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## **1 ARTICLE 5**

### **1.1 Text of Article 5**

#### **Article 5**

##### *Good Offices, Conciliation and Mediation*

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

### **1.2 Article 5.1: the voluntary/consensual nature of Article 5 procedures**

1. In *US/Canada – Continued Suspension*, the Appellate Body distinguished the "consensual" or "alternative" means of dispute resolution provided for in Article 5 of the DSU (and in Article 25 of the DSU) from "adjudication" through panel proceedings:

"Certainly, parties to a dispute are not precluded from pursuing consensual or alternative means of dispute settlement foreseen in the DSU. Article 3.7 of the DSU provides that '[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.' To reach a mutually acceptable solution, Members can engage in consultations or resort to mediation and good offices. Moreover, Article 25 provides for arbitration as an alternative to panel proceedings for dispute resolution. Consultations, mediation, good offices, and arbitration are, however, alternatives to compulsory adjudication and require the consent of the parties. In the absence of such consent, they cannot lead to a binding decision. Thus, it is important to distinguish between these

consensual means of dispute resolution, which are always at the Members' disposal, and adjudication through panel proceedings, which are compulsory."<sup>1</sup>

### **1.3 Article 5.3: "at any time"**

2. In *China – HP-SSST*, the Appellate Body noted that the European Union had referred to Article 5 of the DSU in the context of suggesting an informal meeting between the parties to reach agreement on certain matters pending in the appeal:

"In its appellee's submission, the European Union referred to Article 5 of the DSU that provides that good offices, conciliation, or mediation may be requested and take place 'at any time'. The European Union suggested that a 'procedural possibility' that it could envisage would be to invite informally the participants to 'indicate whether or not they would be prepared to voluntarily participate in a short informal meeting'. For the European Union, the purpose of the meeting would be to ascertain whether the parties would be able to reach an agreement concerning the Panel's findings under Article 2.2.2 of the Anti-Dumping Agreement, 'or indeed any other matter pending in this appeal'. (European Union's appellee's submission, para. 215) At the oral hearing, China was given an opportunity to comment."<sup>2</sup>

### **1.4 Article 5.5: procedures in parallel with panel process**

3. In *US – Tariff Measures*, the Panel understood the respondent's argument to imply that the parties' engagement to pursue a bilateral negotiations process aimed at resolving a disagreement between them could be characterized as a "mutually satisfactory solution" within the meaning of Article 12.7 of the DSU that barred the Panel from ruling. In the context of rejecting this argument, the Panel stated:

"That negotiations aimed at settlement can be pursued in parallel with panel proceedings is further underlined by Article 11 of the DSU which requires the Panel to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution". Moreover, Article 5 of the DSU on "good offices, conciliation and mediation" refers specifically to a series of "soft" dispute settlement procedures that "may continue while the panel process proceeds" (Article 5.5 of the DSU)."<sup>3</sup>

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<sup>1</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 340.

<sup>2</sup> Appellate Body Reports, *China – HP-SSST*, fn 59.

<sup>3</sup> Panel Report, *US – Tariff Measures*, para. 7.18.