1 ARTICLE 2 AND THE ILLUSTRATIVE LIST

1.1 Text of Article 2 and the Illustrative List

Article 2

National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

ANNEX

ILLUSTRATIVE LIST

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

1.2 Article 2.1

1.2.1 Cumulative application of Article 2 of the TRIMs Agreement, Article III of the GATT 1994, and provisions of other WTO agreements

1. In *EC – Bananas III*, the Panel discussed the relationship between GATT 1994, the Licensing Agreement and Article 2 of the TRIMs Agreement. The Panel concluded that there was no conflict among these provisions:

> "Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.
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> Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.
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> In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMS Agreement all apply to the EC's import licensing procedures for bananas."[1]

2. In *Indonesia – Autos*, claims regarding various Indonesian measures were raised under the GATT 1994, the SCM Agreement and Article 2 of the TRIMs Agreement. The Panel rejected Indonesia's argument that the measures in dispute were covered only by the SCM Agreement, reasoning that the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters:

> "In this context the fact that the drafters included an express provision governing conflicts between GATT and the other Annex 1A Agreements, but did not include any such provision regarding the relationship between the other Annex 1A Agreements, at

[1] Panel Report, *EC – Bananas III*, paras. 7.161-7.163.

> a minimum reinforces the presumption in public international law against conflicts. With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy.
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> A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies. There is no provision contained in the SCM Agreement that obliges a Member to violate the TRIMs Agreement, or vice versa.
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> We consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different focus, and they impose different types of obligations."[2]

3. The Panel in *Indonesia – Autos* found support for its finding in the Appellate Body Reports in *Canada – Periodicals* and *EC – Bananas III*:

> "In support of this finding, we agree with the principles developed in the *Periodicals*[3] and *Bananas III*[4] cases concerning the relationship between two WTO agreements at the same level within the structure of WTO agreements. It was made clear that, while the same measure could be scrutinized both under GATT and under GATS, the specific aspects of that measure to be examined under each agreement would be different. In the present case, there are in fact two different, albeit linked, aspects of the car programmes for which the complainants have raised claims. Some claims relate to the existence of local content requirements, alleged to be in violation of the TRIMs Agreement, and the other claims relate to the existence of subsidies, alleged to cause serious prejudice within the meaning of the SCM Agreement.
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> [W]e do not consider that the application of the TRIMs Agreement to this dispute would reduce the SCM Agreement, and Article 27.3 thereof, to 'inutility'. On the contrary, with Article 27.3 of the SCM Agreement, those subsidy measures of

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[2] Panel Report, *Indonesia – Autos*, paras. 14.50-14.52.

[3] *(footnote original)* In *Canada – Periodicals*, the Appellate Body stated at page 19: "The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994".

[4] *(footnote original)* In *EC – Bananas III*, the Appellate Body stated in paragraph 221: "The second issue is whether the GATS and the GATT are mutually exclusive agreements. (...) Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods. certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. (...) [W]hile the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different."

> developing countries that are contingent on compliance with TRIMs (in the form of local content requirement) and that are permitted during the transition period provided under Article 5 of the TRIMs Agreement, are not prohibited by Article 3.1(b) of the SCM Agreement, for the transition period specified in Article 27.3 of the SCM Agreement.
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> We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the Indonesian car programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute."[5]

1.2.2 Order of analysis between claims under Article 2 of the TRIMs Agreement and Article III:4 of the GATT 1994

4. The Panel in *EC – Bananas III* found that the allocation of import licences to a particular category of operators was inconsistent with Article III:4 of GATT 1994.[6] With respect to the claim that this measure was also inconsistent with Article 2 of the TRIMs Agreement, the Panel, further to noting that the TRIMs Agreement essentially interprets and clarifies the provisions of Article III where trade-related investment measures are concerned, exercised judicial economy:

> "[W]e first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions[7] the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.
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> We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement."[8]

5. The Panel in *Indonesia – Autos* found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programmes constituted "advantages" within the meaning of the chapeau of paragraph 1 of the Illustrative List of TRIMs, and as a result were inconsistent with Article 2.1 of the TRIMs Agreement.[9] The Panel then decided that it was unnecessary to consider claims raised with respect to these measures under Article III:4 of GATT 1994.[10]

6. In *Canada – Autos*, the complainants raised claims pertaining to conditions concerning the level of Canadian value added, and the maintenance of a certain ratio between the net sales value of vehicles produced in Canada and the net sales value of vehicles sold for consumption in Canada. These claims were based upon both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel decided to examine first the claims raised under Article III:4 of GATT 1994.

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[5] Panel Report, *Indonesia – Autos*, paras. 14.53-14.55.
[6] Panel Report, *EC – Bananas III*, para. 7.182.
[7] *(footnote original)* We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU.
[8] Panel Report, *EC – Bananas III*, paras. 7.185-7.186.
[9] Panel Report, *Indonesia – Autos*, paras. 14.91-14.92.
[10] Panel Report, *Indonesia – Autos*, para. 14.93.

The Panel first took note of the different outcomes in prior panel proceedings resulting from the sequence in which the claims were addressed, and the application of judicial economy. The Panel then turned to the case before it:

> "In the present dispute, the parties have not explicitly addressed this question of which of the claims raised under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement should be examined first. Implicit in the order in which they have presented their claims is the view that these claims should be addressed first under Article III:4 of the GATT. While we are aware of the statement made by the Appellate Body in *EC – Bananas III*, and referred to by the panel in *Indonesia – Autos,* that a claim should be examined first under the agreement which is the most specific with respect to that claim, we are not persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case. Thus, we note that there is disagreement between the parties not only on whether the measures at issue can be considered to be 'trade-related investment measures' but also on whether the Canadian value added requirements and ratio requirements are explicitly covered by the Illustrative List annexed to the TRIMs Agreement. It would thus appear that, assuming that the measures at issue are 'trade-related investment measures', their consistency with Article III:4 of the GATT may not be able to be determined simply on the basis of the text of the Illustrative List but may require an analysis based on the wording of Article III:4. Consequently, we doubt that examining the claims first under the TRIMs Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4.
>
> In light of the foregoing considerations, we decide that, consistent with the approach of the panel in *EC – Bananas III*, we will examine the claims in question first under Article III:4 of the GATT."[11]

7. After finding that certain requirements concerning domestic value added were inconsistent with Article III:4 of the GATT 1994,[12] the Panel in *Canada – Autos* addressed the issue why judicial economy regarding the claim under Article 2.1 of the TRIMs Agreement would be appropriate in that case:

> "In light of the finding in the preceding paragraph, we do not consider it necessary to make a specific ruling on whether the CVA requirements provided for in the MVTO 1998 and the SROs are inconsistent with Article 2.1 of the TRIMs Agreement. We believe that the Panel's reasoning in *EC – Bananas III* as to why it did not make a finding under the TRIMs Agreement after it had found that certain aspects of the EC' licensing procedures were inconsistent with Article III:4 of the GATT also applies to the present case. Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the TRIMs Agreement would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the GATT since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the TRIMs Agreement."[13]

8. The Panel in Canada – *Autos* also rejected a claim under Article 2.1 of the TRIMs Agreement as a consequence of rejecting a claim under GATT Article III:4 against the same measure.[14]

9. In *India – Autos*, the United States and the European Communities alleged violations of Articles III:4 and XI:1 of the GATT 1994 and Article 2 of the TRIMs Agreement in relation to certain Indian measures affecting trade and investment in the automotive industry. The Panel noted that these measures could violate both the GATT 1994 and the TRIMs Agreement, and decided to examine GATT 1994 provisions first. The Panel began its analysis of the relationship between the GATT 1994 and the TRIMs Agreement in the light of *Canada – Autos:*

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[11] Panel Report, *Canada – Autos*, paras. 10.63-10.64.
[12] Panel Report, *Canada – Autos*, paras. 10.90 and 10.130.
[13] Panel Report, *Canada – Autos*, para. 10.91. See ibid. para. 10.131.
[14] Panel Report, *Canada – Autos*, para. 10.150.

> "As a general matter, even if there was some guiding principle to the effect that a specific covered Agreement might appropriately be examined before a general one where both may apply to the same measure, it might be difficult to characterize the TRIMs Agreement as necessarily more 'specific' than the relevant GATT provisions. Although the TRIMS Agreement 'has an autonomous legal existence', independent from the relevant GATT provisions, as noted by the *Indonesia – Autos* panel, the substance of its obligations refers directly to Articles III and XI of the GATT, and clarifies their meaning, *inter alia*, through an Illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the GATT 1994. On the other hand, the TRIMs Agreement also introduces rights and obligations that are specific to it, through its notification mechanism and related provisions. An interpretative question also arises in relation to the TRIMs Agreement as to whether a complainant must separately prove that the measure in issue is a 'trade-related investment measure'. For either of these reasons, the TRIMs Agreement might be arguably more specific in that it provides additional rules concerning the specific measures it covers.[15] The Panel is therefore not convinced that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions."[16]

10. The *India – Autos* Panel then decided to examine the GATT 1994 provisions first.[17] After finding that both the indigenization and the neutralization conditions were inconsistent with Articles III:4 and XI:1 of the GATT 1994, the Panel applied the principle of judicial economy and did not separately consider whether such conditions also violated the provisions of the TRIMs Agreement.[18]

11. In *Canada – Wheat Exports and Grain Imports,* the Panel rejected a claim that Section 87 of the Canada Grain Act was inconsistent with Article III:4 of the GATT 1994, and therefore found that the measure was not inconsistent with Article 2.1 of the TRIMs Agreement.[19]

12. In *Canada – Renewable Energy / Feed-in Tariff Program,* the Panel declined to rule on a "stand-alone Article III:4 claim" after having reached a finding of violation under Article 2.1 and the Illustrative List of the TRIMs Agreement. The Appellate Body considered that "it is not obvious what a stand-alone finding of violation of Article III:4 of the GATT 1994 would add to a finding of violation of Article III:4 that is consequential to an assessment under the Illustrative List of the TRIMs Agreement."[20]

13. In *India – Solar Cells*, the Panel noted that in prior disputes with concurrent TRIMs and GATT 1994 national treatment claims, some panels have assessed which agreement "deals specifically, and in detail, with" the measures at issue to determine the appropriate sequence of analysis, and observed that past panels "have reached differing conclusions in response to this question":

> "See, e.g. Panel Report, *Indonesia – Autos*, para. 14.63 (deeming the TRIMs Agreement to be 'more specific' than the GATT 1994 as a basis for examining the TRIMs claims first); Panel Reports, *Canada – Autos*, para. 10.63 and *India – Autos*, para. 7.157 (expressing doubt as to whether the TRIMs Agreement can in fact be characterized as more specific than the relevant GATT 1994 provisions); and Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.70 (noting that 'the measures at issue are trade-related investment measures affecting imports of renewable energy generation equipment and components', which 'suggests that, compared with the SCM Agreement and Article III:4 of the GATT 1994, it is the TRIMs

[15] (*footnote original*) To say, for instance, that the TRIMs Agreement is more specific because it contains a specific criterion of the presence or absence of a trade-related investment measure depends upon whether that is a distinct criterion and whether the lack of such a criterion in Articles III and XI of GATT 1994 makes these provisions more general as opposed to merely having a broader range of coverage on the same criteria. The only practical difference and potential advantage in looking at the TRIMs agreement first in this instance seems to be the possible utilization of the Illustrative List, to the extent that it would be relevant to the claims at issue and may facilitate the identification of a violation of Articles III:4 or XI:1 of GATT 1994.

[16] Panel Report, *India – Autos*, para. 7.157.

[17] Panel Report *India – Autos*, paras. 7.158–7.162.

[18] Panel Report *India – Autos*, paras. 7.323–7.324.

[19] Panel Report, *Canada – Wheat*, para. 6.381.

[20] Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.94.

> Agreement that deals most directly, specifically and in detail' with the challenged aspects of the measures at issue in that case)."[21]

1.3 Article 2.2 and the Illustrative List of TRIMs

1.3.1 "Illustrative"

14. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body confirmed that the Illustrative List is not a closed list of TRIMs that are inconsistent with Articles III:4 and XI:1 of the GATT 1994:

> "Article 2.2 refers to the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994, as well as the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of the GATT 1994. Article 2.2 also refers to an illustrative list of TRIMs that is found in the Annex to the TRIMs Agreement. The term 'illustrative' indicates that the examples in the list do not constitute a closed list. In other words, there can be other types of TRIMs that are inconsistent with the national treatment obligation in Article III:4 and the obligation of general elimination of quantitative restrictions in Article XI:1 of the GATT 1994. The use of the term 'include' in paragraph 1 of the Illustrative List further supports this understanding."[22]

1.3.2 Availability of GATT exceptions and derogations to measures covered by the Illustrative List

15. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the European Union's argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of the Illustrative List (and, thereby, Article 2.2 of the TRIMs Agreement).[23] The Appellate Body explained:

> "In our view, Article 2.2 provides further specification as to the type of measures that are inconsistent with Article 2.1. The operative part of Article 2.2 is the reference to the Illustrative List, which provides examples of measures that are inconsistent with the national treatment obligation. While Article 2.2 and the Illustrative List focus on the specific provisions where such obligation is reflected – that is, Article III:4 of the GATT 1994 – we do not believe it responds to the question of whether such measures are inconsistent with Article III of the GATT 1994 in its entirety. Where a measure falls within the scope of Article III:8(a), the measure is not inconsistent with Article III overall. Thus, we agree with the Panel that Article 2.2 and the Illustrative List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies. Furthermore, we understand the absence of a reference to Article III:8(a) of the GATT 1994 in Article 2.2 of the TRIMs Agreement and in the Illustrative List as indicating that these provisions are neutral as to the applicability of the former provision. This results in a harmonious interpretation of Articles 2.1 and 2.2 of the TRIMs Agreement and Articles III:4 and III:8(a) of the GATT 1994. By contrast, the interpretation advocated by the European Union would result in different obligations for those TRIMs that fall within the Illustrative List and those that do not."[24]

1.3.3 The Illustrative List as interpretative context

16. In *China – Publications and Audiovisual Products*, the Appellate Body referred to the Illustrative List in the Annex to the TRIMs Agreement in the context of observing that some measures (e.g. TRIMs) that do not directly regulate goods, or the importation of goods, may nonetheless contravene GATT obligations:

> "The close relationship between restrictions on entities engaged in trade and GATT obligations relating to trade in goods has also been recognized in previous GATT panel

[21] Panel Report, *India – Solar Cells*, para. 7.46 and fn 146.
[22] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.22.
[23] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.
[24] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.26.

> and WTO panel and Appellate Body reports, where measures that did not directly regulate goods, or the importation of goods, have nonetheless been found to contravene GATT obligations. Thus, for example, restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry, have been found to be inconsistent with Article III:4 or Article XI:1 of the GATT 1947 or 1994. In addition, the Illustrative List in Annex 1 to the *Agreement on Trade-Related Investment Measures* (the '*TRIMs Agreement* ') sets out a number of requirements imposed on *enterprises* that are deemed to be inconsistent with either Article III:4 or Article XI:1 of the GATT 1994, and Article 3 of the *TRIMs Agreement* states that all exceptions under the GATT 1994 apply, as appropriate, to the provisions of the *TRIMs Agreement*. These considerations suggest that measures that restrict the rights of traders may violate GATT obligations with respect to trade in goods."[25]

17. In *Colombia – Ports of Entry*, the Panel rejected the argument that Article XI:1 of the GATT should be interpreted narrowly to cover only those types of measures included in the Illustrative List of the TRIMs Agreement. In rejecting this *a contario* reading of the Illustrative List, the Panel stated:

> "Colombia has lastly referred to Paragraph 2 of the Illustrative List of the Annex of the TRIMs Agreement as informing the scope of Article XI:1. The *TRIMs Agreement* states in Article 2 that 'no Member shall apply any TRIM that is inconsistent with the provisions of ... Article XI of *GATT 1994*'. Paragraph 2 of the Illustrative List of the Annex of the *TRIMs Agreement* further provides in part that 'TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of *GATT 1994* include those ... which restrict: ... the importation ... generally or to an amount related to the volume or value of local production that it exports'. On a plain reading, the Annex expressly recognizes that Article XI:1 contains an obligation to generally eliminate quantitative restrictions. The Illustrative List then identifies various type of TRIMs measures that should be considered prohibited import or export restrictions, i.e. each subparagraph of the Illustrative List refers to restriction based on specified amounts, such as the types of products used in or related to production; the volume or value of local production; the volume or value of products, in terms of product type; or to an amount related to foreign exchange flows. In the Panel's view, Article XI:1 is not restricted to such a finite list of possible measures. On the contrary, Article XI:1 applies to 'prohibitions or restrictions other than duties, taxes or other charges' and does not include finite categories. Accordingly, the Panel declines to consider the Illustrative List of the Annex of the TRIMs Agreement in interpreting the scope of Article XI:1'."[26]

1.3.4 "TRIMs that are inconsistent with"

18. In *Canada – Renewable Energy / Feed-in Tariff Program,* the Appellate Body stated that "[i]n the present case, fulfilment of the elements in paragraph 1(a) of the Illustrative List of TRIMs results in a finding of inconsistency with Article III:4 of the GATT 1994."[27]

19. In *India – Solar Cells*, India argued that where a TRIM falls within the terms of the Illustrative List, it must still be demonstrated that the measure accords "less favourable treatment" within the meaning of Article III:4 of the GATT 1994 in order to find a violation of Article 2.1 of the TRIMs Agreement. The Panel disagreed, and found that TRIMs falling under paragraph 1(a) of the TRIMs Illustrative List (the paragraph of the Illustrative List at issue in that case) "are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994". The Panel considered that this approach "gives meaning and effect to the explicit terms of the TRIMs Agreement and the definitional operation of the Illustrative List with respect to 'TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994'".[28]

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[25] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 227.
[26] Panel Report, *Colombia – Ports of Entry*, para. 7.248.
[27] Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.103.
[28] Panel Report, *India – Solar Cells*, paras. 7.47-7.54.

1.3.5 "necessary to obtain an advantage"

20. The Panel in *Indonesia – Autos* concluded from its analysis of the measures at issue that "under these measures compliance with the provisions for the purchase and use of particular products of domestic origin is necessary to obtain the tax and customs duty benefits on these car programmes, as referred to in Item 1(a) of the Illustrative List of TRIMs."[29] The Panel then concluded that the tax and customs duty benefits were "advantages" within the meaning of the chapeau of paragraph 1 of the Illustrative List:

> "In the context of the claims under Article III:4 of GATT, Indonesia has argued that the reduced customs duties are not internal regulations and as such cannot be covered by the wording of Article III:4. We do not consider that the matter before us in connection with Indonesia's obligations under the TRIMs Agreement is the customs duty relief as such but rather the internal regulations, i.e. the provisions on purchase and use of domestic products, compliance with which is necessary to obtain an advantage, which advantage here is the customs duty relief. The lower duty rates are clearly 'advantages' in the meaning of the chapeau of the Illustrative List to the TRIMs Agreement and as such, we find that the Indonesian measures fall within the scope of the Item 1 of the Illustrative List of TRIMs.
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> Indonesia also argues that the local content requirements of its car programmes do not constitute classic local content requirements within the meaning of the *FIRA* panel (which involved a binding contract between the investor and the Government of Canada) because they leave companies free to decide from which source to purchase parts and components. We note that the Indonesian producers or assemblers of motor vehicles (or motor vehicle parts) must satisfy the local content targets of the relevant measures in order to take advantage of the customs duty and tax benefits offered by the Government. The wording of the Illustrative List of the TRIMs Agreement makes it clear that a simple advantage conditional on the use of domestic goods is considered to be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such. We note in addition that this argument has also been rejected in the Panel Report on *Parts and Components.*[30]
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> We thus find that the tax and tariff benefits contingent on meeting local requirements under these car programmes constitute 'advantages'."[31]

21. The Panel in *Indonesia – Autos* also found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programmes constituted "advantages" within the meaning of the chapeau of paragraph 1 of the Illustrative List of TRIMs, and as a result were inconsistent with Article 2.1 of the TRIMs Agreement.[32]

22. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that compliance with the relevant domestic content requirements was a "necessary condition and prerequisite" for electricity generators to participate in Canada's tariff programme.[33] The Panel found that "mere participation" in that programme was sufficient to confer an "advantage" on a beneficiary enterprise.[34] Thus, the Canadian programme met the requirements in Paragraph 1(a) of the Illustrative List in the Annex to the TRIMS Agreement for the measure to be deemed inconsistent with Article III:4 of the GATT 1994, and therefore Article 2.1 of the TRIMS Agreement.[35]

23. In *India – Solar Cells*, the Panel found that the domestic content requirements at issue were "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage". The Panel stated:

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[29] Panel Report, *Indonesia – Autos*, para. 14.88.
[30] *(footnote original)* In *Parts and Components*, the panel recognized that requirements that an enterprise voluntarily accepts to gain government-provided advantages are nonetheless "requirements".
[31] Panel Report, *Indonesia – Autos*, paras. 14.88-14.91.
[32] Panel Report, *Indonesia – Autos*, paras. 14.91-14.92.
[33] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.165.
[34] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.165.
[35] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.155-7.167.

> "We consider that the present case is not unlike that examined by the panel in *Canada – Renewable Energy / Feed-In Tariff Program*, in which contracts with qualifying generators provided for specific performance and certification requirements in exchange for long-term guaranteed prices 'to ensure economically viable operations'.[36] We find these considerations to be persuasive in the present case, and conclude that compliance with the DCR measures 'is necessary to obtain an advantage' within the meaning of paragraph 1(a) of the TRIMs Illustrative List. Moreover, we find the various contractual obligations and penalties for default by SPDs, in combination with the requirements established under the relevant *Guidelines* and *Request for Selection* documents, to sustain the conclusion that the DCR measures are 'mandatory or enforceable under domestic law'."[37]

24. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found that the term "advantage" in Paragraph 1(a) of the Illustrative List to the TRIMs Agreement does not mean the same thing as "benefit" in Article 1.1(b) of the SCM Agreement:

> "In *Canada – Aircraft* and in its later jurisprudence, the Appellate Body did not equate the notions of 'benefit' and 'advantage'. The Appellate Body's interpretation of 'benefit' in Article 1.1(b) of the SCM Agreement clearly suggests that, while benefit involves some form of advantage, the former has a more specific meaning under the SCM Agreement. 'Benefit' is linked to the concepts of 'financial contribution' and 'income or price support', and its existence requires a comparison in the marketplace. The same cannot be said about an 'advantage' within the meaning of the TRIMs Agreement. Paragraph 1 of the Illustrative List of the TRIMs Agreement simply refers to TRIMs that are necessary to obtain an advantage. The concept of 'advantage' in the TRIMs Agreement has to be interpreted in the context of this Agreement and, without entering into the merit of such an interpretation, it seems to us that 'advantage' under the TRIMs Agreement may take other forms than a 'financial contribution' or a 'benefit' under the SCM Agreement. In any event, a finding of an 'advantage' under the TRIMs Agreement does not require a comparison with a benefit benchmark in the relevant market, as required for a benefit analysis under the SCM Agreement.
>
> Thus, while we do not exclude that certain measures that provide an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement may also confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, it is conceivable that a measure that confers an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement be found not to confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement."[38]

1.3.6 Paragraph 1(a): "require … the purchase or use by an enterprise of products of domestic origin"

25. In *India – Solar Cells*, the domestic content requirements at issue included conditional or "partial" requirements. The Panel found that, notwithstanding their "partial coverage", these measures were TRIMs that "require" the "use" by "an enterprise" of "products of domestic origin", and were "specified in terms of particular products", namely in terms of solar cells and modules with the possibility of additional specification of the technology used.[39] On that basis, the Panel found that the DCR measures "require the purchase or use by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the TRIMs Illustrative List.[40] India raised arguments regarding the partial coverage of the DCR measures in connection with the meaning of "less favourable treatment" under Article III:4. In the context of its analysis under Article III:4, the Panel reasoned that:

> "[I]t is not in dispute that the scope of the domestic content requirements did not extend to all cells and modules in Phase I (Batch 1) and Phase I (Batch 2) or all

[36] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.164-7.165.
[37] Panel Report, *India – Solar Cells*, para. 7.72.
[38] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.208-5.209.
[39] Panel Report, *India – Solar Cells*, para. 7.67.
[40] Panel Report, *India – Solar Cells*, para. 7.67.

> projects in Phase II (Batch 1), and that SPDs therefore could use, and many in fact are using, foreign cells and modules. At the same time, we recall that it is not in dispute that the requirements imposed under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1 – Part A) prohibit the use of certain types of foreign cells or modules, without establishing any comparable restriction on domestic cells or modules. The fact that all SPDs participating in the National Solar Mission could use (and the fact that some in fact are using) *certain types* of foreign cells and modules (e.g. thin film solar modules under Phase I) does not negate the fact that the DCR measures accord less favourable treatment to the *other types of foreign cells* and modules whose use *is* prohibited by the requirements in question (e.g. c-Si solar modules in Phase I – Batch 2)."[41]

26. In *Brazil – Taxation*, the Panel found that the local content requirements at issue "require the purchase or use by an enterprise of products of domestic origin or from any domestic source", as referred to in paragraph 1(a) of the Illustrative List annexed to the TRIMs Agreement.[42]

1.3.7 Paragraph 1(b): measures relating to export requirements and Article III:4

27. In *India – Autos*, the Panel treated paragraph 1(b) as relevant context for its interpretation of Article III:4 of the GATT 1994. Specifically, the Panel noted that "the TRIMS Agreement Illustrative List envisages measures relating to export requirements both in the context of Article XI:1, as noted above in the context of our analysis under Article XI:1, and in the context of Article III:4 of the GATT 1994, by listing as inconsistent with that provision measures which require 'that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports' TRIMS Illustrative List, Item 1 (b)".[43]

1.3.8 Paragraph 2(a): "amount related to the volume or value of local production"

28. The Panel in *India – Autos* found that a condition provided in a regulation and in binding agreements between the government and investors limiting the amount of imports by linking them to an export commitment "acts as a restriction on importation, contrary to the terms of Article XI:1" of the GATT. The Panel stated that this finding "appears consistent with Item 2(a) of the Illustrative List … which suggests that measures linking the amount of imports to a certain quantity or value of exports can constitute restrictions on importation within the meaning of Article XI:1."[44] It noted that "this item does not limit the linkage to past export."[45] The Panel also noted that "to fall within the terms of item 2(a), the measures in question may in any case need to be characterized as measures that 'restrict' imports in certain ways."[46]

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[41] Panel Report, *India – Solar Cells*, para. 7.94.
[42] Panel Report, *Brazil – Taxation*, para. 7.805.
[43] Panel Report, *India – Autos*, fn 433.
[44] Panel Report, *India – Autos*, para. 7.279.
[45] Panel Report, *India – Autos*, para. 7.280.
[46] Panel Report, *India – Autos*, para. 7.281.