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1.1 Text of Article 1

Article 1

Coverage

This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").

1.2 "investment measures"

1. In *Indonesia – Autos*, the Panel examined the consistency of certain Indonesian measures with the TRIMs Agreement. Indonesia argued that the measures at issue were not trade-related investment measures within the scope of the TRIMs Agreement. The Panel rejected Indonesia's argument. First, the Panel found that the term "investment measures" is not limited to measures taken specifically in regard to *foreign* investment:

"We note that the use of the broad term 'investment measures' indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to *foreign* investment. ... [N]othing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to a particular measure is an element in deciding whether that measure is covered by the Agreement. We therefore find without textual support in the TRIMs Agreement the argument that since the TRIMs Agreement is basically designed to govern and provide a level playing field for foreign investment, measures relating to internal taxes or subsidies cannot be construed to be a trade-related investment measure. We recall in this context that internal tax advantages or subsidies are only one of many types of advantages which may be tied to a local content requirement which is a principal focus of the TRIMs Agreement. The TRIMs Agreement is not concerned with subsidies and internal taxes as such but rather with local content requirements, compliance with which may be encouraged through providing any type of advantage. Nor, in any case, do we see why an internal measure would necessarily not govern the treatment of foreign investment."¹

2. In examining whether the measures in question were "investment measures", the Panel in *Indonesia – Autos* reviewed the legislative provisions relating to these measures. The Panel found that the measures at issue fell within any reasonable interpretation of those terms:

"On the basis of our reading of these measures applied by Indonesia under the 1993 and the 1996 car programmes, which have investment objectives and investment features and which refer to investment programmes, we find that these measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term 'investment measures'. We do not intend to provide an overall definition of what constitutes an investment measure. We emphasize that our characterization of the measures as 'investment measures' is based on an examination of the manner in which the measures at issue in this case relate to investment. There may be other measures which qualify as investment measures

¹ Panel Report, *Indonesia – Autos*, para. 14.73.

within the meaning of the TRIMs Agreement because they relate to investment in a different manner.

With respect to the arguments of Indonesia that the measures at issue are not investment measures because the Indonesian Government does not regard the programmes as investment programmes and because the measures have not been adopted by the authorities responsible for investment policy, we believe that there is nothing in the text of the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation. In any event, we note that some of the regulations and decisions adopted pursuant to these car programmes were adopted by investment bodies."²

3. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the FIT Programme, and the FIT and microFIT Contracts, to the extent they envisaged and imposed a "Minimum Required Domestic Content Level", constituted "investment measures related to trade in goods" within the meaning of Article 1 of the TRIMs Agreement.³ As to the first element, i.e. whether the challenged measures constituted "investment measures", the Panel answered in the affirmative on the basis of evidence demonstrating that "one of the aims of the FIT Programme, and the FIT and microFIT Contracts, is to encourage investment in the local production of equipment associated with renewable energy generation in the Province of Ontario."⁴

4. In *India – Solar Cells*, the Panel found that the challenged measures were "investment measures" on the basis that the complainant's arguments were "consistent with the approach of the panel in *Indonesia – Autos*, which assessed the question of 'investment measures' based upon evidence that the measure pursued the promotion and development of specific industries with explicit reference to investment-related implications."⁵

1.3 "related to trade"

5. In examining whether the measures at issue in the dispute before it were "trade-related", the Panel in *Indonesia – Autos* held that local content requirements were necessarily trade-related:

"[I]f these measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade.

An examination of whether these measures are covered by Item (1) of the Illustrative List of TRIMs annexed to the TRIMs Agreement, which refers amongst other situations to measures with local content requirements, will not only indicate whether they are trade-related but also whether they are inconsistent with Article III:4 and thus in violation of Article 2.1 of the TRIMs Agreement."⁶

6. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the challenged measures were "trade related" on the grounds that the "Minimum Required Domestic Content Level" at issue in that dispute were "not unlike the domestic content requirements challenged in *Indonesia – Autos*, where the panel opined that 'by definition, [domestic content requirements] always favour the use of domestic products over imported products, and therefore affect trade'."⁷

7. In *India – Solar Cells*, the Panel found that the complainant's argument on why the challenged measures were "trade related" was "closely in line with the view of previous panels that 'if [the] measures are local content requirements, they would necessarily be 'trade-related'

² Panel Report, *Indonesia – Autos*, paras. 14.80-14.81.

³ Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.108-7.112.

⁴ Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.109-7.110.

⁵ Panel Report, *India – Solar Cells*, para. 7.60.

⁶ Panel Report, *Indonesia – Autos*, paras. 14.82-14.83.

⁷ Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.111.

because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade'.⁸

8. In *Brazil – Taxation*, the respondent maintained that certain programmes were investment measures, but did not relate to trade in goods because they dealt with research, development and production. The Panel found that they were "trade-related" investment measures, stating that "[t]he programmes also have an impact on trade, by affecting the sale and purchase of imported products, including the inputs used in the production of incentivized *finished* and *intermediate* products."⁹

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⁸ Panel Report, *India – Solar Cells*, para. 7.63 (citing Panel Reports, *Indonesia – Autos*, para. 14.82; *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.111).

⁹ Panel Report, *Brazil – Taxation*, para. 7.360.