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## 1 PARAGRAPH A

### 1.1 Text of Paragraph A

*Members hereby agree as follows:*

#### A. Objectives

(i) The purpose of the Trade Policy Review Mechanism ("TPRM") is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.

(ii) The assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment. However, the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system.

### 1.2 Paragraph A(i): "not ... intended to serve as a basis ... for dispute settlement procedures"

1. In *Canada – Aircraft*, Brazil referred to material from a Trade Policy Review, and Canada argued against reliance on this material. Brazil argued that assistance to the regional aircraft industry conferred a "benefit", relying on a statement in the Secretariat report in the 1998 Trade Policy Review of Canada that the programme in question "provides export guarantees for projects considered too risky by private financial institutions". The Panel noted that according to TPRM paragraph A(i), the TPRM "is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures ... ." The Panel then stated that it would "attach no importance" to this Trade Policy Review in relation to this issue, and it then found that Brazil had "failed to adduce any evidence" of assistance to the Canadian regional aircraft sector by the programme in question, and therefore that there was "no basis for a *prima facie* case" that such assistance had been provided as export subsidies prohibited by the SCM Agreement.<sup>1</sup> The Panel noted separately that none of its findings were based on the Trade Policy Review material.<sup>2</sup>

2. In *Chile – Price Band System*, Argentina argued that a Secretariat Report in a Trade Policy Review of Chile had stated that Chile's price band mechanism "works as a variable levy", arguing that the document "represents a respectable technical opinion".<sup>3</sup> The Panel found that a Secretariat TPRM Report "should not be taken into account in the context of dispute settlement

<sup>1</sup> Panel Report, *Canada – Aircraft*, paras. 9.274-9.275.

<sup>2</sup> Panel Report, *Canada – Aircraft*, para. 8.14.

<sup>3</sup> Panel Report, *Chile – Price Band System*, paras. 4.4 and 4.108.

proceedings", and decided to disregard the information contained in the TPRM report referred to by Argentina.<sup>4</sup>

3. In *US – Gambling*, the Panel assessed whether the gambling problem addressed by the measure fell within the scope of the "public morals" exception within the meaning of Article XIV(a) of the GATS. In doing so, the Panel considered *inter alia* other Members' trade measures with similar objectives as shown in trade policy review reports and secondary interpretative materials such as decisions by other jurisdictions on similar issues (e.g. the ECJ). Based on such resources, the Panel found that gambling is a matter that could fall within the scope of public morals.<sup>5</sup>

4. In *US/Canada – Continued Suspension*, the Appellate Body reversed the Panel's finding that statements made by Members during DSB meetings could constitute a "determination" within the meaning of Article 23 of the DSU. In the course of its analysis, the Appellate Body reasoned that:

"The Panel's finding that DSB statements could constitute a definitive determination concerning the WTO-inconsistency of a Member's measure could adversely affect WTO Members' ability to freely express their views on the potential compatibility with the covered agreements of measures adopted by other Members. This would result in a 'chilling' effect on those statements, because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23. If this were the case, the DSB would be inhibited from properly carrying out its function, pursuant to Article 21.6 of the DSU, to keep under surveillance the implementation of its recommendations and rulings."<sup>6</sup>

The Appellate Body noted the concern expressed by the United States that the Panel's interpretation, which the Appellate Body reversed, had "made the bold and novel move of transforming the minutes of DSB, other WTO committee meetings, and even Trade Policy Review meetings into a fertile source of comments that ... could constitute 'determinations' actionable under Article 23.2(a)".<sup>7</sup>

5. The Panel in *Russia – Traffic in Transit* considered it appropriate to take into account Russia's reference to a part of Ukraine's Trade Policy Review Report in order to identify a situation that Russia had presented in its first written submission to the Panel:

"Paragraph A(i) of the TPRM states that the TPRM is 'not ... intended to serve as a basis for the enforcement of specific obligations under the covered Agreements or for dispute settlement procedures'. In two prior disputes, panels have rejected a complainant's reference to the report drawn up by the WTO Secretariat as part of the respondent's Trade Policy Review. In both instances, the reference was used as the basis for an argument that a measure was WTO-inconsistent.

The Panel notes that the Russian representative referred to the relevant paragraph from Ukraine's 2016 Trade Policy Review Report in order to show that the hypothetical situation put forward in Russia's opening statement at the second meeting of the Panel has been referred to by Ukraine—in another context, it is true—as being 'the annexation of the Autonomous Republic of Crimea and the military conflict in the east'. Russia therefore used the reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report solely to further identify the situation that it had presented in its first written submission in the following general terms: 'the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests'. Russia had also previously asserted that the circumstances that led to the imposition of the measures at issue were publicly available and known to Ukraine. Russia did *not* refer to the relevant paragraph of Ukraine's 2016 Trade Policy Review Report as evidence that Ukraine (or Russia, for that matter) characterizes that situation as an emergency in international relations for the purposes of the present proceedings. The Panel therefore does not

<sup>4</sup> Panel Report, *Chile – Price Band System*, fn 664.

<sup>5</sup> Panel Report, *US – Gambling*, para. 6.471.

<sup>6</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 399.

<sup>7</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, fn 818.

consider that paragraph A(i) of the TPRM applies to this situation, or that the Panel is thereby precluded from taking into account Russia's reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report."<sup>8</sup>

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<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.117-7.118.