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## **1 PREAMBLE**

### **1.1 Text of the Preamble**

*Members,*

*Considering* that Ministers agreed in the Punta del Este Declaration that "Following an examination of the operation of GATT Articles related to the trade-restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade";

*Desiring* to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;

*Taking into account* the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country Members;

*Recognizing* that certain investment measures can cause trade-restrictive and distorting effects;

Hereby *agree* as follows:

### **1.2 to "elaborate, as appropriate, further provisions"**

1. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the European Union's argument that the government procurement derogation in Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement (and the Illustrative List annexed thereto).<sup>1</sup> In advancing this argument, the European Union emphasized the language in the preamble of the TRIMs Agreement stating that the object and purpose of the TRIMs Agreement was precisely to "elaborate" "further" or "additional" provisions to the already existing ones. The European Union argued that the contrary interpretation would contradict the TRIMs Agreement's object and purpose because, if Article 2.2 and the Illustrative List were to be read as merely stating the obvious i.e. that the types of measures listed in the annex discriminate against imported goods, with no other implications, they would largely be redundant. In the course of its analysis, the Appellate Body found that the first recital to the preamble did not contradict its interpretation:

"The first paragraph of the preamble of the TRIMs Agreement quotes the negotiating mandate of the Punta del Este Declaration, referring to the 'trade restrictive and distorting effects of investment measures' and calling for negotiations to 'elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade'. The fourth paragraph recognizes that 'certain investment measures can cause trade-restrictive and distorting effects'.

We do not find the European Union's reliance on the language of the Punta del Este negotiating mandate to be persuasive. Looking at the TRIMs Agreement as a whole, we consider that the 'further' provisions that it contains mainly clarify the application of Articles III and XI of the GATT 1994 to a specific set of measures – namely, TRIMs.

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<sup>1</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

In doing so, however, there 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>2</sup>

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<sup>2</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.31-5.32.