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## **1 ARTICLE 3**

### **1.1 Text of Article 3**

#### **Article 3**

##### *Exceptions*

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.

### **1.2 General**

1. In *Indonesia – Autos*, the Panel referred to Article 3 in discussing the relationship between the TRIMs Agreement and GATT 1994.<sup>1</sup> The Panel also noted that "a violation of Article 2.1 of the TRIMs Agreement may be justified under Articles 3, 4 or 5 of the TRIMs Agreement".<sup>2</sup>

2. In *China – Raw Materials*, the Appellate Body took Article 3 of the TRIMs Agreement into account as relevant context for purposes of analysing whether the general exceptions in Article XX of the GATT 1994 were applicable to Paragraph 11.3 of China's Accession Protocol:

"We note, as did the Panel, that WTO Members have, on occasion, 'incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements'. For example, Article 3 of the *Agreement on Trade-Related Investment Measures* (the '*TRIMs Agreement*') explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994, stating that '[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement'. In the present case, we attach significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX."<sup>3</sup>

3. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found that Article III:8(a) of the GATT 1994 is applicable to Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.<sup>4</sup> While recognizing that Article III:8(a) may not be an "exception" covered by Article 3 of the TRIMs Agreement, the Appellate Body nonetheless found support for its interpretation in Article 3 insofar as that provision suggests that the provisions of the TRIMs Agreement are not intended to constrain other "rights" that Members have under the GATT 1994:

"We find additional support for this interpretation in the initial clause of Article 2.1 and Article 3 of the TRIMs Agreement. The opening clause of Article 2.1 reads: 'Without prejudice to other rights and obligations under GATT 1994'. This language suggests that the provision is not intended to curtail other rights that Members have under the GATT 1994. The right to discriminate in government purchases – subject to the conditions and requirements of Article III:8(a) – is one such right recognized in the GATT 1994. Moreover, Article 3 of the TRIMs Agreement, entitled 'Exceptions', provides contextual support for our interpretation. It states that '[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.' As the title and text of Article 3 indicate, this provision refers to 'exceptions'. The Panel and the participants have characterized Article III:8(a) as a 'scope' provision. Even though Article III:8(a) is not one of the exceptions that 'apply, as

<sup>1</sup> Panel Report, *Indonesia – Autos*, paras. 14.60-14.61.

<sup>2</sup> Panel Report, *Indonesia – Autos*, para. 14.92.

<sup>3</sup> Appellate Body Reports, *China – Raw Materials*, para. 303.

<sup>4</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

appropriate,' to the TRIMs Agreement, Article 3 further suggests that the provisions of the TRIMs Agreement are not intended to constrain other rights that Members have under the GATT 1994."<sup>5</sup>

4. The Appellate Body further observed that:

"[T]here is little, if any, indication that the provisions of the TRIMs Agreement were intended to override rights recognized in the GATT, such as the right provided in Article III:8(a). On the contrary, several provisions of the TRIMs Agreement – particularly the initial clause of Article 2.1, and Articles 3 and 4 – would seem to reflect reiterative attempts to safeguard rights recognized in the GATT, rather than to override them."<sup>6</sup>

5. In *India – Solar Cells*, the respondent invoked Article XX defences in respect of a violation of Article 2.1 of the TRIMs Agreement. The Panel observed, with reference to Article 3, that "[t]he general exceptions in Article XX of the GATT 1994 apply to the obligation in Article III:4 of the GATT 1994, and also to the corresponding obligation in Article 2.1 of the TRIMs Agreement."<sup>7</sup>

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<sup>5</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.27.

<sup>6</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.32.

<sup>7</sup> Panel Report, *India – Solar Cells*, para. 7.188.