinion, the Panel should not accept and consider the information and opinions provided by the experts beyond the areas of expertise by virtue of which they were selected.[28]

D. How to Guarantee the Quality of the Expert Advice

Although the expert advice only had an advisory nature, it was no doubt the Panel relied heavily on it when do its ruling. However, in the current practice of WTO, the expert advice is difficult to get cross-examination. This leads to some poor-quality, even false expert advice misguiding the Panels. For example, in *EU-Hormones*, Dr. Lucia, in the absence of any support from empirical research, commented that the risk of getting cancer resulted from adding hormones in the production of the beef is less than per million.[29] Both the Panel and the Appellate Body relied heavily on this conclusion when preparing their rulings, because this conclusion changed a very complex scientific issue into a simple percentage that can be easily understood for almost everyone. The Panel and the Appellate Body felt it was convenient to use such a conclusion. In addition, as all the circumstances mentioned above, including whether the questions raised by the Panel based on the information or concerns provided by the third party, whether the expert advice went beyond their areas of expertise, whether the expert advice went beyond the scope of the questions asked to them and so on, it is clearly unscientific for Panels to rely on such advices directly without any discriminating process.

To this end, the Panels have developed a number of specific measures.[30] Generally speaking, the Panel will transfer the written replies made by the experts to the parties to the dispute for them to comment. After that,

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[27] Panel Report, Australia-Measures Affecting the Importation of Salmon, WT/DS18/R, 6 Nov. 1998.

[28] A related issue is whether the Panel may consider the answers given by the experts beyond the scope of the Panel's questions. This issue is not controversial in theory, because the Panel apparently will not consider the experts advices beyond the scope of questions it asked. But the key is sometimes it is very difficult to distinguish the margin in practice.

[29] Panel Report, European Communities-measures Concerning Meat and Meat Products (Hormones), para. VI, WT/DS26/R, WT/DS48/R, 18 Aug. 1997.

[30] Such practice has developed based on the provisions of Appendix II of TBT Agreement. Paragraph 6 of this Appendix states: "The technical expert group shall submit a draft of report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members when it is submitted to the Panel." But this provision obviously can not constitute the cross-examination procedure.

the Panel may reconvene the experts' meeting either on its own decision or at the request of either party to the dispute. On this meeting, the experts may have opportunities to respond to the comments made by the parties to the dispute. In essence, such practice is similar to the cross-examination procedure under the domestic laws of the WTO Members. However, since it is not a compulsory procedure, and the relevant provisions are too vague to be applied, it is hard to say there exists standardized cross-examination procedure for the expert advice.[31] To ensure the quality and legitimacy of the expert advice, it is necessary to introduce the cross-examination procedure prevailing in the domestic evidence rules into the consultation with experts procedure under the WTO dispute settlement system in the future.

In this regard, many scholars have suggested introducing the traditional cross-examination procedure under the common law system.[32] However, after carefully examining such cross-examination procedure, this paper argues that it is inappropriate to simply reproduce the traditional cross-examination procedure in the consultation with experts procedure. This is because in the common law system, the traditional cross-examination procedure originated from the philosophy of liberty, pursuing the typical pattern of adversary system and putting the judges in a detached and passive position during the whole hearing. It is especially right for the expert advice, because the experts were appointed by the parties to the dispute. In view of this, the cross-examination was designed to be: firstly direct examination—each party to the dispute queried its own appointed experts, then cross examination—each party to the dispute queried the experts appointed by other parties, and again direct examination, or even take the second cross examination when necessary. The cross-examination procedure was designed to protect the party's right of free query, and help the court to find reliable and objective expert advice and/or to understand the issues involving the expertise in particular fields.

However, the WTO dispute settlement system does not adopt the typical pattern of adversary system.[33] As far as the consultation with experts procedure is concerned, the experts were mainly selected and appointed by the Panel, they are entrusted to act on the Panels rather than the parties to the dispute and to a great extent were subjected to the control of the Panels. In short, the cross-examination procedure was designed to against the liberalism of the parties to the dispute to defend themselves, including the appointment of external experts to defend themselves in the adversarial trial. Therefore, after considering the purposes and objectives of the cross-examination procedure, we find it is not suitable for the consultation with experts procedure in the WTO dispute settlement system.

As an alternative, the paper recommends a concurrent evidence procedure originated from the practice of Australia's courts in the patent cases to the consultation with experts procedure in the WTO dispute settlement system.[34]

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[31] Zhang Xiaojian, "Expert Decision and Public Participation in WTO Dispute Settlement System", Hebei Law Science, Vol. 25, No. 3, March 2007.

[32] For example, Joost Pauwelyn, "The Use of Expert in WTO Dispute Settlement", in *Int'l & Comp. L. Q.* Vol. 51, 325, 327 (2002); Christopher T. Timura, "Cross-examining Expertise in the WTO Dispute Settlement Process", *Mich. J. Int'l L.* Vol. 23 (3), 709 (2002).

[33] The Panel and the Appellate Body of WTO expressed in many cases that the Panel is more similar with the court under the civil law bearing the duties ex officio. For example, in Canada - Continued Suspension, the Appellate Body confirmed Article 13 of the DSU 13 and Article 11.2 of the SPS Agreement authorized "significant investigative powers" to the Panel, and the Panel enjoyed a wide range of discretion in applying these powers, including the selection of external experts. See Appellate Body Report, Canada-Continued Suspension of obligation in EC Hormones, para. 439, WT/DS321/AB, 31 Mar. 2008.

[34] The Official name of this procedure is Concurrent Evidence Procedure, commonly known as hot tub.

The concurrent evidence procedure is a way parallel to the cross-examination procedure specifically for the experts' testimony. From the Australia's practice, the procedure includes the following steps: First, the court will ask each expert to prepare a written report and then exchange the written report among them. Second, in the trial, all the experts will share their views on specific issues, and then the court will announce orally both the consensus and disagreement of the experts. Third, the court will allow the experts to provide public statements outlining their views and the supported data, methods and empirical basis. After each expert finishes the public statements, the court will again ask questions to each expert.[35]For the court's questions, the experts should give comments, and not just in response to the questions raised by the court special for him, but may also in response to the questions raised by the court to other experts. Through the concurrent evidence procedure, the court can make it clear whether the information relied by the experts to make their advices are sufficient and correct, and whether the standards applied by the experts to make conclusions are applicable. Furthermore, this procedure can help the court together with the parties to the dispute better understand the issues involving the expertise in the professional fields, find an appropriate solution and then improve judicial efficiency.

As far as the WTO dispute settlement system is concerned, in order to better introduce the concurrent evidence procedure, the first thing is that the Panel should ensure the experts can access to all the documents submitted by the parties. If, after consulting the experts, the parties to the dispute put forward new evidences and disputes arising from these new evidence, then such new evidences should also be sent to the experts for their comment. Second, the experts should submit all the written evidences that they relied to give their expert opinion. This requirement aims to avoid the experts issuing their opinion only by guesswork and provide basis for the Panel and the parties to the dispute to examine. Third, in addition to enhancing the symmetry of information between the parties to the dispute and the experts, there should be enough time for the Panel, the parties to the dispute and the experts to conduct the concurrent evidence procedure. Under the current practice, the parties to the dispute usually have to wait until the substantive session is convened by the Panel to comment on the expert advice, and the meeting with the experts thereafter is usually completed within one day, which makes the experts in fact have no opportunity to respond to the parties' comments. Finally, to guarantee the due process, the private exchanges and contacts between the experts and the members of the Panel should be prohibited.[36]

III. CONCLUSION

The WTO judiciary makes an increasingly use of expert advice. This development must be applauded. It helps to guarantee the quality, transparency and legitimacy of WTO decisions, in particular those that cut across a number of social values. To scientifically design the consultation with experts procedure in the WTO dispute settlement system, we need to correctly handle the following questions:

First of all, how to correctly understand and apply the concept of due process. Due process is a basic system under the domestic constitution, which refers to the procedures ensuring the parties to be equally protected by the neutral judges, implementing the principles of parties initiative and guaranteeing the procedure's effectiveness. In short, it refers to

[35] However, some courts do not provide the public statements process for the experts, but go into the court question phase directly.

[36] See Joost Pauwelyn, "The Use of Expert in WTO Dispute Settlement", *Int'l & Comp. L. Q.* Vol. 51, 325, 327 (2002).

all the procedures that can maximally guide the judges to achieve justice.[37]According to this definition, we can see that not all the procedural issues can be raised to the concept of due process. Some minor procedural issues, as will not affect the fair trial rights of the parties, may be put in a less optimal position comparing to the substantive justice. Such situations exist in the consultation with experts procedure. For example, as for only one expert has been selected, if in fact the Panel had tried its best to find the appropriate experts while only one expert was available due to many objective reasons, it is difficult for that reason alone to think this practice violate the principle of due process, because only one expert being selected does not necessarily affect the fair trial rights of the parties.[38]Again, although the information disclosed by the candidate experts in the disclosure form showed certain relationships existed between the candidates and the party to the dispute, or if the candidate came from the party to the dispute, this does not necessarily lead to the candidates being excluded directly. Only if there are firm evidences showing that such relationship adversely affects the candidate expert to provide the advice independently and impartially, the opposition to this candidate can stand up.

Second, how to keep balance between the rights of the Panels and the rights of the parties to the dispute. Setting aside the whole design of the WTO dispute settlement system, as far as the consultation with experts procedure is concerned, WTO's current approach is more inclined to pursue the inquisitorial doctrine of the civil law. Because in current practice, the consultation with experts procedure were to great extent controlled by the Panel: (1) whether to consult the external experts is decided by the Panel. Although the parties to the dispute have the right to request, the Panel does not have the obligation to accept such a request.[39]And, even if the parties to the dispute do not raise such a request, the Panel can also make such a decision ex officio.[40] (2) the Panel also decides which issues belonged to the factual issues so that can seek expert advice for them; which experts to be selected after negotiation with the parties to the dispute; what kind of written questions to be asked in the initial meeting with the experts, and whether the parties to the dispute can make verbal challenge to the experts about their advices face to face.

China is also a civil law country, but on this issue, the appropriate position for us is to allow the parties to the dispute to participate in the consultation with experts procedure more actively so as to avoid the Panel totally controlling it. Therefore, it is necessary to amend the relevant provisions of the DSU, including allowing the parties to the dispute to decide whether to consult the experts or not, authoring the parties to the dispute with greater rights in selecting the experts, with the right to solicit expert advice directly and with the right to further cross-examine the expert advice, and so forth.

Third, how to keep balance between

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[37] John V. Orth, translated by Yang Mingcheng, Chen Shuanglin, *Due Process of Law: A Brief History*, (Beijing: Commercial Press , 2006), p. 25.

[38] In Australia-Apples, Australia opposed that only one expert in the field of ALCM was selected, arguing that this violated the principle of due process. The Panel rebutted such an argument, stated that such a practice did not affect the fair trial rights of Australia, and therefore did not constitute the violation of due process. Panel Report, Australia—Measures Affecting the Importation of Apples from New Zealand, .para. 7.11-7.21, WT/DS367/R, 9 August, 2010.

[39] For example, in Argentina-Footwear, Argentina has requested expert advice from the IMF. The Panel considered it as unnecessary and rejected Argentina's request. See Panel Report, Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items, para.III.C.2, WT/DS56/R, 25 Nov. 1997.

[40] For example, in US-Shrimp/Turtles, no party has request to solicit external experts' advice, but the Panel decided to do so. See Panel Report, US-Import Prohibition of Certain Shrimp and Shrimp Products, para. VA, WT/DS58/R, 15 May, 1998.

quickly resolving the disputes and detailedly examining the complex facts involving knowledge in special fields. Article 3 of the DSU clearly states that one of the goals of the WTO dispute settlement system is to resolve disputes quickly. In order to achieve this goal, the DSU provides clear time limits for the WTO dispute settlement procedure. However, these time limits are increasingly challenged with more and more disputes involving non-trade specialized knowledge. When criticizing the Panels' failure to comply with the time limits, people, noted that more and more cases had adopted the consultation with experts procedure, began to reflect on whether the strict time limits may hinder the Panel to identify the facts of the case. Thus, as mentioned above, a compromise is to provide extra period outside of the current trial time limits for the consultation with experts procedure. Combined with previous practice and consider the entire trial period, we suppose this period to be 3 months.

In short, with the consultation with experts procedure plays an increasingly important role in the WTO dispute settlement system, the developing countries including China should pay more attention to the use of this procedure, and should make voice for how to improve this procedure in the future so as to safeguard their national interests.

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