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## **1 ARTICLE 1 AND APPENDIX 1 AND 2**

### **1.1 Text of Article 1**

*Members hereby agree as follows:*

#### **Article 1**

##### *Coverage and Application*

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements

as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

## **1.2 Article 1.1: "covered agreements"**

### **1.2.1 Text of Appendix 1**

#### **APPENDIX 1**

##### AGREEMENTS COVERED BY THE UNDERSTANDING

- (A) Agreement Establishing the World Trade Organization
- (B) Multilateral Trade Agreements
  - Annex 1A: Multilateral Agreements on Trade in Goods
  - Annex 1B: General Agreement on Trade in Services
  - Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights
  - Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
- (C) Plurilateral Trade Agreements
  - Annex 4: Agreement on Trade in Civil Aircraft
  - Agreement on Government Procurement
  - International Dairy Agreement
  - International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

### **1.2.2 General**

1. In *Brazil – Desiccated Coconut*, the Appellate Body defined the term "covered agreements" as follows:

"The 'covered agreements' include the *WTO Agreement*, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the *DSU*. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."<sup>1</sup>

2. In *Guatemala – Cement I*, the Appellate Body examined the Panel's interpretation of the relationship between Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU. In this context, the Appellate Body made the following general statement about Article 1.1 of the DSU:

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<sup>1</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 13.

"Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (the 'covered agreements'). The DSU is a coherent system of rules and procedures for dispute settlement which applies to 'disputes brought pursuant to the consultation and dispute settlement provisions of' the covered agreements. The *Anti-Dumping Agreement* is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement."<sup>2</sup>

### 1.2.3 The DSU

3. In *India – Patents (US)*, the Appellate Body examined the Panel's interpretation of various provisions of the TRIPS Agreement and noted that "as one of the covered agreements under the DSU, the *TRIPS Agreement* is subject to the dispute settlement rules and procedures of that Understanding".<sup>3</sup>

4. In *Argentina – Poultry Anti-Dumping Duties*, Argentina objected to Brazil's decision to make the entirety of its written submission available to the public, and asked the Panel to express its view on whether doing so was consistent with Article 18.2 of the DSU. The United States, a third party in that case, argued that Article 18.2 of the DSU fell outside of the Panel's terms of reference, and that the Panel should decline to provide views on the proper interpretation of that provision. The Panel disagreed:

"By virtue of Article 1.1 of the *DSU*, the provisions of the *DSU* apply to all WTO dispute settlement proceedings, subject to certain special or additional rules and procedures on dispute settlement identified in Appendix 2 to the *DSU*. The provisions of the *DSU* therefore apply in all cases, whether or not they are mentioned in a Member's request for establishment of a panel. Indeed, we are not being asked to rule on whether a measure identified in the request for establishment is consistent with Article 18.2 of the *DSU*. Rather, we are being asked to make such rulings in respect of Article 18.2 of the *DSU* as are necessary to manage procedural aspects of these proceedings. By ruling in respect of Article 18.2 of the *DSU*, we are simply acting in conformity with Article 1.1 of the *DSU*. We are not purporting to make an interpretation within the meaning of Article IX:2 of the *WTO Agreement*. Accordingly, we reject the US argument that the Panel should decline to rule on the matter raised by Argentina."<sup>4</sup>

### 1.2.4 Bilateral agreements

5. In *EC – Poultry*, the Appellate Body considered the relationship between Schedule LXXX of the European Communities and the so-called "Oilseeds Agreement", which had been negotiated by the European Communities and ten other contracting parties, including Brazil. As a part of its agreement with Brazil, a "global" tariff-rate quota had been introduced by the European Communities and subsequently incorporated into the European Communities' Schedule LXXX. Subsequently, in the context of the interpretation of the European Communities' Schedule, the question of the relationship between Schedule LXXX and the Oilseeds Agreement arose. The European Communities argued that Schedule LXXX superseded and terminated the Oilseeds Agreement because the WTO Agreement was a later treaty relating to the same subject matter in accordance with Article 59(1) of the Vienna Convention; alternatively, the European Communities argued that the Oilseeds Agreement only applied to the extent compatible with Schedule LXXX, pursuant to Article 30(3) of the Vienna Convention. The Appellate Body stated:

"In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO

<sup>2</sup> Appellate Body Report, *Guatemala – Cement I*, para. 64.

<sup>3</sup> Appellate Body Report, *India – Patents (US)*, para. 29. See also Panel Report, *China – Intellectual Property Rights*, paragraph 7.500.

<sup>4</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.12.

resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case. Schedule LXXX is annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the '*Marrakesh Protocol*'), and is an integral part of the GATT 1994. As such, it forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds*. As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments."<sup>5</sup>

6. In *EC – Commercial Vessels*, the Panel examined a bilateral agreement between the European Communities and Korea, referred to as the "Agreed Minutes". The Panel noted the Agreed Minutes are not a "covered agreement" within the meaning of Articles 1 and 2 of the DSU. Citing the passage from the Appellate Body Report in *EC – Poultry* reproduced above, the Panel emphasized that:

"[I]ts review of the text of the Agreed Minutes only serves the purpose of enabling it to decide a factual issue on which the parties disagree and that it is not interpreting the Agreed Minutes in order to determine the rights and obligations of the parties under that bilateral agreement."<sup>6</sup>

7. In *EC and certain member States – Large Civil Aircraft*, the European Communities argued that, in its examination of the matter referred to it, the Panel should directly apply the provisions of a 1992 Agreement between the European Communities and the United States. The Panel stated that:

"Article 7.2 of the DSU requires panels to 'address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute.' The 'covered Agreements' cited by the United States in document WT/DS316/2 include the DSU, the GATT 1994 and the SCM Agreement. As the 1992 Agreement is not a covered Agreement cited by the United States in document WT/DS316/2, or contained in the list of covered Agreements in Appendix 1 to the DSU, or one of the instruments included in the GATT 1994, we do not have jurisdiction to determine of the rights and obligations of the parties under the 1992 Agreement."<sup>7</sup>

### 1.2.5 Ministerial Declaration on Trade in Information Technology Products

8. In *India – Tariffs on ICT Goods (Japan)*, India, the respondent in the dispute, argued that its tariff commitments were set forth in the ITA, and hence were to be regarded separate from the commitments under the contested sub-headings of India's WTO Schedule. The Panel disagreed, noting that the ITA did not constitute a covered agreement:

"In this respect, we observe that the ITA does not constitute a covered agreement within the meaning of the WTO Agreement and the DSU. ... The ITA is not listed in Appendix 1 of the DSU, nor is the ITA listed in Annexes 1 to 4 of the WTO Agreement. Thus, in contrast to India's WTO Schedule, the ITA is not a 'covered agreement' within the meaning of the WTO Agreement and the DSU."<sup>8</sup>

<sup>5</sup> Appellate Body Report, *EC – Poultry*, para. 79.

<sup>6</sup> Panel Report, *EC – Commercial Vessels*, para. 7.131.

<sup>7</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.89.

<sup>8</sup> Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.42.

### 1.3 Article 1.2: "special or additional rules and procedures"

#### 1.3.1 Text of Appendix 2

#### **APPENDIX 2**

#### SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

<i>Agreement</i>	<i>Rules and Procedures</i>
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:3
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

#### 1.3.2 General

##### 1.3.2.1 Requirement to identify genuine "conflict" between DSU and special or additional rules and procedures

9. In *Guatemala – Cement I*, the Appellate Body stated that special and additional rules within the meaning of Article 1.2 of the DSU apply to the exclusion of the provisions of the DSU only in the case of "inconsistency" or a "difference" between these rules and the provisions of the DSU:

"Article 1.2 of the DSU provides that the 'rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.' (emphasis added) It states, furthermore, that these special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions (emphasis added). Accordingly, if there is no 'difference', then the rules and procedures of the DSU apply *together with* the special or

additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply."<sup>9</sup>

### 1.3.2.2 Agreements / provisions not included in Appendix 2 of the DSU

10. In *India – Quantitative Restrictions*, India appealed the Panel's conclusion that the Panel was competent to review the justification of India's balance-of-payments (BOP) restrictions under Article XVIII:B of the GATT 1994. India argued that the Panel had erred by failing to give proper consideration to the "institutional balance" embodied in the WTO Agreement; according to India, BOP measures were within the exclusive competence of the BOP Committee and the General Council. India claimed that in view of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of GATT 1994 and the BOP Understanding, the Panel erred in finding that it was competent to review the justification of balance-of-payments restrictions. The Appellate Body ruled:

"We note that Appendix 1 to the DSU lists 'Multilateral Agreements on Trade in Goods', to which the GATT 1994 belongs, among the agreements covered by the DSU. A dispute concerning Article XVIII:B is, therefore, covered by the DSU.

... Appendix 2 does not identify any special or additional dispute settlement rules or procedures relating to balance-of-payments restrictions. It does not mention Article XVIII:B of the GATT 1994, or any of its paragraphs. The DSU is, therefore, fully applicable to the current dispute."<sup>10</sup>

11. In *US – Upland Cotton*, the Panel considered that the absence of any reference to any provision of the Agreement on Agriculture in Appendix 2 of the DSU had to be given meaning:

"[T]here is no special dispute settlement requirement foreseen in the covered agreements in respect of a panel's consideration of the fulfilment of Article 13 conditions. The issue of fulfilment of the conditions of Article 13 of the *Agreement on Agriculture* is to be resolved using generally applicable *DSU* rules and procedures. The fact that certain very specific provisions are included in Appendix 2 of the *DSU* as special or additional rules indicates that, when the drafters intended to make a particular provision applicable as a special or additional dispute settlement rule, they did so explicitly. Therefore, their failure to include a reference to any provision of the *Agreement on Agriculture* in the text of Appendix 2 demonstrates that they did not intend to make any provision of that Agreement a special or additional dispute settlement rule. It is not necessary for us to look for any further interpretive guidance on this issue."<sup>11</sup>

12. In *US – Oil Country Tubular Goods Sunset Reviews*, the Panel noted that:

"Neither the provisions of Article 11 pertaining to reviews, nor the other provisions of the Agreement pertaining to investigations, are identified as such special or additional rules and procedures. Accordingly, we believe that the provisions of the DSU and the Anti-dumping Agreement must be read together in a coherent manner."<sup>12</sup>

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<sup>9</sup> Appellate Body Report, *Guatemala – Cement I*, para. 65. See also Appellate Body Report, *US – FSC*, para. 159.

<sup>10</sup> Appellate Body Report, *India – Quantitative Restrictions*, paras. 85-86.

<sup>11</sup> Panel Report, *US – Upland Cotton*, para. 7.5.

<sup>12</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, fn 39.

### 1.3.3 Anti-Dumping Agreement

#### 1.3.3.1 General

13. In examining the relationship between Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU, the Panel in *Guatemala – Cement I* found that Article 17 of the Anti-Dumping Agreement "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases ... that replaces the more general approach of the DSU". However, the Appellate Body disagreed with the Panel and held:

"Article 17.3 of the *Anti-Dumping Agreement* is not listed in Appendix 2 of the DSU as a special or additional rule and procedure. It is not listed precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994, under most of the other agreements in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'), and under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the '*TRIPS Agreement*').

...

Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. To read Article 17 of the *Anti-Dumping Agreement* as *replacing* the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU.

For these reasons, we conclude that the Panel erred in finding that Article 17 of the *Anti-Dumping Agreement* 'provides for a coherent set of rules for dispute settlement specific to anti-dumping cases ... that replaces the more general approach of the DSU'.<sup>13</sup>

14. In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body summed up the situation of Articles 17.4 to 17.7 of the Anti-Dumping Agreement as special or additional rules as follows:

"We recall, in this regard, that Article 1.1 of the DSU applies the rules and procedures contained in the DSU to 'disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1', but that this general rule is, under Article 1.2 of the DSU, subject to the special or additional rules and procedures on dispute settlement identified in Appendix 2 to the DSU. The *Anti-Dumping Agreement* is listed as a covered agreement in Appendix 1 of the DSU. Articles 17.4 through 17.7 of the *Anti-Dumping Agreement* are listed as special or additional rules in Appendix 2 to the DSU."<sup>14</sup>

#### 1.3.3.2 Standard of review

15. In *US – Hot-Rolled Steel*, the Appellate Body pointed out that Article 17.6 of the Anti-Dumping Agreement is identified in Article 1.2 and Appendix 2 of the DSU as one of the special or additional rules and procedures that prevail over the DSU to the extent that there is a difference between those provisions and the provisions of the DSU. Quoting its previous Report in *Guatemala – Cement I*, the Appellate Body considered the extent to which Article 17.6 of the Anti-Dumping Agreement can properly be read as "complementing" the rules and procedures of the DSU or, conversely, the extent to which Article 17.6 "conflicts" with the DSU. With respect to

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<sup>13</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 64 and 67-68. See also Appellate Body Reports, *US – Lead and Bismuth II*, para. 45, and *US – 1916 Act*, para. 70.

<sup>14</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, fn 82.



Article 17.6(i) and the first sentence of Article 17.6(ii), the Appellate Body saw no "conflict" between these provisions and the DSU.<sup>15</sup> With respect to the second sentence of Article 17.6(ii), the Appellate Body characterized it as "supplementing, rather than replacing" the DSU:

"[A]lthough the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an 'objective assessment of the matter' as a whole. Thus, under the DSU, in examining claims, panels must make an 'objective assessment' of the legal provisions at issue, their 'applicability' to the dispute, and the 'conformity' of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement."<sup>16</sup>

### **1.3.3.3 Implementation**

16. In *US – Zeroing (Japan) (Article 21.5 – Japan)*, a question arose as to whether actions or omissions that occur after the expiry of the reasonable period of time due to domestic judicial proceedings are excluded from the implementing Member's compliance obligations. The Appellate Body stated that:

"According to the United States, the relevant provisions for purposes of deciding the question before us are Article 13 and footnote 20 to Article 9.3.1 of the *Anti-Dumping Agreement*. Japan, by contrast, refers to several provisions of the DSU that it considers indicate the actions that a respondent Member must take to implement the DSB's recommendations and rulings. We note, in this regard, that neither provision of the *Anti-Dumping Agreement* to which the United States refers is listed in Appendix 2 of the DSU as a special or additional rule and procedure that would prevail in case of conflict, in accordance with Article 1.2 of the DSU. Accordingly, the rule in Article 1.2 is inapplicable in this case. Therefore, both the *Anti-Dumping Agreement* and the DSU should be taken into account in this dispute and should be interpreted harmoniously. We begin our analysis with the provisions of the *Anti-Dumping Agreement* that the United States considers relevant to the issue raised on appeal, after which we will turn to the provisions of the DSU."<sup>17</sup>

### **1.3.4 SCM Agreement**

#### **1.3.4.1 General**

17. In *Korea – Commercial Vessels*, the Panel stated that:

"We begin our consideration of these issues by noting that Articles 4.2, 4.4, 7.2 and 7.4 of the SCM Agreement are identified as 'special or additional rules and procedures' in Appendix 2 of the DSU. If possible, these provisions should therefore be read so as to complement the relevant provisions of the DSU, including Article 4.2 – 4.7."<sup>18</sup>

#### **1.3.4.2 Annex V information – gathering procedures**

18. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a

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<sup>15</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 51 and 56-57.

<sup>16</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 62.

<sup>17</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 172.

<sup>18</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.2.



procedure and the DSB establishes a panel, even in the absence of DSB consensus.<sup>19</sup> The Appellate Body observed that:

"All of Annex V, together with, *inter alia*, Articles 6.6, 7.4, 7.5, and 7.6 of the *SCM Agreement*, are listed as special or additional rules and procedures under Appendix 2 to the DSU. We recall in this connection that, pursuant to Article 1.2 of the DSU, the provisions of both the *SCM Agreement* and the DSU apply in the context of a dispute involving allegations of actionable subsidies causing serious prejudice, except that, to the extent that there is a conflict, those provisions of the *SCM Agreement* identified in Appendix 2 to the DSU prevail, including over Article 2.4 of the DSU."<sup>20</sup>

19. The Appellate Body found support for its interpretation in the fact that Annex V procedures are among the special or additional rules and procedures identified in Appendix 2:

"Additional relevant context, in our view, is found in Article 1.2 of the DSU, which deals with the special or additional dispute settlement rules found in other agreements (including Annex V and Article 7.4 of the *SCM Agreement*). The last sentence of Article 1.2 stipulates that, in the event of a conflict between the DSU and the special or additional rules and procedures listed in Appendix 2 to the DSU:

'The Chairman shall be guided by the principle that special or additional rules and procedures *should be used where possible*, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.' (emphasis added)

This provision expresses Members' preference for the use of the special or additional rules and procedures. Such preference is logical given that the special or additional rules listed in Appendix 2 were crafted by the negotiators of each individual agreement with a view to the particular characteristics of disputes that might arise under such agreement and, in the case of the *SCM Agreement*, under each Part of that Agreement.

In contrast, if a positive consensus rule were to apply to the initiation of an Annex V procedure, as the United States contends, this would mean that an Annex V procedure cannot be initiated whenever there is a formal objection by a single WTO Member. This would enable individual Members to prevent the use of this detailed, carefully tailored mechanism for gathering necessary information, even though the DSB's initiation of such information-gathering procedures and Members' duty to cooperate in them are both expressed as mandatory. Furthermore, if initiation required positive consensus, two consequences could flow for which there may be no remedy in the panel proceedings. First, the parties to the dispute could be denied access to critical information from third-country Members if those Members choose not to become third parties in the dispute. Second, if the objection to the initiation of the Annex V procedure comes from a WTO Member other than the responding party or a concerned third-country Member, there may be no basis upon which the Panel could, pursuant to paragraphs 6 and 7 of Annex V, allow the complainant to rely upon best available evidence and/or draw adverse inferences based on the conduct of the respondent."<sup>21</sup>

#### **1.3.4.3 Consultations**

20. In *Brazil – Aircraft*, Brazil objected that certain measures referenced in Canada's panel request were not the subject of consultations. In considering this issue, the Panel began by noting that:

"[W]e must apply not only the relevant provisions of the DSU, but also the special or additional dispute settlement provisions found in Article 4.2 through 4.12 of the *SCM Agreement*, keeping in mind the injunction of Article 1.2 of the DSU that, '[t]o the extent there is a difference between the rules and procedures of the [DSU]

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<sup>19</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

<sup>20</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 509.

<sup>21</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 522-523.

and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."<sup>22</sup>

21. In *US – FSC*, the United States argued that the European Communities' claim under Article 3 of the SCM Agreement should have been dismissed because the request for consultations did not include a "statement of available evidence" as required by Article 4.2 of the SCM Agreement. In the context of addressing this issue, the Appellate Body stated that:

"Article 1.2 of the DSU states that 'the rules and procedures of the DSU shall apply subject to the special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding'. Article 4.2 of the *SCM Agreement* is listed as a 'special or additional rule or procedure' in Appendix 2 to the DSU. In our Report in *Guatemala - Cement*, we said that 'the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement' except that, 'in the case of a *conflict* between them', the special or additional provision prevails.<sup>23</sup> Article 4.4 of the DSU requires that all requests for consultations, under the covered agreements, 'give reasons for the request, including *identification of the measures at issue* and an *indication of the legal basis for the complaint*.' (emphasis added) It is clear to us that Article 4.4 of the DSU and Article 4.2 of the *SCM Agreement* can and should be read and applied together, so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions."<sup>24</sup>

#### 1.3.4.4 Implementation

22. In *Australia – Automotive Leather II (Article 21.5 – US)*, both parties argued that Article 4.7 of the SCM Agreement should be read consistently with Article 19.1 of the DSU. The Panel concluded that Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies. The Panel stated:

"Rather, the recommendation to 'withdraw the subsidy' is required by Article 4.7 of the SCM Agreement, which is a special or additional rule or procedure on dispute settlement, identified in Appendix 2 to the DSU. It is Article 4.7 which we must interpret and apply in this dispute. In this respect, we note Article 1.2 of the DSU ... Thus, to the extent that 'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity', it is that different action which prevails."<sup>25</sup>

23. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated the following with regard to Article 7.8 of the SCM Agreement:

"In cases like this one, involving a determination that subsidies have resulted in adverse effects to the interests of another WTO Member, Article 7.8 of the *SCM Agreement* provides that 'the Member *granting or maintaining* the subsidy 'shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'. Article 7.8 is one of the 'special or additional rules and procedures on dispute settlement contained in the covered agreements' that are identified in Article 1.2 and Appendix 2 of the DSU, which prevail over the general DSU rules and procedures to the extent that there is a difference between them. As we see it, Article 7.8 specifies the actions that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member. This means that, in order to determine whether there is compliance with the DSB's recommendations and rulings in a case involving such actionable subsidies, a panel would have to assess whether the Member concerned has taken one of the actions foreseen in Article 7.8 of the *SCM Agreement*. We agree, therefore, with the Panel that we must also take into account Article 7.8 of

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<sup>22</sup> Panel Report, *Brazil – Aircraft*, para. 7.6.

<sup>24</sup> Appellate Body Report, *US – FSC*, para. 160. See also Panel Report, *US – Upland Cotton*, para. 7.82.

<sup>25</sup> Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.41.

the *SCM Agreement* in order to determine the proper scope of these Article 21.5 proceedings."<sup>26</sup>

24. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel offered the following general observations on Article 7.8 of the *SCM Agreement* as a "special or additional" rule or procedure:

"Article 7.8 of the *SCM Agreement* is one of the 'special or additional rules and procedures on dispute settlement contained in the covered agreements', which prevail over the general DSU rules and procedures to the extent that there is a conflict between them. Article 7.8 specifies what an implementing Member must do following the adoption of a panel and/or Appellate Body report in which it is determined that any subsidy has caused adverse effects within the meaning of Article 5 of the *SCM Agreement*. In particular, Article 7.8 prescribes that any 'Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'. It follows that in order to determine whether an implementing Member has complied with the recommendations and rulings adopted by the DSB in cases involving actionable subsidies, one of the questions that an Article 21.5 panel will have to evaluate is whether the Member concerned has acted in conformity with the requirement to 'take appropriate steps to remove the adverse effects' or 'withdraw the subsidy'.

...

As already noted, Article 7.8 is one of the 'special or additional rules and procedures on dispute settlement contained in the covered agreements' which prevail over the general DSU rules and procedures to the extent that there is a conflict between them. This does not, however, mean that Article 7.8 must be applied in isolation to the rules of the DSU. On the contrary, it is well established that the 'special or additional rules and procedures contained in the covered agreements' must be applied in conjunction with the rules of the DSU. It is only where the two sets of rules '*cannot* be read as complementing each other that the special or additional rules are to *prevail*'. Thus, a first important part of the context of Article 7.8 are the rules of the DSU governing when and how WTO compliance obligations are incurred and discharged."<sup>27</sup>

#### 1.3.4.5 Countermeasures

25. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator noted that the provisions that established their mandate included Article 4.11 and footnote 10 of the *SCM Agreement*, and Articles 22.6 and 22.7 of the DSU. The Arbitrator stated that:

"The Arbitrators are aware that Article 4.10 and 11 has the status of 'special or additional rules and procedures', within the meaning of Article 1.2 of the DSU. Having considered the views expressed by the parties, we follow the practice of the Appellate Body as defined more specifically in its report on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*. "<sup>28</sup>

26. In *US – FSC (Article 22.6 – United States)*, the Arbitrator stated that:

"As we have already noted in our analysis of the text of Article 4.10 of the *SCM Agreement* above, there is, by contrast, no such indication of an explicit quantitative benchmark in that provision. It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are 'special or additional rules' under Appendix 2 of the DSU, and that in accordance with Article 1.2 of the DSU, it is possible for such rules or procedures to prevail over those of the DSU. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4 so that the notion of 'appropriate

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<sup>26</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235.

<sup>27</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.2 and 6.804.

<sup>28</sup> Decision of the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.5.

countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning."<sup>29</sup>

27. In *US – Upland Cotton (Article 22.6 – United States II)*, the Arbitrator observed that:

"The question before us in this case is whether Article 22.3 of the DSU and Article 7.9 and 7.10 of the *SCM Agreement* can be read as complementing each other, or whether adherence to the principles and procedures contained in Article 22.3 of the DSU would lead to a violation of Article 7.9 or 7.10 of the *SCM Agreement*, such that there is a *conflict* between the two provisions. In other words, we must clarify whether the special or additional rules of Article 7.9 and 7.10 of the *SCM Agreement* constitute the entirety of the applicable rules relating to the type and level of countermeasures that may be authorized in relation to actionable subsidies, or whether the principles and procedures of Article 22.3 of the DSU and these provisions may be read as complementing each other in defining the rules applicable to the suspension of concessions or other obligations in relation to actionable subsidies."<sup>30</sup>

### 1.3.5 TBT Agreement

28. In *EC – Asbestos*, the Panel decided to seek the opinion of individual scientific experts, rather than establishing an expert review group. The European Communities objected, arguing among other things that if the measure in question should be considered as coming under the TBT Agreement, Article 14.2 of the TBT Agreement would mean that a technical expert group would have to be consulted for any scientific or technical question. The European Communities argued that, pursuant to Article 1.2 of the Understanding, Article 14.2 of the TBT Agreement would prevail over the provisions in Article 13 of the DSU. The Panel responded that:

"Article 14.2 of the TBT Agreement is one of the provisions mentioned in Appendix 2 to the Understanding and which, according to Article 1.2 of the Understanding, prevails over the latter if there is any difference between the two. We note, however, that it is only 'if there is any difference' between the rules and procedures in the Understanding and a special or additional rule or procedure covered by Appendix 2 to the Understanding that the latter would prevail. As the Appellate Body has already pointed out, it is only when the provisions in the Understanding and the special or additional rules and procedures in Appendix 2 *cannot* be construed as *complementary* that the special or additional rules will prevail over those in the Understanding, in other words, in a situation where the two provisions would be mutually incompatible.<sup>31</sup> In this particular case, Article 14.2 of the TBT Agreement provides that a panel 'may' establish a technical expert group. Like Article 13.2 of the Understanding, this text allows the *possibility* of establishing an expert group and determines the procedures applicable to it, where applicable. It does not however make the establishment of such a group mandatory and, in our view, this possibility is not incompatible with the overall possibility given in Article 13 of the Understanding of consulting experts individually. The two provisions can be seen as complementary."<sup>32</sup>

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<sup>29</sup> Decision of the Arbitrator, *US – FSC (Article 22.6 – United States)*, para. 5.47.

<sup>30</sup> Decision of the Arbitrator, *US – Upland Cotton (Article 22.6 – United States II)*, para. 5.18. See also Decision of the Arbitrator, *US – Upland Cotton (Article 22.6 – United States I)*, para. 5.18.

<sup>32</sup> Panel Report, *EC – Asbestos*, para. 8.10.