

**ARTICLE 5 OF THE DISPUTE SETTLEMENT UNDERSTANDING**

Communication from the Director-General

The following communication from the Director-General, dated 13 July 2001 has been addressed to the Chairman of the DSB with the request that it be circulated for the information of Members.

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The Dispute Settlement Understanding is rightly considered a critical aspect of the international trading system. It provides an avenue for the Members to settle their disputes in a multilateral forum. Fortunately, many disputes brought to the WTO have been settled through negotiated mutually acceptable solutions. However, many have also required panel and Appellate Body proceedings.

I am of the view that Members should be afforded every opportunity to settle their disputes through negotiations whenever possible. Article 5 of the DSU provides for the use of good offices, conciliation and mediation, but this Article has not been used since the inception of the WTO. In light of that, I would like to call Members attention to the fact that I am ready and willing to assist them as is contemplated in Article 5.6. It is time to make this provision operational.

There are two attachments to this letter which will assist Members in this regard. Attachment A is a short background note and Attachment B provides some simple procedures for Members to use to request assistance.

I would like to emphasize that these procedures are purely to help Members resolve their differences and do not limit their treaty rights in any manner. I would also like to assure Members that these procedures do not in any way limit my availability to assist delegations more generally whenever they request my help.

I look forward to working with delegations and hope the note will prove useful to Members that might wish to avail themselves of the provisions of Article 5.

## ATTACHMENT A

### Background Note Regarding Requests for Good Offices, Conciliation and Mediation Pursuant to Article 5 of the DSU

Article 5 of the DSU, *Good Offices, Conciliation and Mediation*, has never been utilised. The predecessor procedures under the GATT were only rarely used.<sup>1</sup> Specifically, Article 5.6 provides that the Director-General may, acting in his *ex officio* capacity, offer good offices, conciliation or mediation to the parties to a dispute. This authority is considered inherent in the post even though not further detailed in law.<sup>2</sup> Thus, no new powers are being provided to the Director-General by this provision; rather, he may exercise his normal powers to assist Members in negotiating and resolving disagreements.<sup>3</sup>

#### **Historical Background**

The 1979 Understanding on dispute settlement provided for the use of good offices to settle disputes. Paragraph 8 of the Understanding stated as follows:

If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.<sup>4</sup>

This provision was resorted to unsuccessfully by the United States and the European Communities in 1982 regarding their dispute over EC tariff treatment of citrus products. Also in 1982, the Ministerial Declaration stated as follows:

With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. . . .<sup>5</sup>

In 1987-1988 this procedure was used by Japan and the European Communities to assist in the resolution of their dispute concerning pricing and trading practices for copper in Japan. The Director-General nominated a personal representative to submit a report on the

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<sup>1</sup> We do not include actions taken pursuant to the provisions of the Decision of 5 April 1966 (BISD 14S/18). These are now covered by Article 3.12 of the DSU and are taken in lieu of action under Articles 4, 5, 6, and 12 of the DSU. The 1966 Decision provides some specific procedural rules.

<sup>2</sup> *Black's Law Dictionary* provides the following definition of *ex officio*: "From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer which are not specifically conferred upon him, but are necessarily implied in his office; these are *ex officio*. Thus, a judge has *ex officio* the powers of a conservator of the peace."

<sup>3</sup> This should be distinguished from the provision for formal arbitration provided for in Article 25 as an alternative to dispute settlement procedures.

<sup>4</sup> Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 (26S/210).

<sup>5</sup> Ministerial Declaration of 29 November 1982, Decision on Dispute Settlement (29S/13).

dispute. In addition, another outside expert was retained to assist in developing the factual basis for the report. The Director-General communicated to the Contracting Parties a report which included a short factual finding as well an "advisory opinion" to the effect that the European Communities and Japan should enter into mutually advantageous and reciprocal negotiations regarding certain Japanese tariffs as part of the Uruguay Round.<sup>6</sup>

In 1988 The Director-General reported that he had been requested to provide good offices by Canada and the European Communities. As requested by the parties, he provided an advisory opinion on a question that arose during Article XXIV negotiations regarding whether a tariff concession granted by Portugal to Canada included wet salted cod.<sup>7</sup>

Paragraph D of the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures (36S/61), provided further rules for requesting good offices. These new rules are quite similar to the current Article V of the DSU. Also, the reference to appointing a personal representative of the Director-General contained in the 1982 Decision was dropped. There is no record that this provision was utilized.

### **Current Proposal**

The Director-General is of the view that Members should attempt to settle disputes as often as possible without resort to panel and Appellate Body procedures. In this regard, he wishes Members to be aware of his willingness to actively support attempts to settle their disputes through use of good offices, conciliation and mediation. Unlike the situation under the 1982 Decision, there is no explicit authorization for appointment of another person to conduct the proceeding. Instead the DSU provides that this is to be considered part of the Director-General's *ex officio* powers.<sup>8</sup> Thus, it is appropriate that there be closer involvement of the Director-General as these are the powers specifically derived from his office. Therefore, it is contemplated that the proceedings will be handled directly by the Director-General or, with the concurrence of the parties, a designated Deputy Director-General. There will, necessarily, need to be provision for assistance from the Secretariat or, following consultation with the parties, other consultants retained for these purposes.

Another distinction arises in light of the considerably different situations existing with respect to dispute settlement under the GATT and the WTO. The negative consensus rule which provides certainty in access to the dispute settlement system as well as the introduction of an appellate process to ensure greater consistency have significantly changed the nature of the dispute settlement system. In light of these changes, the Director-General does not expect to provide "advisory opinions", strictly speaking, although informal non-legal advice regarding the best path to finding a solution may be appropriate. Legal conclusions regarding a particular dispute are best left to the formal dispute settlement process. Rather, Article 5 proceedings should be seen more as efforts to assist in reaching a mutually agreed solution. It should also be recalled that Article 25 provides for Arbitration and the Director-General does not wish to encroach upon this provision of the DSU.

In light of the above, the Director-General proposes to provide some procedural steps for parties to take when requesting Article 5 proceedings and such steps would be based on the following considerations:

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<sup>6</sup> Measures Affecting the World Market for Copper Ores and Concentrates, Note by the Director General (36S/199).

<sup>7</sup> C/M/225, p.2.

<sup>8</sup> Obviously, as these are *ex officio* powers to be used in this specific setting, it follows that the Director-General could offer his services to assist in settling disagreements between Members in other settings. The language of Article 5 should not be seen as limiting his role elsewhere.

1. Requests under Article 5 may only be made after commencement of a formal dispute pursuant to a request for consultations in accordance with Article 4 of the DSU. The nature of the Article 5 request should be specified.<sup>9</sup>
2. The Director-General should meet with the parties as soon as possible after a request to: (a) listen to their views of the dispute; (b) assess the resources that he should devote to the process to help reach a settlement;<sup>10</sup> and (c) provide any preliminary assessments as might seem appropriate.
3. The Director-General may designate a Deputy Director-General to assist and/or act in his stead. Except for the limited case of good offices, the Director-General or designated Deputy Director-General shall be present at meetings held pursuant to the process. As this is an exercise of *ex officio* powers, further delegation beyond the Deputy Director-General level should be avoided.
4. The Director-General may provide Secretariat staff to support the process as he deems appropriate. Care will be taken to insulate such staff from involvement in formal dispute settlement procedures in order to ensure the objectivity of the Secretariat.<sup>11</sup> To the extent necessary, outside consultants could be retained to assist in the process.
5. The Director-General and the Deputy Directors-General are not directly involved in on-going panel and Appellate Bodies cases so no further "firewalls" should be necessary in this regard.<sup>12</sup> With respect to other staff and consultants it would be necessary to require that they have no direct involvement in the dispute in question either before or after the Article 5 procedures. This should already be covered by the Rules of Conduct and no further action would be required.

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<sup>9</sup> Good offices, conciliation and mediation are seen as three different levels of involvement of the Director-General with good offices being overseeing of logistical and Secretariat support, conciliation involving direct participation in negotiations and mediation including the possibility of actually proposing solutions, if appropriate. Flexibility is to be maintained with regard to changing the role.

<sup>10</sup> This will, in any event, vary depending on the type of assistance requested.

<sup>11</sup> As a general matter, staff from Divisions primarily responsible for dispute settlement will not be involved in Article 5 proceedings.

<sup>12</sup> Article 8.7 of the DSU provides that the Director-General shall determine the composition of the panel if requested by one of the parties. As a general matter, this role would not seem to involve a substantive conflict of interest and, in any event, is specifically contemplated by Articles 5.6 and 8.7 taken together.

## ATTACHMENT B

### Procedures for Requesting Action Pursuant to Article 5 of the DSU

1. Any time after a request for consultations is made pursuant to Article 4 of the DSU, any party to the dispute<sup>13</sup> may submit a request to the Director-General<sup>14</sup> for provision of good offices, conciliation or mediation.<sup>15</sup>
2. Such request shall identify whether the request is for good offices, conciliation and/or mediation. It is recognized that the Director-General's role may change during the process if the parties agree. Such a request shall include any proposed issues for such proceedings, which may include any or all of the issues included in the request for consultations.
3. The Director-General shall meet with the parties within 5 days to discuss the issues raised. If all parties to the dispute agree, the Director-General shall proceed forward with an offer of good offices, conciliation and/or mediation. The Director-General shall arrange further meetings with the parties as appropriate.
4. As soon as possible, the Director-General shall identify to the parties any Secretariat staff or, after consultation with the parties, consultants that will assist him in carrying out the procedures.
5. The process shall be terminated upon the request of any party to the dispute, except in a circumstance where there are two or more complainants and at least one complainant and the respondent wish to continue in the process. In such situations, the Director-General shall continue his efforts with respect to the remaining parties.
6. A process which has been terminated may be re-started at any time by the request of the parties. The considerations of the previous paragraph regarding multiple party situations shall apply *mutatis mutandis*.
7. *Ex parte* communications are permitted. All communications made during the process shall remain confidential and shall not be revealed at any time, including during any other procedures undertaken pursuant to the DSU.
8. There shall be no third party participation in the process unless the parties to the dispute mutually agree.
9. If a mutually agreed solution to a dispute is reached pursuant to an Article 5 process, the notification to the DSB and relevant Councils and Committees pursuant to Article 3.6 shall so indicate.

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<sup>13</sup> Article 1.1 of the DSU indicates that a "dispute" in this context arises upon initiation of consultations pursuant to Article 4.

<sup>14</sup> References to the Director-General may, upon concurrence of the parties, include a designated Deputy Director-General.

<sup>15</sup> Good offices shall consist primarily of providing physical support and Secretariat assistance to the parties. Conciliation shall consist of good offices plus the further involvement of the Director-General in promoting discussions and negotiations between the parties. Mediation shall consist of conciliation plus the possibility of the Director-General to propose solutions to the parties.