

1.2.2	General	2
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"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."²

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".³

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:

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1.3.4.2 Annex V information – gathering procedures

18. In *US – Large Civil Aircraft (2nd 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 procedure and the DSB establishes a panel, even in the absence of DSB consensus.¹⁹ 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."²⁰

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.

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

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

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."³³

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³³ Panel Report, *EC – Asbestos*, para. 8.10.