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## **1 LANGUAGE INCORPORATING GATT 1947 AND OTHER INSTRUMENTS INTO GATT 1994**

### **1.1 Text of the language incorporating GATT 1947 and other instruments into GATT 1994**

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
  - (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
  - (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
    - (i) protocols and certifications relating to tariff concessions;
    - (ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
    - (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement<sup>1</sup>;

*(footnote original)* <sup>1</sup> The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994.<sup>1</sup> The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.
  - (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;

<sup>1</sup> By Procès-Verbal of rectification the correct date of document MTN/FA/Corr.6 was noted as 18 March 1994.

- (c) the Understandings set forth below:
  - (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
  - (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
  - (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
  - (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
  - (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
  - (vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
- (d) the Marrakesh Protocol to GATT 1994.

## 2. *Explanatory Notes*

- (a) The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".
  - (b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes *Ad* Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.
  - (c)
    - (i) The text of GATT 1994 shall be authentic in English, French and Spanish.
    - (ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.
    - (iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.
3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to: (a) the continuation or prompt renewal of a non-conforming provision of such legislation; and (b) the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947. This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph.

- (b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.
- (c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.
- (d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.
- (e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

## 1.2 Paragraph 1

### 1.2.1 Paragraph 1(a): "as rectified, amended, or modified"

1. In *China – Rare Earths*, the Appellate Body referenced paragraph 1(a) in the context of examining the relationship between accession protocols and the WTO Agreement. In the course of its analysis, the Appellate Body observed that:

"The first sentence of Paragraph 1.2 stipulates that: '[t]he WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession.' We note that the reference to an agreement as 'rectified, amended, or modified' is standard language also found elsewhere in the WTO legal framework, including Article II:4 of the Marrakesh Agreement and paragraph 1(a) of the language incorporating the GATT 1994 into Annex 1A.<sup>2</sup> In the context of the first sentence of Paragraph 1.2 of China's Accession Protocol, the language makes clear that 'the WTO Agreement', to which China accedes, is the most recent version of that 'Agreement', including any rectification, amendment, or modification thereto. As we see it, by referring to rectification, amendment, or modification that '*may have entered into force*', the first sentence of Paragraph 1.2 may properly be understood to cover the possibility that the Marrakesh Agreement may have been rectified, amended, or modified during the period between 1995 and up to the ratification of the accession protocol by the acceding Member."<sup>3</sup>

### 1.2.2 Paragraph 1(b): Legal instruments under the GATT 1947

#### 1.2.2.1 Paragraph 1(b)(i): "protocols and certifications relating to tariff concessions"

2. The Panel in *Japan – Film* found that "[t]he ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement."<sup>4</sup>

3. In *US – FSC*, the Appellate Body examined a 1981 decision by the GATT 1947 Council and found:

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<sup>2</sup> (*footnote original*) In both instances, the relevant agreement that may have been "rectified, amended or modified" is the GATT 1947.

<sup>3</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.42.

<sup>4</sup> Panel Report, *Japan – Film*, para. 10.64.

"[I]n terms of Article II:2 of the *WTO Agreement*, these various 'legal instruments' are, in themselves, 'integral parts' of the *WTO Agreement* and are 'binding on all Members'. The inclusion of these 'legal instruments' in the GATT 1994 recognizes that the legal character of the rights and obligations of the contracting parties under the GATT 1994 is not fully reflected by the text of the GATT 1994 because those rights and obligations are conditioned by the 'protocols', 'decisions' and other 'legal instruments' to which paragraph 1(b) refers."<sup>5</sup>

#### 1.2.2.2 Paragraph 1(b)(ii): "protocols of accession"

4. In *China – Rare Earths*, China argued that Article XX of the GATT 1994 was applicable to goods-related obligations in its protocol of accession. China argued, *inter alia*, that those goods-related obligations were an "integral part" of the GATT 1994. The Panel rejected China's argument, and in the course of its analysis the Panel referred to paragraph 1(b)(ii) of the language incorporating the GATT 1994 into Annex 1A of the WTO Agreement:

"Second, paragraph 1 of the GATT 1994 specifies what the GATT 1994 'shall consist of'. Paragraph 1 of the GATT 1994 appears to be an exhaustive, closed list. Paragraph 1(b)(ii) refers specifically to the provisions of protocols of accession 'that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement'. This is consistent with the fact that the Uruguay Round Agreements went beyond trade in goods and, as a result, post-1994 accession protocols cover services and intellectual property issues not covered by the GATT 1994. China's interpretation that Paragraph 11.3 of China's Accession Protocol has to be treated as an integral part of the GATT 1994 is difficult to reconcile with the express terms of paragraph 1, and in particular paragraph 1(b)(ii) of the GATT 1994."<sup>6</sup>

#### 1.2.2.3 Paragraph 1(b)(iv) – "other decisions of the CONTRACTING PARTIES to GATT 1947"

5. In *Japan – Alcoholic Beverages II*, the Appellate Body reversed a panel finding that the "other decisions" incorporated into the GATT 1994 include panel reports adopted by the CONTRACTING PARTIES to GATT 1947, noting that the decision to adopt a panel report was not intended by the GATT 1947 CONTRACTING PARTIES to "constitute a definitive interpretation of the relevant provisions of GATT 1947":

"Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system....<sup>7</sup> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.<sup>8</sup> In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

[W]e do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute 'other decisions of the

<sup>5</sup> Appellate Body Report, *US – FSC*, para. 107.

<sup>6</sup> Panel Reports, *China – Rare Earths*, para. 7.83.

<sup>7</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.

<sup>8</sup> (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

CONTRACTING PARTIES to GATT 1947' for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.<sup>9</sup>

6. In *EC – Poultry*, the Appellate Body found that the Oilseeds Agreement, concluded between Brazil and the European Communities was not one of the legal instruments enumerated in paragraph 1(b):

"The Oilseeds Agreement [...] 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*.<sup>10</sup> ...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*<sup>11</sup>, the Oilseeds Agreement is not one of those legal instruments."<sup>12</sup>

7. In *US – FSC*, the Appellate Body found that an understanding adopted by the GATT Council in connection with the adoption of four panel reports, read in the light of the circumstances, was not an "other decision" within the meaning of paragraph 1(b)(iv).<sup>13</sup> The Appellate Body remarked that "[t]he inclusion of these 'legal instruments' in the GATT 1994 recognizes that the legal character of the rights and obligations of the contracting parties under the GATT 1994 is not fully reflected by the text of the GATT 1994 because those rights and obligations are conditioned by the 'protocols', 'decisions' and other 'legal instruments' to which paragraph 1(b) refers."<sup>14</sup>

8. In *EC – Tariff Preferences*, the Appellate Body held that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv). On that basis the Appellate Body found that the Enabling Clause is "an integral part of the GATT 1994."<sup>15</sup>

9. In *EU – Poultry (China)*, the Panel was presented with claims under Articles XXVIII and II of the GATT 1994 in connection with two tariff renegotiation exercises initiated by the European Union. In the course of its analysis of these claims, the Panel referred to the Procedures for Negotiations under Article XXVIII<sup>16</sup> and the Procedures for Modification and Rectification of Schedules.<sup>17</sup> The Panel noted that diverse views had been presented by the parties and third parties on the proper legal characterization of these procedures, but that it was common ground between the parties and third parties expressing a view on the matter that, at a minimum, both procedures qualified as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement. Having set out the reasons why the Panel agreed with the parties and third parties with respect to Article XVI:1, the Panel then considered it unnecessary to decide whether those procedures also qualified as "decisions" within the meaning of paragraph 1(b)(iv):

"In this case, diverse views have been presented on whether one or both of these procedures might additionally be characterized as 'decisions of the CONTRACTING PARTIES to GATT 1947' within the meaning of paragraph 1(b)(iv) of the GATT 1994, as a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of the

<sup>9</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above. Appellate Body Report, *India – Patents (US)*, para. 50. Also, in *US – FSC*, the Appellate Body endorsed the second paragraph. Appellate Body Report, *US – FSC*, para. 108.

<sup>10</sup> (footnote original) Adopted 25 January 1990, BISD 37S/86; and DS28/R, 31 March 1992.

<sup>11</sup> (footnote original) Those legal instruments are described in paragraph 1(b) of that incorporating language as including certain protocols and certifications relating to tariff concessions, certain protocols of accession, certain decisions on waivers granted under Article XXV of the GATT 1947, and "other decisions of the CONTRACTING PARTIES to GATT 1947".

<sup>12</sup> Appellate Body Report, *EC – Poultry*, para 79.

<sup>13</sup> Appellate Body Report, *US – FSC*, para. 111.

<sup>14</sup> Appellate Body Report, *US – FSC*, para. 107.

<sup>15</sup> Appellate Body Report, *EC – Tariff Preferences*, para 90.

<sup>16</sup> Procedures for Negotiations under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and Corr. 1, BISD 27S/26-29.

<sup>17</sup> Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25

Vienna Convention, or form the basis for 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention. Recalling that there is no disagreement that both procedures fall within the scope of Article XVI:1 of the WTO Agreement, and thus no disagreement that the Panel should take them into account in its examination of China's claims under the GATT 1994, we see no need to decide on whether any of the foregoing may constitute additional legal justifications for taking the two procedures into account. We note that there have been several prior cases in which panels and the Appellate Body referred to these procedures without elaborating on their legal status."<sup>18</sup>

10. In *EU – Poultry (China)*, the Panel clarified that the situation would have been different if a claim of violation based on those procedures had been before the Panel:

"If a claim of violation of either of these procedures was properly before the Panel, it would then be necessary to resolve whether either of these procedures is part of a 'covered agreement' as defined in Appendix 1 to the DSU. To resolve that issue, we would need to arrive at a conclusion as to whether either of these procedures are 'decisions of the CONTRACTING PARTIES to GATT 1947' within the meaning of paragraph 1(b)(iv) of the GATT 1994. However, for the reasons set out further below in section 7.3.3.1, we do not consider any such claim to be properly before the Panel in this case."<sup>19</sup>

### 1.2.3 Paragraph 1(c): The Understandings

11. In *EU – Poultry (China)*, the Panel observed that the provisions of the GATT 1994 must be interpreted harmoniously with relevant Ad Notes and the Understandings, as other integral parts of the GATT:

"The text of the GATT 1994 includes not only the articles contained therein, but also the Ad Notes contained in Annex I of the GATT. In this connection, we recall that the articles of the GATT and the accompanying Ad Notes 'have equivalent treaty status in that both are treaty language which was negotiated and agreed at the same time', and that they must 'be read together in order to give them proper meaning'.<sup>20</sup> By virtue of paragraph 1(c)(vi) of the GATT 1994, the Understanding on the Interpretation of Article XXVIII of the GATT 1994 (the Understanding) is also an integral part of the GATT 1994. Thus, there can be no question that Article XXVIII of the GATT 1994, and any related provisions, must be interpreted harmoniously with the relevant Ad Notes and the Understanding."<sup>21</sup>

### 1.2.4 Paragraph 2(b): references to the CONTRACTING PARTIES acting jointly

12. In *EU – Poultry (China)*, the Panel considered the obligation in Article XXVIII:1 of the GATT to negotiate or consult with those Members "determined by the CONTRACTING PARTIES" to have a principal or substantial supplying interest. The Panel stated that "in the present case, there was no determination by the Council for Trade in Goods or the General Council", and noted in this regard:

"Paragraph 2(b) of the Explanatory Note to the GATT 1994 provides that certain functions assigned to the CONTRACTING PARTIES under the GATT 1947, including this one, shall be allocated by the Ministerial Conference. The Panel understands that this function under Article XXVIII:1 would be carried out either by the Council for Trade in Goods or the General Council."<sup>22</sup>

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<sup>18</sup> Panel Report, *EU – Poultry (China)*, para. 7.27.

<sup>19</sup> Panel Report, *EU – Poultry (China)*, fn 39.

<sup>20</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24.

<sup>21</sup> Panel Report, *EU – Poultry (China)*, para. 7.21.

<sup>22</sup> Panel Report, *EU – Poultry (China)*, fn 302.