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ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

REPORTS OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Reports of the Panel to be found in document WT/DS438/R, WT/DS444/R, WT/DS445/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 14 June 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The Panel may, after consultation with the parties, adopt additional procedures for the protection of business confidential information (BCI) provided by the parties in the course of these proceedings.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If any of the complainants requests such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their responses to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted by the Panel upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by any of the other parties. Exceptions to this procedure shall be granted by the Panel upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party or parties a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit into a WTO working

language. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. The Panel may grant a reasonable extension of time for filing an objection as to the accuracy of a translation, upon a showing of good cause.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as an Annex, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the complainants shall be numbered, respectively, EU-1, EU-2, etc., or US-1, US-2, etc., or JPN-1, JPN-2, etc. Exhibits submitted by the respondent shall be numbered ARG-1, ARG-2, etc. If the last exhibit in connection with the first submission was numbered, for example, EU-5, the first exhibit of the next submission shall be numbered EU-6. Any joint exhibits submitted by the complainants shall be numbered JE-1, JE-2, etc.

Questions

11. The Panel may at any time pose questions to any of the parties or third parties, orally or in writing, including prior to any substantive meeting. Each party shall respond to those questions within the deadlines determined by the Panel.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than at 5.00 p.m., local Geneva time, the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite each of the complainants to make an opening statement to present its case first. Subsequently, the Panel shall invite the respondent to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final written version of its statement, preferably at the end of the meeting, and in any event no later than at 5.00 p.m., local Geneva time, on the first working day following the final day of the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions posed to the other party or parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the written questions posed by another party or parties within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe it will determine, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement; the complainants shall present their closing statements first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the respondent if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the respondent to present its opening statement, followed by the complainants. If the respondent chooses not to avail itself of that right, the Panel shall invite each of the complainants to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final written version of its statement, preferably at the end of the meeting, and in any event no later than at 5.00 p.m., local Geneva time, on the first working day following the final day of the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions posed to the other party or parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions posed by another party or parties within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe it will determine, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement; the party that presented its opening statement first, shall present its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than at 5.00 p.m., local Geneva time, the previous working day.

17. The third party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies for the interpreters, through the Panel Secretary. Third parties shall make available to the Panel, the parties and other third parties the final written versions of their statements, preferably at the end of the session, and in any event no later than at 5.00 p.m., local Geneva time, on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to pose questions to any of the third parties for clarification on any matter raised in the third parties' submissions or statements. The respective third party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel,

any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. The respective third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe it will determine, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, nor annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the Panel's interim report, each party may submit a written request to review precise aspects of the interim report and may request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the written requests for review filed by any of the other parties, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the written requests for review filed by any of the other parties.

23. The Panel's interim report, as well as the final report prior to its official circulation to the Members, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file seven (7) paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, three (3) CD-ROMS/DVDs shall be filed; in that case, where appropriate, three (3) paper copies of those exhibits shall also be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide, at the same time as it files the paper versions, an electronic copy of all documents it submits to the Panel, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, with

a copy to *****.*****@wto.org, *****.*****@wto.org, and *****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other parties in paper form and electronically at the time that it transmits such document to the Panel. Each party shall, in addition, serve directly on all third parties its written submissions in advance of the first substantive meeting with the Panel at the time that it transmits such document to the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties in paper form and electronically at the time that it transmits such document to the Panel. A party or third party may submit its documents to other parties or third parties only electronically, subject to the prior written approval of the recipient party or third party and provided that the Panel Secretary is notified of this arrangement. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties, where appropriate) by 5.00 p.m., local Geneva time, on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF THE PARTIES

EUROPEAN UNION

UNITED STATES

JAPAN

ARGENTINA

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY
OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION AND FACTUAL BACKGROUND

1. In its first written submission the European Union challenges certain instruments used by Argentina in order to pursue its policy of "managed trade", which includes protecting the domestic industry against imports and promoting import substitution. The European Union challenges two main measures (i) the non-automatic import license system known as the Declaration Jurada Anticipada de Importacion ("**DJAI system**"); and (ii) the Restrictive Trade-Related requirements ("**RTR requirements**") imposed by Argentina. The European Union then shows that these measures infringe fundamental principles enshrined in the GATT and the *Import Licensing Agreement*.

1.1. DJAI SYSTEM

2. The main elements of the DJAI system are: (a) no product can be imported into Argentina without the prior authorisation of the Argentinean Government; (b) traders are obliged to request this authorisation through the submission of an electronic "sworn declaration", in advance of any importation; (c) various bodies of the Argentinean Government and, most prominently, the Secretariat for Domestic Trade of the Ministry of Economy (the "**Secretariat for Domestic Trade**"), have the right to block the authorisation of the requested importation, through the placing of the mention "Observation" ("*Observada*") in the electronic system; (d) if the prospective importer wishes to continue with its plan to import the goods, then he/she must contact directly the governmental body that has registered its objection and make an effort to convince that governmental body to remove that objection; (e) there are no limits on the discretion of the governmental bodies to block imports, or on the duration of the blockage; (f) the Argentinean Customs authorities would not allow the release of the imported goods and the Central Bank of Argentina will not authorise the payment in foreign currency for the imported goods (nor the opening of a letter of credit, or the issue of a guarantee in favour of the importer) unless all governmental bodies have recorded into the electronic system their approval of the importation, or have not registered into the system any objection.

3. The DJAI system covers virtually all goods. This is expressly stated in the Preamble of Resolution 1/2012 issued by the Secretariat for Domestic Trade. Likewise, the DJAI system covers all types of persons and entities wishing to import goods into Argentina.

4. There are a number of Argentinean governmental entities that have the right to review and block importation through the DJAI system. The European Union understands that these are: the Secretariat for Domestic Trade, ANMAT, AFIP, SEDRONAR, DGRSS, SENASA and INV. Argentina has not published any legal instruments authorising any other governmental bodies to review imports through the DJAI system. However, there are press releases issued by the Ministry of Industry, which indicate that the National Institute of Industrial Technology ("INTI") may also be reviewing and blocking imports.

5. Argentina has not published the grounds on the basis of which the Secretariat for Domestic Trade and the other governmental entities listed above may block a specific importation. In relation to the Secretariat for Domestic Trade, Resolution 1/2012 describes its mandate in very broad and vague terms: the Secretariat for Domestic Trade is granted the power to review imports in order to "ensure that the domestic market of Argentina is not adversely affected" by *inter alia* the "quantity of the imports" and their "repercussions on domestic trade". It also states that (a) the Secretariat for Domestic Trade has the power to review and block the importation of all goods into Argentina; and (b) there is no limitation on the Secretariat's broad and unfettered discretion to block imports. Argentina does not publish the number of imports that it blocks through the DJAI system. However, publicly available information indicates that Argentina has used the DJAI system extensively in order to block a very significant number of imports. For example, according to news

reports, of blocked imports has been estimated at 65% of all applications, or as having reached the number of 130.000.

6. In addition, the Argentinean courts have rendered a number of judgments confirming that the DJAI system constitutes a non-automatic import licensing system and that the Secretariat for Domestic Trade, in particular, enjoys unfettered discretion to block imports.

7. The Secretariat for Domestic Trade often uses the DJAI system in order to impose on importers commitments that are often trade restrictive themselves. These commitments typically include the obligation to import lower quantities of goods than previously planned, or the obligation to export goods from Argentina. If the prospective importers refuse to accept those commitments, then their imports are altogether prohibited.

8. The Secretariat for Domestic Trade's use of the DJAI system is also evidenced in a Note, which the Secretariat for Domestic Trade distributed to various business associations around the 22 February 2012. As clarified in the European Union's response to question 27 of the Panel, the European Union understands that this Note has been distributed in a "generic" form to a large number of trade associations and import facilitating-brokerage companies in Argentina so that it would be publicly available to all interested applicants. This Note lists, inter alia, the types of information that importers should submit to the Secretariat for Domestic Trade, once the latter has registered into the DJAI system its objection for a particular import. The information must include the prices for all products sold by the importer in Argentina during the previous three years (including goods not related to the products to be imported) and the development of the prices from one year to another. Most importantly, the Note requires the importer to provide information on the quantities of products that the importer "proposes to export" from Argentina, in order to "establish the trade balance". If the importer is not involved in the exportation of goods from Argentina, then the Note obliges him to "indicate all the explanations that enable the Secretariat for Domestic Trade to understand the reasons for which the company does not export". The Note concludes by stating that "it is clarified that, until such time as the companies comply with the requirements, the DJAI will not be authorised".

1.2. RTR REQUIREMENTS

9. The RTR requirements imposed by Argentina, *inter alia*, include to (i) export a certain value of goods from Argentina related to the value of imported products, as a condition to import products into Argentina ("**one-to-one requirement**"); (ii) limit the volume of imported products, as a condition to continue importing some products into Argentina ("**import reduction requirement**"); (iii) freeze or reduce the prices of products sold locally, as a condition to import products into Argentina ("**price control requirement**"); (iv) increase the local content of domestically produced goods, by replacing imported products with domestic products, either as a condition to import products into Argentina or, more generally, as a condition to do business in Argentina and/or obtain an advantage ("**import substitution requirement**") and (v) make investments in Argentina and/or refrain from repatriating profits abroad, as a condition to import products into Argentina ("**investment requirement**").

10. The RTR requirements are not stipulated formally in any published law or regulation, and are usually conveyed orally to economic operators in Argentina in their dealings with the relevant Argentine authorities. However, the European Union provides ample evidence of their existence recorded in public statements, where high-ranked government officials announce the implementation of such requirements. Also, the European Union also provides ample evidence of unofficial sources (namely press clippings) attesting the same facts. In addition, the European Union adduces a copy of the document of a notary public confirming the existence of eight documents reflecting agreements between the Argentine Government and economic operators in Argentina containing undertakings to comply with one-to-one as well as with investment requirements.

11. In its first written submission Argentina objects validity and relevance of the evidence submitted by the European Union in the form of information provided by certain sources of information in Argentina, in particular Clarín and La Nación newspapers. The European Union addresses this objection in its opening oral statement. First, the European Union disagree with Argentina's suggestion that the European Union is supporting its claims on evidence consisting on "press releases and newspapers articles … which cannot be considered as anything more than

journalistic opinion tinged with ideology". The European Union submits that due to the lack of transparency (i.e., the absence publication of the overreaching measure the European Union is challenging) it is necessary to rely on a variety of evidence, including newspapers, to show the existence of such measure. Moreover, as it is mentioned in section 0 above, in addition to information contained in newspapers from various sources, the European Union has provided, inter alia, official press releases, official documents produced by Argentine authorities, a document made by notary public and surveys by industry associations.

12. Second, with respect to Argentina's request to withdraw all information taken from Clarín and La Nación newspapers from the record of these panel proceedings, the European Union notes that such information is only a minimal part of all the evidence provided by the European Union in this case. Further, the European Union observes that the Panel is free to admit and evaluate evidence of every kind, and to ascribe to it the weight the Panel sees fit. This was also the finding of Panel in *US-Hot-Rolled Steel*. Moreover, the European Union notes that it has only cited twice the information provided by Clarín in its first written submission and most of the references made to specific sets of facts contained in information provided by Clarín and La Nación have been confirmed by other sources, including other means of communication (newspapers, radios, TVs, magazines, blogs, etc) as well as official press releases by the Argentine authorities.

13. We agree with Argentina that, with respect to the information provided in newspapers, a distinction should be made between the facts described therein and the journalistic colouring of these facts. However, the information provided by those newspapers in this case confirms that an event or fact took place in the past, thereby confirming the existence of the overarching measure as well as the separate measures the European Union is challenging in this case. Moreover, such an event or fact, or similar events or facts, are reported in very similar terms in other sources of information, such as other newspapers or official press releases. Thus, the European Union considers that the Panel should ascribe a value to the information provided by those newspapers (as well as others) when considering the totality of the evidence put forward by the European Union about the existence and content of the measures it is challenging as RTR requirements. In this respect, the European Union also notes that previous panels and the Appellate Body have taken into account evidence provided by newspapers, without the need to demonstrate factual assertions through contemporaneous sources of information. Specially, panels have been inclined to accept the information provided by newspapers in cases like the present one, where the respondent did not challenge the truth of the facts reported. The European Union would also invite the Panel to draw the necessary inferences, where appropriate, from Argentina's refusal to engage in the rebuttal and substantive discussion of the facts and arguments raised by the European Union in its first written submission about the RTR requirements.

14. Finally, with respect to the Argentina's objection against the submitted evidence, the European Union observes that in numerous press releases published by official authorities in Argentina, mainly the Ministry of Industry and the Ministry of Economy, references are made to agreements being signed between the relevant Argentine authorities and economic operators, containing the RTR requirements the European Union is challenging in this case. The European Union has seen many of those agreements and their content. However, the European Union has not been authorised by those economic operators to disclose them in these proceedings. Therefore, the European Union invites the Panel to seek those agreements directly from Argentina, if necessary by following the BCI proceedings already foreseen in the Panel's Working Procedures. We believe that such a request would facilitate the Panel's tasks of making an objective assessment of the matter.

15. The RTR requirements are comprehensively and systematically imposed across economic operators and sectors. Naturally, economic operators in Argentina are more or less affected by the RTR requirements depending on their potential contribution to eliminating trade balance deficits and achieving the import substitution objectives pursued by the Argentine Government.

16. As the European Union clarify in the response to question 9 and 11 of the Panel, the way the Argentine Government enforces compliance with the RTR requirements is not uniform and may take a variety of forms. While the RTR requirements often operate in concert with certain published trade measures—such as the DJAI system—the RTR requirements have also been imposed by other coercive means: from exercising pressure, such as insinuating the nationalization of private companies to freezing the operations of companies (by retaining the identification number for tax purposes, i.e. CUIT). In addition to "sticks" to induce compliance with

the RTR requirements, Argentina also employs "carrots" such as providing awards to comply with the requirements (such as the increase in the value of imports that is permitted), and providing incentives to companies complying with import substitution requirements. In any event, the European Union observes that this list is not exhaustive.

17. In the response to question 11, the European Union further clarifies that it is incorrect to assume that to each type of RTR requirement corresponds a specific type of enforcement mechanism. For instance, it is not that the one-to-one requirement is always enforced through the DJAI system. RTR requirements may be enforced by all mechanisms available to the Argentine Government, from the DJAI system to other coercive means mentioned before which affect the regular business activities of economic operators in Argentina. Those other means of enforcement, including sticks and carrots, may not impose a limitation on the ability to import products. For instance, if a government exercises pressure to comply with the one-to-one requirement, companies may be subject to dawn raids interfering with their operations while continue importing. Similarly, companies may not benefit from any support scheme if they do not comply with the import substitution policy by achieving certain local content thresholds; however, those companies would continue importing products.

18. Last, the European Union would like to recall that the enforcement mechanisms must be distinguished from the RTR requirements themselves. The overarching measure the European Union is challenging consists in the imposition of one or more of the RTR requirements which themselves restrict the importation of products or the use of imported products. In other words, the RTR requirements contain limiting conditions which are contrary in themselves to Articles XI:1 and III:4 of the GATT. The enforcement mechanism in case of non-compliance with the RTR requirements, either in the form of a "stick" or a "carrot", is what makes the RTR requirements to be "requirements". In some cases, the enforcement instrument chosen to induce compliance with the RTR requirement may be incompatible with Article X1:1 of the GATT 1994 (i.e., in cases where the DJAI system is used).

1.2.1. One-to-one requirement

19. This requirement suggests that, for every dollar spent on imports, an importer must engage in export activities for at least one dollar. However, this "parity" is not always what is required as the Argentine Government often compels companies to increase their level of exports compared to the previous year, while maintaining imports at a lower level (and thus achieve a trade surplus). Also, the Argentine Government requires companies to even out their trade balance on an annual basis. Even if an entity achieved a positive trade balance in one year, next year such entity is required to even out its trade balance starting from zero in the export side. In turn, if a company did not even out its trade balance in one year, next year imports are not allowed until such a company exports the value required to even out its trade balance.

20. Companies in Argentina have addressed the one-to-one requirement in various ways. Sometimes, companies devise export plans based on their own production capacities, which often leads to altering their production plans to increase their production capacity in Argentina with a view to exporting the required values. In some other cases, companies partner with domestic producers to export domestic products (mostly unrelated to their own imports or production in Argentina) under the name of the importing firm. In most cases, however, companies need to hire exporters in order to assume entitlement over such exports and thus, meet the export commitments. The last is the most recurrent case especially by small and medium importers which, due to their limited capacities, are unable to engage in export activities by themselves. This has created an emerging market of exporters offering their exports to importers in exchange of a percentage of the value of exports needed. Also, other companies compensate the lack of agreed exports by making irrevocable capital contributions.

21. The European Union in its first written submission illustrates how the Argentine Government has imposed the one-to-one requirement to the present day, and the way in which economic operators have committed to it by referring to the one-to-one requirement applied in the sectors of automobiles, trucks, motorcycles, cultural products, tyres, agricultural products, electronic products/appliances, clothing, pharmaceuticals, pork meat and toys.

1.2.2. Import reduction requirement

22. The Argentine Government also requires economic operators to limit the volume of imported products, as a condition to continue importing some products into Argentina. This requirement may be asked separately or may also be a part of a broader set of requirements (often the one-to-one requirement) that economic operators must undertake. In all cases, compliance with the import reduction requirement serves as a "permission" to continue importing products in the future. Like the rest of RTR requirements, the import reduction commitments are unrelated to the essence, composition or performance of the product being imported, but respond to Argentina's objectives to control trade deficits and substitute imports.

23. The European Union illustrates the implementation of the import reduction requirement by commitment by supermarket chains to limit the volume of imported products, commitment by automobile importers to reduce imports, commitment by motorcycle importers to reduce imports and commitment by Argentine pork associations to stop and limit imports of pork meat products.

1.2.3. Price control requirement

24. Either separately or together with other RTR requirements, the Argentine Government requires economic operators to freeze or reduce their prices in order to continue importing products. Compliance with the price control requirement serves as a "permission" to continue importing products in the future but also, compliance with the price control requirement is used as a "reward" to companies, in the sense that companies abiding by it are permitted to increase the levels of imported products they are allowed to achieve. The European Union illustrates the price control requirement by commitments by supermarket chains to freeze or reduce their prices and by certain premium clothing companies to halt prices.

1.2.4. Import substitution requirement

25. Over the last years, the Argentine Government also requires economic operators in Argentina to incorporate local content to their products by substituting imported products by products that are or can be produced in Argentina. Sometimes the import substitution requirement is imposed as a condition to continue importing some products. The import substitution requirement is often imposed together with other RTR requirements, specially the one-to-one requirement. In those cases, in order to reach the necessary trade surplus, an import substitution requirement is also imposed to lower the level of imported products. In other cases, the import substitution requirement is not necessarily a condition to the importation of products but, more generally, is seen as a requirement to do business in Argentina or to benefit from tax incentives or other types of support.

26. The Argentine Government has set up sectorial working groups bringing together producers of manufactured goods and local (potential) suppliers of inputs with a view to enjoining the former to substitute imports for domestically produced goods in the production of the downstream product. In many cases, the Argentine Government has required relevant stakeholders to identify inputs or products that can be replaced by domestic sources and to commit to an import substitution plan. The sectors for which a working group has been set up are: (i) leather and footwear; (ii) wood; (iii) textile and apparel; (iv) automotive-autoparts; (v) construction materials; (vi) software; (vii) agricultural machinery; (viii) medicines for human consumption; (ix) capital goods; (x) poultry, pork and dairy; and (xi) chemical and petrochemical.

27. The European Union describes how the Argentine Government has implemented the import substitution requirement in several key sectors, such as the mining, automotive, agricultural machinery, motorcycle, electronics, and bicycles sectors. In these sectors, the Argentine Government has explicitly made it clear that the import substitution requirement is not an option but an obligation with which producers of downstream products and local suppliers of inputs must engage. Yet, the import substitution requirement is not confined only to these sectors. Argentine is progressively broadening the scope of the industries over which import substitution requirements are imposed.

1.2.5. Investment requirement

28. The Argentine Government also requires companies to invest in Argentina in existing or new production facilities, as a condition to import products. Specifically, the Argentine Government

requires companies to make or increase investments in Argentina by bringing new capital and/or by refraining from repatriating profits abroad. By imposing such a requirement, the Argentine Government seeks to even out trade deficits and achieve import substitution (i.e., the investment would increase local production which, in turn, is sold locally replacing imports or is exported, thereby evening out trade balances).

29. This requirement may be imposed separately or together with other RTR requirements. For example, in some cases, the Argentine Government imposes the one-to-one requirement and the investment requirement in order to oblige the company to obtain a positive trade balance surplus. In other cases, the Argentine Government does not require a specific export target or trade balance surplus but merely "efforts" to even out trade balance deficits to acceptable levels by imposing the investment requirement. In many cases, however, investments are also undertaken together with the obligation to increase the local content in the production of goods in Argentina.

30. The European Union exemplifies several cases where the Argentine Government has required, and the companies have undertaken investment commitments as a condition to import products.

2. LEGAL ARGUMENT CONCERNING DJAI SYSTEM

2.1. THE DJAI SYSTEM IS INCONSISTENT WITH THE GATT

2.1.1. The DJAI system is inconsistent with Article XI:1 of the GATT

31. The European Union argues that the DJAI system is a "governmental measure" and a "limiting condition on importation" and therefore inconsistent with Article XI of the GATT. The European Union discusses the design and structure of the DJAI system: (a) all importers must submit the "sworn affidavit" prior to the importation of any and all goods into Argentina; (b) the importation can take place only if it is authorised by the Argentinean authorities through the DJAI system; (c) there are a number of Argentinean governmental authorities, which have the right to block the importation through the DJAI system; (d) for as long as the importation is blocked on the DJAI system, the importation cannot take place and the Argentinean Customs Authorities refuse to allow the release of the goods into the Argentinean market and the Central Bank of Argentina refuses to authorise the opening of letters of credit, the issuance of bank guarantees, or the payment in foreign currency for the imported goods; (e) there is no limit on the time period during which the Argentinean authorities may continue to block the importation through the DJAI system and (f) there are no limits on the Argentinean authorities' discretion to block an importation, or continue to block the importation indefinitely.

2.1.2. Argentina has acted inconsistently with its obligations under Article X:1 of the GATT

32. Argentina has acted inconsistently with its obligations under Article X:1 of the GATT because Argentina has failed to publish promptly and in a manner such as to enable governments and traders to become acquainted with them, all laws, regulations and administrative rulings of general application (legal instruments) relating to the operation of the DJAI system. First, Argentina has failed to publish a complete list of all governmental entities that have the right to inspect and block imports through the DJAI system. For instance, there are press releases which indicate that INTI may be reviewing and blocking imports through the DJAI system. However, Argentina has not published any legal instrument providing INTI with such right. Second, Argentina has failed to publish the complete list of the goods that each governmental entity can review and block through the DJAI system. The Manual for DJAI Operations only lists the goods that the Secretariat for Domestic Trade, AFIP and ANMAT may review and block, however it does not list the goods the importation of which may be blocked by any other governmental entity. The fact that Argentina has published the specific list of goods for only some entities, confirms that it has intentionally omitted to publish the list of goods for the other entities. Third, Argentina has failed to publish the conditions on the basis of which the Secretariat for Domestic Trade, the ANMAT, the SEDRONAR, the DGRSS, the SENASA, the INV and the INTI can block imports through the DJAI system. Argentina has published in the Manual for DJAI Operations only the grounds on the basis of which AFIP may block specific imports. The fact that Argentina has published these conditions for only one entity, confirms that it has intentionally omitted to publish the corresponding conditions for the other governmental entities. Fourth, Argentina has failed to publish the grounds on the basis of which the deadline for "Withdrawn-Expired" status ("*Anulada*") of a DJAI application may be

extended. Lastly, Argentina requires the submission of the Note discussed above. However, Argentina has not published any legal instrument that provides for the existence of that Note.

2.1.3. Argentina's administration of the DJAI system is inconsistent with Article X:3(a) of the GATT

33. The European Union submits that Argentina's administration of the DJAI system does not meet the requirements of Article X:3(a) of the GATT. First, given the absence of any published grounds or conditions on the basis of which the Secretariat for Domestic Trade, in particular, would block imports, there is no "consistency" or "predictability" in Argentina's administration of the DJAI system. The absence of such published grounds or conditions means that the Secretariat for Domestic Trade could block the imports of one importer, while authorise the imports of another importer (despite the fact that the two importers would be of the same type and size) or that an importer could see its imports being authorised at one point in time, but blocked at another point in time. The European Union also showed that the Secretariat for Domestic Trade, in particular, is requiring importers to undertake various trade-restrictive commitments, in order to allow them to import into Argentina. This element alone suffices to render Argentina's administration of the DJAI system non-uniform. Second, in the absence of any published grounds or conditions on the basis of which the Secretariat for Domestic Trade, in particular, would block imports, the DJAI system does not contain any "adequate safeguards" that could ensure the "impartial" and fair treatment of all prospective importers. Third, the publicly available information establishes that the Secretariat for Domestic Trade, in particular, routinely requires applicants to undertake trade-restrictive obligations and conditions, in order to allow their imports through the DJAI system. For as long as the applicants have not agreed to undertake these obligations and conditions, the Secretariat for Domestic Trade continues to block the applicants' imports, sometimes even for months, as established by the Argentinean Court judgments. An administration with such characteristics is definitely not "reasonable", "proportional" or "sensible" and it is definitely "asking for too much".

2.2. THE DJAI SYSTEM IS A NON-AUTOMATIC IMPORT LICENSING SYSTEM, WHICH IS INCONSISTENT WITH THE PROVISIONS OF THE IMPORT LICENSING AGREEMENT AND THE GATT

34. The European Union considers the DJAI system as an "import licensing" regime, which falls within the scope of both Article XI of the GATT and of the *Import Licensing Agreement*.

2.2.1. The DJAI system is inconsistent with Article XI:1 of the GATT

35. WTO Panels have already found that an import licensing system falls within the prohibition of the GATT Article XI:1 when it is "discretionary or non-automatic". The DJAI system is such a non-automatic import license system. First, because the DJAI system does not grant the approval of the "application" in all cases. Second, there are numerous examples of applications for importation which have been blocked through the DJAI system, as evidenced both by the Argentinean court judgments and the other publicly available information. In addition, the DJAI system is designed and structured to grant authorisations for imports with important time delays. As mentioned, once a governmental entity has blocked the importation through the DJAI system, there is no deadline within which the importation will be authorised. The Argentinean Court judgments also establish that the actual operation of the DJAI system involves very important time delays in the granting of DJAI authorisations, if such authorisations are ever granted. Consequently, the important time delays in the granting of DJAI authorisations are an additional element showing that the DJAI system is inconsistent with Article XI:1 of the GATT.

2.2.2. Argentina has acted inconsistently with its obligations under Article 1.3 of the Import Licensing Agreement

36. The Appellate Body in *EC-Bananas III* has found that "the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage". Therefore, to the extent that the Panel finds that the DJAI system constitutes an import licensing system which falls within the scope of the *Import Licensing Agreement*, the European Union requests the Panel to find that Argentina has acted inconsistently with Article 1.3 of that agreement, for the reasons discussed in this Submission, under the Section on Article X:3(a) of the GATT.

2.2.3. Argentina has acted inconsistently with its obligations under Article 1.4(a) and Article 3.3 of the Import Licensing Agreement

37. The European Union has not received any information indicating that Argentina has provided the requisite publications to the WTO Committee on Import Licensing or the WTO Secretariat. Moreover, Argentina has failed to publish in the manner required by Article 1.4(a) of the *Import Licensing Agreement*, (a) the complete list of all Argentinean governmental entities that have the right to review and block the DJAI applications; and (b) the complete list of goods, the importation of which can be reviewed and blocked by each of the governmental entities "affiliated" with the DJAI system. Therefore, Argentina has acted inconsistently with its obligations under Article 1.4(a) of the *Import Licensing Agreement*. In addition, Argentina has not published any laws or regulations imposing quantitative restrictions on imports, nor has its published any laws or regulations stating that the DJAI system is linked to the implementation of such quantitative restrictions on imports. Therefore, there is no evidence that the DJAI system has the purpose of implementing quantitative restrictions. In these circumstances, Article 3.3 of the *Import Licensing Agreement* obliges Argentina to publish "sufficient information" on the "basis for granting and/or allocating licenses". Argentina has failed to do so.

2.2.4. The DJAI system is inconsistent with Article 1.6 of the Import Licensing Agreement

38. The DJAI "application procedure" (a) involves multiple levels of applications at different points in time; (b) requires additional and separate contacts and applications with numerous different governmental entities; (c) requires the submission of documents and information that are not related to the specific goods to be imported; and (d) requires the submission of documents and information on the applicant's export activities while the applicant is actually requesting the authorisation to import goods, and therefore is not "as simple as possible" for purposes of Article 1.6 of the *Import Licensing Agreement*. Moreover, once an application is blocked, applicants may be obliged to contact separately up to seven or eight different "administrative bodies" and submit additional documents and "applications" separately to each of them. Therefore, the total number of "administrative bodies" that applicants may be forced to "approach" exceeds by far the number of three provided in Article 1.6 of the *Import Licensing Agreement*.

2.2.5. The DJAI system is inconsistent with Article 3.2 of the Import Licensing Agreement

39. The European Union considers that the DJAI system is not used in order to "implement" some other "measure" within the meaning of Article 3.2 of the *Import Licencing Agreement*: the DJAI system itself is the measure that restricts imports, in breach of Argentina's obligations under Article XI of the GATT.

2.2.6. The DJAI system is inconsistent with Article 3.5(f) of the Import Licensing Agreement

40. Each application by a prospective importer, submitted through the DJAI system, is considered by the Argentinean authorities "as and when received". This means that the period for processing the applicant's request should not exceed 30 days. However, the DJAI system is designed to grant authorisation during a period which is much longer than 30 days. In fact, the application remains in the blocked "Observed" status for as long as the relevant governmental entity has not removed its objection. The only time "limit" provided for in the Argentinean legislation is that 180 days after the date of the application's registration into the electronic system, the application goes automatically into the "Withdrawn-Expired" status. This deadline can be further extended, but the Argentinean legislation does not describe the conditions that must be met in order for such an extension to be granted. In other words, an application may remain in the blocked "Observed" status indefinitely.

3. LEGAL ARGUMENT ON RESTRICTIVE TRADE-RELATED REQUIREMENTS

41. In this dispute, the European Union challenges the imposition of one or more of the RTR requirements upon economic operators in Argentina as a part an overarching measure inconsistent with Articles XI:I and/or III:4 of the GATT. Since these requirement have not been published promptly in a manner to enable governments and traders to become acquainted with them, the European Union submits that Argentina also violated its obligations under Article X:1 of the

GATT 1994. In the alternative, should the Panel find that the RTR requirements, each on its own or any combination thereof, are not inconsistent with these Articles as a part of an overreaching measure, the European Union challenges as separate measures certain specific instances where Argentina has applied one or more of these requirements with respect to individual economic operators.

3.1. THE RTR REQUIREMENTS ARE INCONSISTENT WITH ARTICLES XI:1 AND/OR III:4 GATT 1994

42. The European Union will demonstrate that each of the requirements which conform the measure at issue is inconsistent with Articles XI:1 and/or Article III:4 of the GATT 1994 since they prohibit or restrict the importation and/or the use of imported products in Argentina. Consequently, the RTR requirements, defined as an overarching measure pursuant to which the Argentine Government requires economic operators to commit to take one or more of the actions described above, is also contrary to Articles XI:1 and/or III:4 of the GATT 1994.

3.1.1. The one-to-one requirement is inconsistent with Article XI:1 of the GATT 1994

43. The European Union submits that a similar "trade balancing requirement" was found inconsistent with Article XI:1 of the GATT 1994 in *India – Autos.* Also, a similar type of restrictive measure, in the particular context of measures affecting investment, was included in the Illustrative List contained in the Annex to the TRIMs Agreement as "inconsistent" with Article XI:1 of the GATT 1994.

3.1.2. The import reduction requirement is inconsistent with Article XI:1 of the GATT 1994

44. The European Union submits that the import reduction requirement imposes a limiting condition on the importation of products and, thus, is inconsistent with Article XI:1 of the GATT 1994. Indeed, the importation of certain products is totally banned (like the case of the pork industry) or restricted (like the case of automobiles and motorcycles) as a condition to continue importing the same or other products into Argentina.

3.1.3. The price control requirement is inconsistent with Article XI:1 of the GATT 1994

45. The European Union submits that the price control requirement is inconsistent with Article XI:1 of the GATT 1994. If the entity concerned does not commit to freeze or reduce the prices of the products it sells in Argentina, the entity is prevented from importing products. If the entity agrees to freeze or reduce those prices, the entity is allowed to continue importing products into Argentina and is also rewarded by benefiting from less import restrictions. In this sense, the price control requirement makes importation contingent upon compliance with certain selling prices.

3.1.4. The import substitution requirement is inconsistent with Articles XI:1 and III:4 of the GATT 1994

46. The European Union submits that the import substitution requirement, insofar as it imposes a limiting condition on the importation of products is contrary to Article XI:1 of the GATT 1994 and to Article III:4 of the GATT 1994 insofar as it imposes a limitation on the use of imported products, is contrary to Article III:4 of the GATT 1994.

47. To elaborate on the latter, the European Union submitted that, *first*, the import substitution requirement is based exclusively on the products' origin. Thus, the goods manufactured in Argentina and imported from elsewhere are like products within the meaning of Article III:4 of the GATT 1994. *Second*, the import substitution requirements are "requirements" in the sense of Article III:4 of the GATT 1994. In particular, entities in Argentina must accept them in order to continue their activities in Argentina and the Argentine Government exercises pressure on these entities to reach local content targets and replace their imported products by other products sourced locally. In some cases, the Argentine Government also imposes the import substitution requirement in order to obtain an advantage (such as a subsidy). *Third*, in the light of the findings of Appellate Body and Panels in *Turkey – Rice*, *Canada – Autos*, *China – Auto Part*, the import substitution requirements "affect" the "internal sale, purchase, or use" of imported products within

the meaning of Article III:4. *Fourth*, the import substitution requirement accord less favourable treatment to imported products than the treatment granted to like domestic products. In fact, by setting local content targets as a condition to operate in Argentina or to have access to an advantage, the Argentine Government alters the conditions of competition in Argentina negatively affecting the possibilities for imported products to be used in Argentina (e.g., in the local production). *Finally*, the European Union observes that paragraph 1(a) of the Illustrative List of the TRIMs Agreement provides that measures like import substitution requirements are inconsistent with Article III:4 of the GATT 1994 and that similar import substitution requirements have been found inconsistent with Article III:4 of the GATT 1994 in other cases, such as *India – Autos*, *Korea – Various Measures on Beef*, *US – Malt Beverages* or *Canada - FIRA*.

3.1.5. The investment requirement is inconsistent with Article XI:1 of the GATT 1994

48. The Argentine Government requires companies to make investments in Argentina as a condition to import products. If the companies do not comply with it, the Argentine Government employs legal instruments such as the DJAI or other coercive means to impede the importation of products. In most cases, however, companies accept such a commitment in order to avoid import restrictions. In either way, the investment requirement imposes a limiting condition on the importation of products and, thus, is inconsistent with Article XI:1 of the GATT 1994.

3.2. ARGENTINA VIOLATED ITS OBLIGATIONS UNDER ARTICLE X:1 OF THE GATT 1994 WHEN FAILING TO PUBLISH THE RTR REQUIREMENTS PROMPTLY

49. The European Union maintains that the RTR requirements are inconsistent with Article X:1. *First*, the RTR requirements apply to a range of situations, to a variety of economic operators and sectors. Thus, the RTR requirements are not isolated cases, but an overarching measure applied to a wide range of situations and, thus, amounts to a measure of general application in the sense of Article X:I of the GATT 1994. *Second*, the RTR requirements are made effective by Argentina. Official government statements and press releases, unofficial press clippings, industry surveys and the WTO Secretariat itself all confirm the existence, nature and operation of the RTR requirements. *Third*, the European Union has also shown that the RTR requirements restrict the importation of products as well as the use of imported products, when imposing at least one of those requirements as a condition to import products and/or as a condition to use imported products in Argentina. *Last*, Argentina has failed to publish the RTR requirements promptly as required by Article X:1 of the GATT 1994. These requirements are not stipulated in any published law or regulation and, in practice, they are usually communicated orally to individual economic operators, either by telephone or in face-to-face meetings.

3.3. SPECIFIC INSTANCES OF APPLICATION OF THE RTR REQUIREMENTS

50. In the alternative, should the Panel find that the RTR requirements, each on its own or any combination thereof, are not inconsistent with Articles XI:1 and/or III:4 of the GATT 1994 as part of an overarching measure, the European Union challenges as separate measures specific instances where Argentina has applied one or more of these requirements with respect to individual economic operators as follows:

Case	Entity(/ies) affected	Approx. Date	Requirement	Claim
1	Renault Trucks	7/02/2012	One-to-one Import substitution Investment	Articles XI:1 and III:4 of the GATT 1994
2	Volkswagen	18/03/2011	One-to-one Import substitution	Articles XI:1 and III:4 of the GATT 1994
3	Porsche	30/03/2011	One-to-one	Article XI:1 of the GATT 1994
4	Mercedes Benz	6/04/2011	One-to-one Import substitution Investment	Articles XI:1 and III:4 of the GATT 1994
5	Peugeot-Citroën	20/04/2011 17/11/2011	One-to-one	Article XI:1 of the GATT 1994
6	Alfa Romeo	20/04/2011	One-to-one	Article XI:1 of the GATT 1994

Case	Entity(/ies) affected	Approx. Date	Requirement	Claim
7	General Motors	2/05/2011	One-to-one Import substitution Investment	Articles XI:1 and III:4 of the GATT 1994
8	Fiat	5/05/2011	One-to-one Import substitution Investment	Articles XI:1 and III:4 of the GATT 1994
9	Ford	23/05/2011	One-to-one Import substitution	Articles XI:1 and III:4 of the GATT 1994
10	Renault	5/08/2011	One-to-one Import substitution	Articles XI:1 and III:4 of the GATT 1994
11	BMW	13/10/2011	One-to-one	Article XI:1 of the GATT 1994
12	Cámara Argentina de Publicaciones and its affiliated entities	31/10/2011	One-to-one	Article XI:1 of the GATT 1994
13	Cámara Argentina del Libro and its affiliated entities	11/11/2011	One-to-one	Article XI:1 of the GATT 1994
14	Scania	21/11/2011	One-to-one Investment	Article XI:1 of the GATT 1994
15	Pirelli	9/03/2012	One-to-one	Article XI:1 of the GATT 1994
16	Pork meat associations	7/05/2012	One-to-one Import reduction	Article XI:1 of the GATT 1994
17	Sociedad Bíblica Argentina (SBA)	22/11/2011	One-to-one	Article XI:1 of the GATT 1994
18	Certain producers of medicines	01-05/2011	One-to-one Investment	Article XI:1 of the GATT 1994
19	Airoldi	7/03/2012	One-to-one	Article XI:1 of the GATT 1994
20	Zanella	03, 10/2011	One-to-one Import substitution	Articles XI:1 and III:4 of the GATT 1994
21	Indesit	07/2012	One-to-one	Article XI:1 of the GATT 1994
22	Michelin	11/04/2013	One-to-one Import substitution Investment	Articles XI:1 and III:4 of the GATT 1994
23	Ermenegildo Zegna	2/08/2012	One-to-one	Article XI:1 of the GATT 1994

4. CONCLUSIONS AND REQUEST FOR FINDINGS

51. For the reasons set out in its first written submission, the European Union requests the Panel to find that:

(1) with respect to the DJAI System, Argentina has acted inconsistently with its obligations under Articles X:1; X:3(a); and XI:1 of the GATT, as well as with Articles 1.3; 1.4(a); 1.6; 3.2; 3.3; and 3.5(f) of the *Import Licensing Agreement*;

(2) with respect to the RTR requirements, that:

- the RTR requirements are inconsistent with Articles XI:1 and/or Article III:4 of the GATT 1994;
- Argentina violated its obligations under Article X:1 of the GATT 1994 by failing to publish the RTR requirements promptly in a manner to enable governments and traders to become acquainted with them;
- in the alternative, that Argentina acted contrary to Articles XI:1 and/or Article III:4 of the GATT 1994 in each of the measures separately identified in this submission.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY
OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. This executive summary summarizes the arguments of the European Union in its second written submission and the Oral Statement in the Second Hearing. It reiterates the position of the European Union and rebuts Argentina's arguments related first to the DJAI Requirement and then to the RTR requirements. On the DJAI, the European Union first identifies the factual points that Argentina does not contest and then explain the reasons for which Argentina's legal assertions should be rejected. On the RTR requirements, the European Union discusses the reasons for which Argentina's assertions are baseless and provides comments on Argentina's responses to the Panel's written questions. The European Union also provides some comments on the Panel's communication of 6 November 2013.

2. DJAI REQUIREMENT

2.1. POINTS THAT ARGENTINA HAS ACKNOWLEDGED

2. Through its first written submission, its oral statements during the first Hearing and its responses to the written questions of the Panel, Argentina has acknowledged the accuracy of a number of facts presented by the European Union in its own submissions. Argentina has generally confirmed the European Union's description of the DJAI system's design, structure and operation. Argentina has also confirmed that no importation can take place for as long as the DJAI system is at "*observed*" status and that a number of Argentinean governmental entities have the power to block imports through the DJAI system. Most importantly, Argentina has confirmed that the Secretariat for Domestic Trade has the power to block the imports of all goods through the DJAI system. Likewise, Argentina has implicitly acknowledged the Secretariat for Domestic Trade's broad discretion in blocking imports and the lack of publication of a specific list of reasons for which this Secretariat may block imports. Also, Argentina has failed to address a number of issues, such as the role of the INTI; and the lack of publication of the legal instruments through which SEDRONAR, SENASA and INV have been given the power to review and block imports through the DJAI System. In addition, Argentina has made confusing statements as to whether SENASA and INV actually have the power to review and block imports through the DJAI System. Therefore, as a result of Argentina's failure to publish promptly all relevant legal instruments in accordance with the provisions of Article X:1 of the GATT, there is uncertainty as to which governmental entities actually review and block imports through the DJAI system. In conclusion, the European Union considers that Argentina's submissions and statements in these proceedings, in combination with the evidence placed at the disposal of the Panel, have served to establish the facts that justify the European Union's claims under Article X:1, Article X:3(a) and Article XI:1 of the GATT, irrespective of whether the DJAI system is considered an "import license", or not.

2.2. POINTS THAT ARGENTINA CONTESTS

3. The European Union noted that Argentina does not contest the main facts presented by the European Union. Rather, Argentina has based its defence on a number of legal interpretations and assertions. These legal interpretations and assertions are wrong and should be rejected, for the reasons discussed by the European Union in the following paragraphs.

2.2.1. Issues relating to the GATT

2.2.1.1 Argentina's assertions in relation to Article XI:1 of the GATT

4. Argentina's defence is based on one main assertion: that a type of measure that Argentina calls "customs formalities" falls outside the scope of Article XI of the GATT, because it allegedly falls only within the scope of Article VIII of the GATT. Argentina further asserts that Article XI of the GATT covers only "substantive" provisions and not "procedural" provisions. According to

Argentina, the latter fall only within the scope of Article VIII of the GATT. These assertions run against both the text of the relevant provisions of the GATT and the consistent jurisprudence of past Panels and the Appellate Body.

2.2.1.1.1 Argentina's assertions in relation to Article VIII of the GATT are wrong

5. Argentina asserts that it cannot be the case that customs formalities that are permitted under Article VIII are prohibited quantitative restrictions under Article XI. Argentina also asserts that the potential trade-restrictive effects of customs formalities are governed by Article VIII and because Article VIII contemplates by its terms that such effects may occur, it cannot be the case that these same effects render a customs formality a prohibited quantitative restriction under Article XI. Otherwise, Members would not be able to maintain customs formalities, because they would be prohibited under Article XI. Argentina's assertions are wrong for a number of reasons.

6. First, Argentina fails to explain which provision of Article VIII of the GATT allegedly "permits" those "customs formalities".

7. Second, the text of Article VIII does not even mention the term "customs formalities". Article VIII:3 simply provides that there should not be "substantial penalties" for "minor breaches of customs regulations or procedural requirements". Moreover, as the European Union noted in paragraph 13 of its Opening Statement in the Second Hearing, the debate that took place during the First Hearing showed that, as a matter of fact, the DJAI requirement does not constitute a "customs formality". In consequence, Argentina subtly shifted terminology in its second written submission and replaced the term "customs formalities" with the term "import formalities".

8. Third, no provision of Article VIII or Article XI of GATT states that "import and export formalities" are "permitted". Article VIII:1(c) simply imposes on WTO Members the obligation to "minimize their incidence and complexity". Argentina's assertion, if accepted, would open an enormous loophole in the GATT.

9. Fourth, the fact that "import and export formalities", as well as other "quantitative restrictions" and "licensing" are mentioned in the text of Article VIII of the GATT does not mean that these measures fall *only* within the scope of Article VIII and fall outside the scope of Article XI of the GATT. The "restrictions on the importation of goods" are also mentioned in other provisions of the GATT, such as Article XIII. For example, the fact that Article XIII provides a very elaborate set of rules on how import restrictions should be administered does not imply that such import restrictions are "permitted" by Article XIII and fall outside the scope of Article XI of the GATT. If that erroneous interpretation was accepted, then Article XI would have no scope. The proper interpretation of Article XI, Article XIII and Article VIII:1(c), which would give meaning to all three Articles, is that import prohibitions and restrictions are generally prohibited by Article XI:1 of the GATT. WTO Members may impose such import prohibitions or restrictions, only if they are justified by one of the exceptions provided in the GATT. In the event that a WTO Member is authorised to impose such import restrictions by virtue of some exception, then the WTO Member must further ensure that these measures and their administration also comply with the provisions of Article XIII and Article VIII:1(c) of the GATT. Therefore, Argentina's erroneous assertion must be rejected. Article XI of the GATT covers "customs formalities", just like it covers all other measures other than duties, taxes and other charges.

2.2.1.1.2 Argentina's distinction between "substantive" and "procedural" provisions for purposes of Article XI of the GATT is wrong

10. Argentina asserts that "Article XI prohibits quantitative restrictions, but not the means by which they are made effective". Argentina asserts that Article XI relates to substantive rules of importation that limit or restrict trade, whereas Article VIII and the ILP Agreement relate to import procedures, including the trade effects of those procedures. Argentina's assertions are wrong. This is made clear by the following considerations.

11. First, there is nothing in the text of Article XI:1 of the GATT that could support Argentina's erroneous assertion. Quite to the contrary, the text of Article XI of the GATT expressly provides that it covers *all* measures that may restrict imports, with the exception of duties, taxes and other

charges. Likewise, Article XI:1 uses language which is all-encompassing. The combination of the fact that the text of Article XI:1 uses such general and all-encompassing language with the fact that Article XI contains its own exceptions, confirms that *all* measures may fall within the scope of Article XI, irrespective of whether they could be characterised as "substantive" or "procedural".

12. Second, Argentina is wrong when it draws a distinction between, on the one hand, "quantitative restrictions" and, on the other hand, the "means by which they are made effective". The text of Article XI:1 reads: "…made effective through quotas, import or export licenses or other measures". If Argentina's erroneous assertion was accepted, then "quotas" should be considered as a "means" by which some other, undefined "quantitative restriction" would allegedly be "made effective". The consequence would be that quotas would fall outside the scope of Article XI of the GATT and would fall only within the scope of Article VIII of the GATT. However, this outcome is denied by the consistent WTO jurisprudence including the Panel Reports on which Argentina relies.

13. Third, Argentina's interpretation of the findings of the Panel in *China-Raw Materials* is wrong. Argentina asserts that the Panel in that case allegedly "recognizes that the trade-restrictive effects of substantive rules…cannot be attributed to the procedures that are used to implement those rules". This assertion is wrong for a number of reasons. Firstly, the Panel in *China-Raw Materials* did not find that the challenged export licences constituted a "procedure". The Panel does not even use the word "procedure" in the relevant Sections of its Report. Quite to the contrary, the Panel considered the export licenses simply as a type of measure that may fall within the scope of Article XI:1 of the GATT, where, by their nature, they have a limiting or restrictive effect. This finding is fully consistent with the legal interpretation of Article XI:1 of the GATT proposed by the European Union, which focuses the analysis on whether the challenged measure (a) is a governmental measure; and (b) prohibits or restricts the importation of goods. Consequently, the basis, on which Argentina's assertion lies, is false. Secondly, the Panel in *China-Raw Materials* found that licenses would constitute a "quantitative restriction" that would breach Article XI:1 of the GATT, where the licensing authorities retained some *discretion* on whether to grant the licenses or not. In that particular case, the facts showed that the Chinese authorities retained the discretion to refuse the grant of the export licenses that were imposed on goods which were not subject to export quotas. The Panel also found that this discretion stemmed from the power of the Chinese authorities to request undefined documents from the applicants. The Panel went on to confirm the consistent jurisprudence on Article XI:1 of the GATT on "discretionary", or "non-automatic" licenses, and found that these export licenses breached Article XI:1 of the GATT. In the present case, the facts are very similar to the facts of these export licenses in *China-Raw Materials*. Argentina imposes the DJAI system on all goods to be imported into Argentina. Argentina has not asserted that it imposes any quota on these goods in addition to the DJAI. And, Argentina's legislation allows to the Secretariat for Domestic Trade the discretion to block imports on the basis of undefined criteria. As the Panel in *China-Raw Materials* found, the authority to deny the license is ever present because the conditions for granting it are subject to the demands of the particular governmental entity. Therefore, this uncertainty amounts to a restriction that is inconsistent with Article XI:1 of the GATT.

14. In conclusion, Argentina's assertions are wrong and should be rejected. The European Union has already presented in its First Written Submission the proper interpretation of Article XI:1 of the GATT, as consistently followed by both the Appellate Body and the Panels in the past. The European Union respectfully requests the Panel to apply this correct legal interpretation on the facts of the present case and to find that the DJAI system breaches Article XI:1 of the GATT.

2.2.1.1.3 The notions of "prohibition" and "restriction" in Article XI of the GATT

15. Argentina asserts that "a proper interpretation of Article XI:1 requires…a showing that the measure at issue limits imports or exports in a quantifiable way and that this quantitative limitation on imports or export is a result of the measure". Argentina also asserts that the co-complainants "have presented no evidence at all that the DJAI procedure has had a quantifiable limiting effect on imports into Argentina, let alone a quantifiable limiting effect that can be separated and distinguished from the alleged RTRRs that the DJAI procedure is allegedly used to implement". Argentina's assertions are wrong.

16. In its first written submission, the European Union has already presented a concise description of the WTO jurisprudence on the notion of "quantitative restriction" for purposes of

Article XI of the GATT. Argentina seems to disagree and it seems to assert that the Appellate Body Report in *China-Raw Materials* has introduced a notion of "restriction", which is different from the interpretation given to that term by the Panel in the same case (consistently with the interpretation of other panels in previous cases). However, on the facts of that case, the Appellate Body actually *approved* the Panel's interpretation of the notions of "prohibition" and "restriction" in Article XI:1 of the GATT. This is because, the Appellate Body found that a measure could be analysed under Article XI:2(a) of the GATT only if it fell within the scope of Article XI:1 of the GATT. If the Appellate Body disagreed with the Panel's interpretation of Article XI:1 of the GATT, then it would have found that there is no reason to analyse the measure under Article XI:2(a): the measure would fall outside the scope of both Article XI:1 and Article XI:2(a). Therefore, the Appellate Body's Report confirms the Panel's interpretation of the notion of "restriction" in Article XI:1 of the GATT and the Panel interpretation is fully consistent both with the interpretation followed by the other panels in previous cases and with the interpretation suggested by the European Union in the present case. The European Union also noted in the paragraphs 26 to 30 of the Opening Statement in the Second Hearing that Argentina interprets the Appellate Body statements in order to devise a legal test which would include words and notions that the Appellate Body has never used. For instance, the Appellate body has not stated that to fall within the scope of Article XI of the GATT, a measure needs to be "*expressed* in the terms of quantity".

2.2.1.1.4 Is the DJAI a "customs formality"?

17. Article XI of the GATT covers all measures (with the exception of duties, taxes and charges). This includes both "import formalities and requirements" and what Argentina calls "customs formalities". Consequently, the Panel does not need to determine whether the DJAI requirement constitutes a "customs formality", or not. Even if the DJAI system was a "customs formality", it would still fall within the scope of Article XI of the GATT and would be contrary to Article XI:1 of the GATT as an "other measure". In any event, the European Union has summarised in its first written submission the facts that establish that the DJAI requirement is not a "customs formality".

2.2.1.1.5 Is the WCO SAFE Framework relevant for the Panel's analysis in the present dispute?

18. The European Union considers that Argentina's alleged compliance with the SAFE Framework is irrelevant for the Panel's analysis of the DJAI system under the GATT. An important legal reason for this is that Argentina has not raised any defence under Article XX(d) of the GATT. As a result, any potential similarity between DJAI and any WCO standards would be irrelevant for the present case: such similarity (even if it existed) would fail to bring the DJAI requirement outside the scope of XI:1 of the GATT. In its Opening Statement in the Second Hearing, the European Union stated that Argentina has, in essence, acknowledged that WCO standards are irrelevant for the present case. The European Union also pointed out that the Letter of the WCO Secretary General basically confirmed that the DJAI does not comply with the WCO standards.

2.2.1.2 Argentina's assertions in relation to Article X:1 of the GATT

19. Argentina is simply factually wrong. It asserts that the European Union's challenge is directed against the "observations that each agency may make" in relation to each specific import application, depending on the "good as it relates to the agency's regulatory authority". However, this is not what the European Union is challenging under Article X:1 of the GATT. The European Union's first written submission lists the types of legal instruments that Argentina has failed to publish in accordance with Article X:1 of the GATT. These do not include the "observations that each agency may make" in a "specific case". Quite to the contrary, the European Union challenges Argentina's failure to publish, in accordance with Article X:1 of the GATT, the complete list of governmental bodies that may block imports; the legal instruments through which certain governmental bodies have been given the power to block imports; the list of goods the importation of which each governmental body can block; the conditions on the basis of which the 180 days deadline may be extended, etc.

20. Argentina also asserts that "there is no 'universal' set of criteria that applies to all goods". Argentina's assertion is factually inaccurate. Argentina itself has published in the Manual for DJAI Operations the "set of criteria" on the basis of which AFIP may block imports. The fact that Argentina has been able to publish a "universal set of criteria" on the basis of which one governmental body would block imports conclusively establishes that Argentina is also able to

publish similar "sets of criteria" for the other bodies and, most importantly, for the Secretariat for Domestic Trade.

21. Argentina also expressly acknowledges that it has not published the actual agreements that establish each agency's powers in relation to the DJAI system; it has only published a "standardised model". Therefore, Argentina acknowledges that it has not published the relevant legal instruments in accordance with Article X:1 of the GATT. Moreover, Argentina acknowledges that the only documents that have been published are the "statutory regulatory authorities" of the participating governmental bodies. However, these legal instruments contain no reference to the respective body's powers in the DJAI system. Therefore, they provide no information on the operation of the DJAI system.

2.2.1.3 Argentina's assertions in relation to Article X:3(a) of the GATT

22. Argentina's main defence is to assert that the European Union's claims under Article X:3(a) of the GATT relate to "substantive rules" and not to the "administration" of rules. Argentina's assertion is wrong. First, Argentina's assertion contradicts the entire content of Argentina's submissions in the present case. Argentina repeatedly asserts that the DJAI system is a "procedure" and not a "substantive rule". It is instructive for the coherence of Argentina's arguments that the DJAI is presented as a "procedure" when Argentina looks at it from the angle of Article XI of the GATT, but becomes a "substantive rule", when Argentina looks at it from the angle of Article X:3(a) of the GATT. In any event, according to the Panel Report in *Argentina-Hides and Leather* a complaining party may challenge under Article X:3(a) even the substance of a domestic measure, where that measure is administrative in nature.

23. Second, the European Union is actually challenging the administration of the DJAI. The European Union's first written submission has explained the reasons for which, in particular, the Secretariat for Domestic Trade administers the DJAI in a manner that is not predictable and consistent and, ultimately, not uniform, impartial and reasonable.

2.2.2. Issues relating to the Import Licensing Procedures Agreement

2.2.2.1 Argentina's defence in relation to the Import Licensing Procedures Agreement

24. Argentina in its submissions did not present specific responses to the European Union's claims under Articles 1.3, 1.4(a), 1.6, 3.3 and 3.5(f) of the Import Licensing Procedures Agreement. Rather, Argentina's defence is based on two main assertions addressing the scope of the ILP Agreement. First, Argentina asserts that the co-complainants have followed an "overly expansive" interpretation of the term "import license" in Article 1.1 of the ILP Agreement. Second, Argentina asserts that, in any event, the "application and documentation" which the DJAI "collects and processes are clearly for customs purposes" and, therefore, the DJAI is "not covered by the ILP Agreement under any circumstances". Argentina also asserts that "the Panel has to begin its analysis with the complainants' claims under the ILP Agreement", which allegedly "operates as *lex specialis* in relation to the provisions of both Article VIII and XI with respect to customs formalities".

2.2.2.1.1 The notion of "import license" in Article 1.1 of the Import Licensing Procedures Agreement

25. Argentina's assertion on the alleged "overly expansive" interpretation of Article 1.1 of the ILP Agreement is wrong for a number of reasons. First, Argentina's definition of "import license" is circular. Argentina asserts that Article 1.1 of the ILP Agreement defines "import licenses" as "import licensing regimes". This is tautology, which deprives the text of Article 1.1 of the ILP Agreement of any interpretative value.

26. Second, the European Union notes that the footnote to Article 1.1 expressly expands the notion of "import licensing" to administrative procedures that are *not* called "licensing". Moreover, the European Union notes the absence of a comma after the words "import licensing regimes" in the body of Article 1.1. This shows that the words "requiring the submission of an application or other documentation" are directly linked to, and inform the meaning of, the words "import

licensing regimes". The proper understanding of this phrase is that the "regimes" that are covered by Article 1.1 are those which require the submission of an application or other documentation, as a prior condition for importation. Those "regimes" do not need to fulfil any other condition in order to fall within the scope of Article 1.1.

27. Third, Argentina is wrong when it asserts that these "regimes" need to be related to the administration of "quantitative restrictions or other similar measures". Firstly, there is no reference to "quantitative restrictions" in the text of Article 1.1. Secondly, Article 3.3 of the ILP Agreement expressly provides that non-automatic import licensing may be used "for purposes other than the implementation of quantitative restrictions". Thirdly, and most importantly, Article 1.1 expressly mentions the "submission of an application or other documentation" as the only "prior condition" preventing the importation.

2.2.2.1.2 Is the DJAI "application and documentation" for "customs purposes"?

28. Argentina has not denied that the DJAI legislation is separate from its customs legislation. Neither Argentina has denied the involvement on non-customs governmental bodies in the DJAI system. Likewise, Argentina has not denied that, when the Secretariat for Domestic Trade blocks a particular importation, it requires the applicant to provide it with documents and information on the applicant's exports and prices of unrelated goods. Argentina has simply asserted that these documents and information are for "customs clearance purposes" and "entirely within the parameters of the SAFE Framework and WCO Data Model". This assertion is wrong.

29. No WCO document includes in its "parameters" information on the importer's exports and prices on unrelated goods. Also, as the European Union noted in its second written submission and in the paragraph 68 of its Opening Statement in the Second Hearing, Argentina has also acknowledged, in essence, that the legal effects of a DJAI authorisation are different from the legal effects of customs clearance. Moreover, as was discussed during the First Hearing, the purpose of "advanced electronic information procedures" that are based on "risk assessment and management" is to expedite and facilitate the selection of the cargoes that should be inspected physically by the customs officials of the importing country, upon the cargoes' arrival at the ports of the importing country. However, this is not what the DJAI achieves. Quite to the contrary, the DJAI *prevents* the arrival of the cargoes into the ports of Argentina. As identified during the First Hearing, this element alone suffices to establish that the DJAI is not for "customs purposes".

2.2.2.1.3 Argentina's assertions on the nature of the Import Licensing Procedures Agreement as "lex specialis"

30. Argentina has asserted that the ILP Agreement "operates as *lex specialis* in relation to the provisions of both Article VIII and XI with respect to customs formalities". (*sic*) It is difficult to see how the ILP Agreement can operate as "lex specialis in respect to customs formalities", when Argentina expressly acknowledges that customs matters are excluded from that Agreement's scope. In any event, the Appellate Body in *EC-Bananas III* has confirmed that both the GATT and the ILP Agreement may apply on specific measures. Consequently, Argentina's assertions are legally baseless and should be rejected. The Panel should first examine the European Union's claims under the GATT. If the Panel finds that the DJAI constitutes a non-automatic import license, then the Panel should analyse the European Union's claims under Article 1.3 of the Import Licensing Procedures Agreement, before the claims under Article X:3(a) of the GATT.

3. RESTRICTIVE TRADE-RELATED REQUIREMENTS

31. The European Union notes that Argentina has failed to engage in rebutting the evidence provided by the European Union showing the existence of the RTR requirements, despite of the fact that the Panel has posed several questions directly to Argentina. The European Union requests the Panel to draw appropriate inferences from Argentina's refusal to provide the requested documents. Further, and importantly, the European Union observes that Argentina has actually recognised the facts as evidenced by the European Union when acknowledging their existence as "unrelated 'one-off' actions". However, Argentina disagrees with the legal characterisation of those actions as a single, unwritten overarching measure with precise content, and with general and prospective operation. Below is the summary of the European Union submission showing that

Argentina's arguments are without merit together with the with the summary of the European Union comments on Argentina's responses to some of the Panel's Questions after the first meeting and of the European Union comments to the Panel's communication dated 6 November 2013 relating to the European Union's decision not to adopt special procedures under Article 13 of the DSU.

3.1. THE EUROPEAN UNION HAS IDENTIFIED THE PRECISE CONTENT OF THE RTR REQUIREMENTS AS AN OVERARCHING MEASURE

32. Argentina's assertion that the European Union has failed to establish the precise content of the RTR requirements as an overarching measure must fail. Following the description of the measures at issue as identified in the EU Panel Request, the European Union included Section 4.2.1 in its first written submission, where the European Union describes the measures at issue as including (1) the RTR requirements as an overarching measure, and (2) 23 separate measures where Argentina has imposed one or more of the RTR requirements.

33. From the description of the RTR requirement as an overarching measure, it becomes obvious that the European Union is challenging a measure attributed to Argentina ("measure established by Argentina"), whereby Argentina requires certain economic operators to undertake one or more of the five actions. i.e., i.e., the one-to-one requirement, import reduction requirement, the price control requirement, the import substitution requirement, investment requirement. (and referred to as "RTR requirements") that prohibit or restrict the importation of products and/or the use of imported products in Argentina. The European Union further identifies the objectives pursued by the overarching measure, as eliminating trade balance deficits and/or substituting imported products by domestic products. The European Union further confirms that the measure has a general scope, since Argentina decides to impose one or more of those requirements depending on how the economic operator or sector in Argentina can best contribute to achieving Argentina's trade balance and import substitution objectives. In this sense, the measure at issue is "overarching", "all-embracing" or "in extended use" in Argentina since the RTR requirements apply to a range of situations, to a variety of economic operators and sectors, as evidenced in the EU's first written submission. Thus, the RTR requirements are not isolated cases, but an overarching measure applied to a wide range of situations, and has become the "rule" for companies doing business in Argentina. Such a "rule" will apply or will likely apply in the future in Argentina, insofar as Argentina continues pursuing its trade balancing and import substitution objectives. This is why the European Union "challenges the overarching measure established by Argentina". Challenging each of the RTR requirements as isolated cases will not get rid of the problem faced by the EU industry. Finally, the European Union indicates that the measure is unwritten, in the sense that "these requirements have not been published". In sum, by identifying the *specific actions* (RTR requirements) that prohibit or restrict the importation of products and/or the use of imported products in Argentina, the *objectives* pursued by the overarching measure, the *unwritten nature* of the measure and its *general and prospective application*, all *attributable to Argentina*, the European Union considers that it has identified the measure at issue with sufficient precision.

3.2. THE RTR REQUIREMENTS AS A SINGLE OVERARCHING MEASURE IS DIFFERENT FROM THE FIVE REQUIREMENTS INDIVIDUALLY IDENTIFIED BY THE EUROPEAN UNION

34. Contrary to what Argentina states, the RTR requirements as an overarching measure is not simply a series of distinct and unrelated actions; rather, the imposition of RTR requirements on economic operators is part of a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives. As Argentina observes, the existence of the overarching measure depends on showing, *inter alia*, that Argentina has imposed one or more of the five RTR requirements. However, this is not the same as saying that the content of each RTR requirement is the same as the content of the RTR requirements as an overarching measure. The content of the overarching measure is different from the five types of RTR requirements. Indeed, the overarching measure implies the existence of a single unwritten measure whereby Argentina seeks to impose certain trade-restrictive actions on economic operators with a view to achieving two specific objectives.

35. That Argentina is pursuing those objectives stands from the multiple official statements the European Union has put on the record and that Argentina does not appear to contest. Indeed, in its response to Question 8, Argentina does not provide any evidence that the official statements

cited therein are incorrect. Argentina has not disputed its policy of "managed trade" either. Thus, it is undisputed that Argentina employs multiple instruments, including the limitation of imports, in order to pursue its objectives of eliminating trade balance deficits and achieving import substitution. The objectives of eliminating trade balance deficits and replacing imported products by domestic products could not be achieved by "unrelated 'one-off' actions", as Argentina asserts, but through a coordinated action.

36. The panel in *Japan – Apples* similarly treated nine inter-related and cumulative legal and administrative requirements actually applied by Japan to the importation of US apple fruit as comprising one single sanitary and phytosanitary measure for the purpose of evaluating the US complaint against those requirements. In following the same approach, the implementation panel explained that the original panel had treated "the requirements imposed by Japan as several elements of one single measure, essentially because all the requirements were presented as part of a systemic approach". In the present case, the imposition of RTR requirements on economic operators is part of a systemic approach and coordinated action seeking to achieve the trade balance and import substitution objectives pursued by Argentina.

3.3. THE EUROPEAN UNION HAS SHOWN THAT THE RTR REQUIREMENTS AS AN OVERARCHING MEASURE HAS A GENERAL AND PROSPECTIVE APPLICATION

37. As part of its challenge of the RTR requirements as an overarching measure, the European Union is challenging the existence of an unwritten measure which has a general and prospective application, rather than a set of unrelated actions taken by Argentina. In other words, the European Union is challenging the "rule or norm" that is not expressed in the form of a written document whereby Argentina requires economic operators to undertake one or more of the five types of actions with a view to achieving its trade balancing and import substitution objectives.

3.3.1. The RTR requirements as an overarching measure has general application

38. The European Union has shown that the RTR requirements as an overarching measure is a generally applicable rule or norm governing the importation and/or sale of goods in Argentina. Contrary to what Argentina asserts, the European Union does not need to show that such a rule applies to the importation and/or sale of "all" goods in Argentina. As explained before, the European Union has not defined the measure at issue in that manner. Rather, the European Union has stated that the Argentine Government decides to impose one or more of these requirements depending on how the economic operator or sector in Argentina can best contribute to achieving Argentina's trade balance and import substitution objectives. In this sense, the overarching measure potentially applies to all goods in Argentina. This does not mean that such a measure indeed applies to all goods in Argentina in the sense that all goods are subject to one or more RTR requirements.

39. In any event, for a measure to be of "general application" it is not necessary that such a measure applies to all goods in Argentina. In this respect, the panel in *US – Underwear* found that insofar as the restraint at issue affected an unidentified number of economic operators, the administrative order was a measure of general application. In the present case, the European Union has shown that this overarching measure applies to many economic operators and sectors in Argentina (such as automobiles, auto parts, motorcycles, trucks, tires, metallurgical products, agricultural machinery, retail apparel, books and other publications), which are required to comply with one or more of the RTR requirements. Argentina has not denied the existence of any of them. Consequently, the European Union has shown that the RTR requirements as an overarching measure amounts to a measure of general application.

3.3.2. The RTR requirements as an overarching measure has prospective application

40. Moreover, the European Union has shown that the RTR requirements as an overarching measure is a "rule" with prospective application. Contrary to what Argentina argues, the RTR requirements are not isolated or unrelated "one-off" actions. As mentioned before, they are part of a systemic approach and coordinated efforts to achieve Argentina's trade balancing and import substitution objectives. Until Argentina does not announce a change in its policy objectives, it should be presumed that Argentina will continue taking similar actions which prohibit or restrict

the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives.

41. The evidence that the European Union has put before the Panel to demonstrate the prospective application of the unwritten rule is manifold. The evidence consists of considerably more than a string of cases, or repeat action, based on which the Panel could simply "divine" the existence of a measure in the abstract. In addition to information contained in newspapers from various sources, the European Union has provided, *inter alia*, official press releases by the Argentine authorities, official documents produced by the Argentine authorities, documents made by public notaries and surveys by different industry associations speaking to the existence of the overarching measure as part of a systemic approach and coordinated efforts by the Argentine authorities to achieve their stated objectives. In any event, "repeated course of action" can, in certain circumstances, be evidence of an unwritten measure with future applicability. Indeed, when completing the analysis and assessing the existence of the measures asserted by the European Communities in *US – Continued Zeroing*, the Appellate Body emphasised that it was looking for evidence of future applicability. Thus, the Appellate Body assessed the "repeated course of action" as evidence of an unwritten measure that would "likely continue to be applied". Similarly, in *Thailand – Cigarettes*, the panel noted that "the actual application of an unwritten general rule will clearly qualify as evidence of the existence of such a rule". Thus, the fact that Argentina has repeatedly imposed various RTR requirements on a variety of economic operators in Argentina also speaks to the existence of an unwritten rule with prospective application. In this respect, the European Union observes that Argentina has not contested the facts as evidenced by the European Union; nor has Argentina stated that the same actions, still taking place today, will not continue also in the future. In addition, the European Union observes that Argentina wrongly posits that the alleged commitments described by the European Union do not have normative content at all since they neither require nor commit prospective courses of action. This is incorrect. As a matter of fact, the agreements signed between economic operators and the Argentine authorities as well as the commitments provided by many economic operators all require a prospective course of action.

3.3.3. Argentina's reliance on *EC – Large Civil Aircraft* is misplaced

42. Finally, contrary to what Argentina asserts, the panel in *EC – Large Civil Aircraft* does not support Argentina's arguments in this case. In fact, Argentina is relying on a section of the panel report that was declared moot by the Appellate Body. In any event, the European Union is very aware of the consequences of challenging the RTR requirements as a single unwritten measure. However, unlike the United States in *EC – Large Civil Aircraft*, the European Union has met its burden of showing the existence of such an overarching measure as described by the European Union. Indeed, in *EC – Large Civil Aircraft*, the panel found that the alleged unwritten LA/MSF Programme as described by the United States did not exist. The United States had described the alleged unwritten LA/MSF Programme as a measure that "creates expectations among the public and among private actors, demonstrating that it has normative value". Specifically, the panel found that the United States failed to show that "LA/MSF, by definition, involves below-market financing" and that "any LA/MSF granted in the future will involve non-commercial interest rates". The panel reasoned that below-market interest rates were not an explicit feature of the LA/MSF contracts; that there was nothing inherent in the LA/MSF contracts rendering them a form of financing that by definition will always involve below-market interest rates; and that interest rate advantage obtained by Airbus varied across the different LA/MSF contracts, in general diminishing with every new model of LCA. According to the panel, "to the extent that past instances of LA/MSF might be argued to evidence a broader co-ordinated financing programme, they do not support a conclusion that such a programme would necessarily involve the provision of loans in the future at below-market interest rates". In the present case, the European Union has shown that Argentina imposes one or more of the five types of RTR requirements as part of a systemic and coordinated approach to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives. Thus, the European Union has demonstrated all the elements of the precise content of the RTR requirements as a single unwritten measure.

3.4. EU'S COMMENTS ON ARGENTINA'S RESPONSES TO THE PANEL'S QUESTIONS AFTER THE FIRST MEETING

3.4.1. Question 7 – Value of the Plan Estratégico Industrial 2020

43. Argentina criticises the value that the European Union grants to the *Plan Estratégico Industrial 2020* as establishing basic guidelines of Argentina's industrial policy over the current decade. However, this is what the document in question indisputably states several times. Argentina does not dispute the content of the pages the European Union has referred to either.

44. Argentina further argues that the objectives described therein are pursued in a manner that is consistent with the covered agreements. The European Union does not question the fact that Argentina can use instruments such as anti-dumping duties, in order to defend its industry against injurious dumping. The European Union does not question either any natural process where a domestic industry increases its competitiveness and it is able to replace imports on a qualitative basis. Instead, the European Union has shown that in pursuing those objectives Argentina has adopted the DJAI system and the RTR requirements which are in breach of several covered agreements. The European Union also wonders about statements contained in the *Plan Estratégico Industrial 2020* where the application of non-automatic import licenses is mentioned as "one of the instruments that have allowed the sector to substitute imports". The European Union disagrees with Argentina that the use of non-automatic import licenses could be a legitimate instrument according to the covered agreements to favour the replacement of imported products by domestic products.

3.4.2. Question 8 – Objectives pursued by Argentina through its managed trade strategy

45. Argentina rejects seeking to preserve the internal market for domestic products. Argentina further rejects seeking a limitation on imports. The European Union notes that Argentina does not provide any evidentiary support to those statements. In contrast, the European Union has provided evidence, including the Exhibits listed in the Panel's Question, showing that Argentina pursues those objectives. Quite tellingly, Argentina does not deny having actively pursued a strategy of so-called "managed trade" ("*comercio administrado*") since 2003. Contrary to what Argentina asserts, such "managed trade" does not allow for a "virtuous convergence" ("*convergencia virtuosa*") of public and private interests. The European Union has provided abundant evidence of this to the Panel where, far from willingly agree with the actions suggested by the Argentine authorities, economic operators are forced to e.g. export unrelated products in order to even out their trade balance. Argentina has not disputed these facts as presented by the European Union.

3.4.3. Questions 13 and 14 - Value of certain evidence produced by means of documents signed by a Notary Public, including affidavits

46. Argentina considers that the statements made by Mr. Richard Rodriguez, a Notary Public in Geneva, do not have any value if the Panel cannot verify the accuracy of those statements. This is disingenuous, at least on two grounds. First, the fact that the Notary Public is confirming the existence of agreements signed between economic operators and the Argentine authorities and containing RTR requirements and that Argentina refuse provide these documents upon the Panel's request could be sufficient for the Panel to conclude the existence of those agreements and commitments. Second, those agreements and commitments have been heralded by the Argentine authorities themselves in official press releases, as well as echoed by unofficial sources. This may also provide the basis for the Panel to conclude that such documents, as confirmed by the Notary Public, do exist. Argentina appears to dismiss the value of the statements made by Mr. Richard Rodriguez, a Notary Public in Geneva. As a Notary Public, Mr. Rodriguez has given public faith and thus certified that it has seen copies of the agreements and commitments showing the existence and content of some RTR requirements. The Notary Public provided a general timeframe where those agreements and commitments were signed since mentioning a specific date per agreement could allow Argentina to identify the specific companies cooperating with the European Union in these proceedings. As mentioned in the EU's Response to Question 19, those companies have not authorised the European Union to disclose those agreements in view of the risk of retaliation. The Notary Public could not either disclose the names or origin of the companies providing those

documents. Thus, Argentina's observations with respect to the alleged deficiencies contained in the document produced by the Notary Public are explained because of the need to keep the identity of those companies confidential in view of the risk to suffer from retaliation. In any event, the European Union considers that the document contained in Exhibit EU-14 evidences the existence of those agreements and commitments. By its part, Argentina has not denied the existence of those agreements and commitments. And indeed many have been heralded in official press releases.

47. With respect to affidavits, the European Union observes that affidavits signed by a Notary Public are instruments regularly used in panel proceedings to adduce the existence of facts. And indeed panels and the Appellate Body have regularly accepted declarations contained in affidavits as evidence.

3.4.4. Questions 16 to 17 – Argentina's refusal to provide certain documents to the Panel

48. The European Union notes that Argentina's lack of response to these questions is very telling. The Panel asked Argentina for very precise documents as evidenced in numerous exhibits submitted by the European Union. However, Argentina does not provide the requested information; rather, Argentina states that, even acknowledging the facts as evidenced by the European Union, that would not be sufficient to establish the existence of the RTR requirements as a single unwritten overarching measure. In other words, Argentina goes as far as not contesting the factual evidence adduced by the European Union and relies on a legal characterisation of those facts as not showing the existence of the measure at issue as described by the European Union. As explained before, such allegation must fail. As the Appellate Body has explained in *US-Continued Zeroing*, a particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence. Also, the Appellate Body has explained that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. Therefore, the European Union considers that the Panel should also take into account Argentina's lack of rebuttal of the facts as presented by the European Union when weighing the totality of the evidence in this case. In the European Union's view, the only conclusion that the Panel should reach when making an objective assessment of the matter is that the European Union has demonstrated the existence of the RTR requirements as an overarching measure.

3.4.5. Question 26 – Nota de Pedido

49. Once again, the European Union observes that Argentina does not rebut the existence of the "Nota de Pedido" as described by the European Union in its submissions. As mentioned before, there is ample evidence that the generic "Nota de Pedido" (i.e., the form that needed to be sent together with the DJAI request) as well as the "Nota de Pedido DJAI Observada" (i.e., the information that was needed to be provided to the Secretary for Domestic Trade once a DJAI had been "observed") began in January and February 2012, as well as that such a mechanism still exists. In addition, since December 2012, another "Note", this time referred to as an "Export Declaration Form", was distributed to economic operators as proof of complying with their trade balancing commitments. Even without a DJAI observed an operator may be requested to fill in an "Export Declaration Form". "Export Declaration Forms" are separate from the DJAI itself but are a *condition sine qua non* to receive any DJAI, i.e. if an operator is requested to fill in "Export Declaration Form" and does not do it, its DJAIs will never be cleared.

3.4.6. Question 42 – Value of unofficial press clippings

50. First, Argentina maintains that none of the evidence provided by the European Union is relevant for the interpretation of the measures at issue. Argentina does not support such a statement. Rather, it appears that Argentina confuses issues of "interpretation" of the meaning of the measure at issue (i.e. its precise content) with issues of proof (i.e., showing the existence of the RTR requirements as an overarching measure). Second, Argentina restates its argument that none of the journalistic material, regardless of its source, can be considered to have any probative value. The European Union already addressed this argument in its Opening Statement in the First Hearing. Panels have been inclined to accept the information provided by newspapers, and especially in cases like the present one, where the respondent did not challenge the truth of the facts reported by those newspapers. Third, Argentina rejects the recurrent use of print media

linked directly or indirectly to the monopolistic structure of *Grupo Clarin SA*, in partnership with the newspaper *La Nación*. The European Union has already expressed its views about this. The facts reproduced by those media have been reported by many different media as being the same, and Argentina has not disputed those facts. Moreover, Argentina wrongly claims that the European Union recurrently provided *Grupo Clarin* and *La Nación* press clippings. Press clippings from *Clarin*, *La Nación* and connected media are only a small part (less than 25 %) of all written press clippings provided by the European Union in its first written submission, and obviously an even smaller part (less than 10 %) of all evidence submitted. In addition, the European Union would like to note that Argentine legislation ensures press freedom. Although there is concentration in the written press sector, there are still sufficient newspapers to guarantee access to information by the public. In fact, Argentine society still trusts the press as a credible source of information. Finally, the European Union observes that of the 24 different media listed in the Panel's Question, Argentina has only provided evidence of its relationship with *Grupo Clarin SA* with respect to two: Diario "Los Andes" and "La Voz del Interior". Argentina has not supported its vague assertion ("etc") with respect to other media that they are related to *Grupo Clarin SA*. The Panel should draw the pertinent consequences accordingly.

3.5. EU'S COMMENTS ON THE PANEL'S COMMUNICATION DATED 6 NOVEMBER 2013

51. The European Union clarifies that, as noted in the EU's comments on the suggested special procedures, the adoption of such special procedures under Article 13 of the DSU was not necessary in view of the particular circumstances of this case. On the one hand, the Panel already has on the record evidence showing the existence of letters containing RTR requirements (e.g. the letter of four industry associations of pork producers provided to Secretary Guillermo Moreno). Furthermore, there is also evidence of the existence and content of the agreements signed between private operators in Argentina and the Argentine authorities, as heralded by the Argentine authorities themselves in numerous official documents (and listed in Annex 1 of the Panel's first set of questions). On the other hand, Argentina is in possession of such documents and is in a better position to provide them to the Panel. However, Argentina has decided not to provide such information to the Panel upon its request pursuant to a direct question posed to Argentina. Further, Argentina has decided not to address the evidence produced by the European Union. That being said, the European Union welcomes the Panel's initiative to propose the suggested special procedures under Article 13 of the DSU. In this respect, the European Union observes that the suggested procedures were similar to the steps taken by the European Union to produce Exhibit EU-14. The main concern was, however, to ensure that the responses provided by the independent expert did not reveal somehow the identity of the companies at issue. Hence, the European Union provided its comments to that effect.

52. The European Union considers that, other than the special procedures suggested by the Panel including all guarantees not to disclose any information relating to the identity of the companies at issue, there may not be any alternative means for the Panel to protect the requested information in a manner that would enable the submission of such information.

4. CONCLUSION

53. The European Union respectfully requests the Panel to find that the DJAI Requirements and the RTR requirements are inconsistent with the covered agreements and to recommend that Argentina brings itself into compliance with its obligations under the covered agreements.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY
OF THE ARGUMENTS OF THE UNITED STATES

FIRST WRITTEN SUBMISSION

1. Argentina imposes licensing procedures which it uses to restrict imports of goods with the aim of protecting the domestic economy. Argentina often withholds approval of these licenses unless the importer agrees to take actions to restrict imports, export goods, make investments, refrain from repatriating profits, or use local content in its production.

2. Argentina declines to publish many of the rules related to their operation, as required by the WTO agreements. However, the evidence presented by co-complainants in this dispute reveals their existence and widespread operation. Argentina's licensing regime and the requirements it places on importers restrict imports in violation of Article XI:1 of the GATT 1994. In addition, Argentina's import regime is non-transparent and arbitrary, failing to comply with the publication, administration and notification provisions of Articles X:1 and X:3(a) of GATT 1994, as well as Articles 1.4(a), 3.2, 3.3 and 5 of the Import Licensing Agreement. Finally, Argentina's licensing procedures fail to meet the requirements of Articles 1.6 and 3.5(f) of the Import Licensing Agreement related to the operation of a licensing regime.

I. FACTUAL BACKGROUND

3. Argentina pursues aggressive policies of "trade management" and "import substitution" to protect domestic industry by restricting the importation of foreign products and to promote a shift to local production. To further these goals, Argentina subjects imports to the DJAI Requirement and the RTRRs.

A. DJAI REQUIREMENT

4. Argentina's Federal Administration of Public Revenue (*Administracíon Federal de Ingresos Públicos*, or "AFIP") issued *Resolution 3252* establishing the DJAI Requirement, which became effective February 1, 2012. Through legal instruments and guidelines, Argentina maintains the DJAI Requirement as a discretionary non-automatic import licensing system. Until the last workday before the establishment of the Panel, Argentina maintained product-specific non-automatic import licenses on over 600 tariff lines ("CIs"). The DJAI Requirement continues and expands the licensing requirements previously imposed through the CIs.

5. Under the DJAI Requirement, importers of goods into Argentina must submit an application on the DJAI page of AFIP's website "prior to issuance of an order form, purchase order, or similar document used to purchase items from abroad." Approval of the DJAI application is a prerequisite to any import transaction in Argentina, and in order to make foreign payments for imports, the importer must have an approved DJAI in "exit" status. The information submitted by the importer is made available to participating government agencies. These agencies must "issue a decision" … "within the time frame indicated in [each agency's] respective accession instrument." A DJAI is placed in "observation" status whenever an agency registers an "observation," which suspends the approval process.

6. Six agencies have acceded to the DJAI system. Different agencies are prescribed different time periods for placing an observation on an application, from 72 hours to 15 calendar days (where published). If the time periods expire without observation, the application enters the "exit" status and the importer may proceed with the transaction. When an observation is made that prevents the application from being assigned the "exit" status, the importer must separately contact the agency making the observation in order to resolve the agency's concern. The importer bears the burden of determining how to make contact. The DJAI application remains effective for 180 days from the date of its "registration." If any observations have not been resolved within 180 days, the DJAI application is automatically voided unless it is extended.

7. The relevant instruments contain few – if any – details on, among other things: (a) the bases upon which a DJAI application may be granted or denied; (b) what types of "observations" may be made; (c) what additional information or actions may be required of importers to obtain approvals; and (d) the timeframe for resolution of observations. The evidence demonstrates that, in practice, approvals are often only granted after lengthy delays.

8. With respect to AFIP, a DJAI User Manual provides a list of thirteen codes representing reasons that AFIP may "observe" a DJAI application. The reasons AFIP may observe an application are related to the status of the importer's tax identification number (the CUIT), and various tax-related issues. With respect to SCI, the preamble to *SCI Resolution 1* by which SCI joined the DJAI system, explains that SCI will look to protecting the domestic market as part of SCI's participation. Legal instruments and other guidance relating to the DJAI system provides no information with respect to the participation of other agencies.

9. Official Argentine press releases and statements of Argentine officials, as well as instructions issued by Secretary Moreno to customs brokers, provide evidence of otherwise unpublished information regarding the granting or denial of DJAI applications.

10. The DJAI process operates separately from Argentina's customs clearance procedure. Argentina's customs regime predates, and is separate from, the DJAI system. The Argentine customs regime is administered by the Directorate-General of Customs. For each import transaction, the importer must fill out a *Despacho de Importación*. In addition, the importer must submit supplementary documentation for the goods in question.

B. RESTRICTIVE TRADE-RELATED REQUIREMENTS

11. The Argentine government has adopted a series of RTRRs on the importation of goods. The RTRRs are often communicated orally to individual importers, or groups of importers, by Argentine authorities. The RTRRs are imposed in conjunction with the DJAIs, and previously the CI Requirement, and approvals are withheld until the importer complies with the RTRRs. The RTRRs take the form of commitments to: (1) compensate imports with an equivalent amount of exports—the "one-to-one" policy; (2) limit the volume or value of imports; (3) incorporate local content into domestically produced goods; (4) make or increase investments in Argentina; and (5) refrain from repatriating funds from Argentina to another country.

12. Argentina requires importers to offset the value of their imports with an equivalent value of exports – often referred to as the "one-to-one" policy. Although typically the importer compensates the entire value of imports with exports, in some cases an importer may only partially offset the value of its imports and undertake another type of RTRR to compensate for the remainder. Argentine government agencies and officials have made numerous statements describing the one-to-one policy, and examples of its application are in the following sectors: automobile manufacturing**;** trucks and motorcycles; agricultural machinery; books and other publishers, audiovisual products, tires, agricultural products, white goods, electronic products, clothing, retail, toys, pharmaceuticals, and auto software and services.

13. Often together with requirements to balance the value of imports with exports, Argentina also requires importers to limit the volume of imports or – less frequently – to limit the unit price of imports. Argentina has also required importers in certain industries to increase their incorporation of local content in the goods they purchase or produce in order to receive permission to import. Some companies are given the option of compensating for part or all of their imports through making or increasing their investments in Argentina, in addition to or instead of, undertaking export or import substitution commitments. The final RTRR placed on importers is the requirement that they refrain from repatriating profits made in Argentina. This requirement appears aimed primarily at controlling the outflow of foreign reserves.

II. LEGAL DISCUSSION

A. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

1. The DJAI Requirement is a "Restriction" Prohibited by Article XI:1

14. The DJAI Requirement is a "restriction" within the meaning of Article XI:1. The term "restriction" is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation." Further, Article XI:1 applies to *any* "restriction," "whether made effective through quotas, import or export licenses or other measures," excluding only "duties, taxes or other charges." Past panels have noted that the scope of the term "restriction," is broad. The DJAI Requirement constitutes a "restriction" – it imposes "limiting conditions" on importation because (a) approvals are not granted in all cases; (b) approvals are made contingent upon the RTRRs; and (c) approvals are granted after delay.

15. A measure is a restriction under Article XI:1 if approval for importation is not granted in all cases. This fact is confirmed by the ordinary meaning of "restriction": if not all imports are allowed to enter a country as a result of measure, that measure is "a limiting condition." The DJAI Requirement restricts imports because agencies may lodge "observations" for any number of reasons, effectively denying the import application unless and until the observation is lifted. If an agency does not lift the "observation," the application enters the "voided" status after 180 days – effectively denying the application. The failure to grant the license in the operation of the DJAI Requirement is described in domestic Argentine court cases. Statements by government officials confirm that the purpose of the DJAI Requirement is to restrict imports and protect domestic industry.

16. The DJAI Requirement is also a "restriction" because it is highly discretionary. If an import licensing system is "discretionary" the authority has latitude to grant or deny licenses. Thus, in a discretionary licensing system, licenses may be denied, resulting in a restriction, or limitation, on imports. The DJAI requirement is highly discretionary, because (1) the implementing measures contain no criteria for approval or denial and no basis for denials; (2) importers must provide unspecified additional information in order to satisfy an "observation"; and (3) there is no stated timeframe for processing applications. Through this system, SCI is able to place an "observation" while refusing to explain the reasons to the importer.

17. The panel in *India – Quantitative Restrictions* concluded that India's licensing requirement constituted a non-automatic licensing system and Article XI:1 restriction because licenses were "not granted in all cases, but rather on unspecified 'merits'." In *China – Raw Materials*, the panel observed that "if a licensing system is designed such that a licensing agency has discretion to grant or deny a license based on unspecified criteria" it would be discretionary and not consistent with Article XI:1. The absence of any procedures or criteria for evaluating licenses, or of demanding additional action or information from importers, leaves the various participating agencies with wide discretion to grant or deny the licenses. The DJAI Requirement is therefore discretionary (and non-automatic), and a restriction under Article XI:1.

18. The DJAI requirement also restricts imports because Argentine authorities use the discretion afforded in their approval of the applications to impose RTRRs as conditions for import. The RTRRs "restrict" imported within the meaning of that term under Article XI:1 because importers may only import goods to the extent that they satisfy the RTRRs imposed by Argentina. Because the DJAI Requirement affords Argentine authorities the discretion to place such conditions on importation, it is a restriction on importation.

19. Finally, the DJAI Requirement also restricts imports because licenses are only granted after delay. Importers must wait an unspecified period of time, which can extend to months, to receive approvals for their import licenses. The Import Licensing Agreement provides context for understanding how delays serve as "restrictions" under Article XI:1. "Automatic import licensing" is defined in Article 2.1 "as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)." According to the introductory clause of Article 2.2(a), certain characteristics of a licensing procedure are presumed to have "restricting" effects, even if licenses are granted in all cases. One such feature is a delay in processing of over ten working days. It is not enough for a license to be granted in all cases in

order for it to "not administered in such a manner as to have restricting effects on imports," the license must also be granted in a timely manner.

20. The time period for the SCI to *consider* whether to place an observation on a DJAI application is 15 days, exceeding the ten days set out in Article 2.2(a)(iii). Further, after an observation is made by any participating agencies, there is no timeline for a decision on whether to grant the application. Because the importer must reach out to the agency, provide further information, and the agency must then consider whether to remove the observation, the total time elapsed would far exceed the "immediate" approval (or a maximum of ten working days) described in the definition of "automatic" import licensing. As is demonstrated by the evidence, importers experience significant delays in the processing of their DJAI applications.

21. In several disputes under the GATT 1947, panels made a connection between the timing of application approvals and whether or not a license requirement constitutes a prohibited restriction under Article XI:1, using the terms "non-automatic" and "automatic" to describe prohibited restrictions and permitted licensing measures, respectively.

22. The evidence regarding the implementation of the DJAI Requirement confirms what is apparent on the face of the legal instruments – that the applications are not approved in all cases, and that the DJAI Requirement is a highly discretionary and non-transparent restriction enabling Argentine officials to condition approval on compliance with RTRRs, and that importers experience lengthy delays in receiving approvals. All of these factors independently support a finding that the DJAI Requirement is inconsistent with Article XI:1 of the GATT 1994.

2. The DJAI Requirement Is an Import License or Other Measure

23. The DJAI Requirement is a restriction made effective through an import license or other measure within the meaning of Article XI:1. More specifically, the DJAI Requirement is a restriction made effective through "import … licenses." The ordinary meaning of "license" is "'[f]ormal, usu[ally] printed or written, permission from an authority to do something … or to own something … ; a document giving such permission; a permit'." Thus, an "import license" is permission granted by a competent authority to bring merchandise into a Member. Article 1.1 of the Import Licensing Agreement defines "import licensing" for purposes of that agreement and provides context for the interpretation. Footnote 1 to Article 1.1 explains that "administrative procedures" qualifying as import licensing procedures include "[t]hose procedures referred to as 'licensing' as well as other similar administrative procedures." A procedure that (a) requires "the submission of an application" (b) as "a prior condition for importation" satisfies the definition.

24. The DJAI Requirement falls within both the ordinary meaning of the phrase "restriction … made effective through … import … licenses", as well as the definition of import licensing set forth in the Import Licensing Agreement. In particular, an importer must submit an electronic application for an import in the DJAI system, and obtain an approval, demonstrated by the "exit" status in that system, as a prior condition for import. More specifically, the various agencies determine, based on the application information, whether to allow the application to pass to the "exit," or to lodge an observation, moving the application into the "observed" status. Once that happens, an importer must contact the agency making the comment to determine what further action, whether the submission of additional information or something else, is required. The importer may not import the goods until the agency is satisfied and approval is obtained and the status moves to "exit." This procedure meets all of the requirements of an import licensing procedure, and therefore the DJAI approval is an "import … license" under Article XI:1.

25. Furthermore, the DJAI application and other documentation is not "required for customs purposes" and therefore is not of the type excluded from the definition of "import licensing" in the Import Licensing Agreement. Argentina has separate customs procedures, whereby customs information is collected and duties and other fees are assessed. In addition, although AFIP participates in the DJAI system, it does so for tax reasons, not reasons related to customs administration. Other agencies also participate in the DJAI system, none of whom have customs administration responsibilities. Where the purposes of an agency's evaluation—and therefore the documentation and other information the agency might request in order to satisfy an "observation"—is set out it is for other than "customs purposes." Thus, the DJAI Requirement constitutes a restriction made effective through an "import license" under Article XI:1.

B. THE IMPOSITION OF RTRRS IS INCONSISTENT WITH ARTICLE XI:1 OF GATT 1994

26. Argentina's use of RTRRs to condition import approvals under the DJAI system demonstrates that the DJAI Requirement is an import restriction, resulting in a breach of Argentina's obligations under Article XI:1. In addition to considering Argentina's RTRRs in conjunction with the DJAI system, the RTRRs are distinct measures that cause trade restrictions, and result in a separate breach of Argentina's obligation under Article XI:1. Argentina has not published its RTRRs. This failure, however, does not shield these measures from challenge under the WTO Agreement. To the contrary, where the record establishes that a Member has adopted an unpublished measure, the measure may be examined for its consistency with the substantive provisions of the WTO Agreement, and with procedural transparency obligations.

27. Argentine authorities enforce RTRRs by withholding approvals of imports such as through the DJAI Requirement, and previously the CI Requirement. Authorities implement these licensing requirements in a highly discretionary manner, including by withholding approvals until an importer complies with RTRRs. Argentina has imposed RTRRs in conjunction with a licensing requirement in sectors including the auto, agricultural machinery, clothing, and white goods. The United States has presented many examples of the imposition of RTRRs across product groups and sectors. Coupled with the statements by Argentine officials, these examples demonstrate that Argentina imposes RTRRs on importers, whether in conjunction with DJAI Requirements, the predecessor CI Requirements, or separately.

28. Argentina's imposition of RTRRs constitutes a "restriction" within the meaning of Article XI:1 because it serves as a "limitation" on imports. Importers are restricted in the amount of goods that they may import based on their ability to satisfy the RTRRs. The *India – Autos* panel determined that India required importers to balance the value of imported auto kits and components with the value of exports from India, and that this requirement was a restriction under Article XI:1. The panel concluded that, even though an importer could theoretically import an unlimited amount of goods, so long as the value of the imports was balanced by that of exports, this requirement imposed a practical limitation on imports. Similarly, RTRRs impose a practical limit on the volume of imports due to the conditions Argentina places on importation. The measure acts as a disincentive to importation by imposing additional costs on importers and, where the importer is unable to fulfill the condition, preventing imports. Other panels have found that a restriction within the meaning of Article XI:1 may operate through the measure's impact on transaction costs or market access.

29. The various RTRRs that Argentina imposes on importers impose burdens on the importation of foreign goods, creating disincentives to importation and limiting the volume of imports. For these reasons, Argentina's imposition of RTRRs constitutes a "restriction" prohibited by GATT 1994 Article XI:1.

30. Argentina's RTRRs make effective a restriction on importation though "quotas, import … licenses or other measures." The scope of "other measures" in Article XI:1 includes any measure that restricts imports, "excluding from its coverage only 'duties, taxes, or other charges.'" Other obligations in the GATT 1994 relate more narrowly to "laws and regulations" or "laws, regulations, judicial decisions and administrative rulings." In contrast, Article XI:1 applies to the broader scope of "measures".

31. For these reasons, the RTRRs are a "restriction" within the meaning of Article XI:1 and are inconsistent with that provision.

C. THE DJAI AND RTRR REQUIREMENTS ARE INCONSISTENT WITH TRANSPARENCY OBLIGATIONS UNDER THE IMPORT LICENSING AGREEMENT AND THE GATT 1994

1. Argentina Has Failed to Publish Sufficient Information Regarding the Basis for Granting or Allocating Licenses, as required by Article 3.3 of the Import Licensing Agreement

32. Article 3.3 of the Import Licensing Agreement applies to the DJAI Requirement, because the DJAI Requirement is (a) an import licensing procedure, (b) is non-automatic, and (c) is a licensing requirement for purposes other than the implementation of quantitative restrictions. First, for the

reasons described at Section IV.A.2, the DJAI Requirement is import licensing within the meaning of Article 1.1 of the Import Licensing Agreement.

33. Based on the ordinary meaning of Import Licensing Agreement Article 3.3, when read in context and light of the object and purpose of the Import Licensing Agreement, the obligation to "publish sufficient information for other Members and traders to know the basis for granting and/or allocating licenses" requires that Members disclose the "set of underlying principles" or the "determining principle" upon which import licenses are granted and/or allocated, and do so in an appropriate medium for other Members and traders to become familiar with them.

34. The DJAI resolutions and related measures do not provide sufficient information for Members or traders to know the basis for granting DJAI approvals. The relevant legal instruments contain little, if any, information regarding the permissible bases upon which SCI or other agencies may lodge an observation. Argentine officials have provided little guidance other than general statements appearing in official press announcements such as: (a) "protect[ing] Argentine industry;" (b) whether a DJAI applicant has agreed to comply with RTRR commitments, including those relating to "import substitution"; (c) national "economic stability;" and (d) the DJAI applicant's "balance of foreign exchange" and "the pace of the company's prices." These statements do not contain sufficient information to allow governments and traders to know the basis for the decisions, and are not published in a manner that would allow them to do so.

35. In sum, the Argentine authorities have failed to publish the relevant bases in the DJAI resolutions or any other measures. As a result, it is impossible for traders and Members to know the "set of underlying principles" or the "determining principle" upon which DJAI approvals are granted.

2. Argentina Has Failed to Publish All Relevant Rules and Information Regarding Application Procedures and Other Features of the DJAI Requirement as Required by Import Licensing Agreement Article 1.4(a)

36. Argentina has violated Article 1.4(a) by failing to publish – in a manner that would enable governments and traders to become acquainted with them – the rules and all information that relate to the process for securing consideration of, and a decision on, a DJAI application, or any exceptions, derogations or changes to such rules.

37. For example, Argentina has failed to publish sufficient information for governments and traders to become familiar with the procedures that a DJAI applicant must follow (*e.g.*, information submission requirements, deadlines, etc.) to resolve Argentine agency "observations" and thereby secure final decision on a DJAI application. In this respect, Argentina has also failed to publish sufficient information for governments or traders to become familiar with at least the following:

- The type of submissions (written, oral, mode of transmission), as well as the content of submissions that DJAI applicants are required to provide in response to agency "observations";
- As part of the DJAI application process, the type of communication to which DJAI applicants are entitled when an agency lodges an "observation" in the course of considering a DJAI application – e.g., whether the relevant agency is required to provide a communication in writing that describes their reasoning, underlying factual and legal grounds, and the steps the company must take to resolve the situation.
- Which importation transactions (that is, of which goods) may be blocked by each of the participating agencies, in connection with the DJAI application process.
- The complete list of agencies participating in the DJAI system and the reasons they may place an observation on a DJAI, in connection with the DJAI application process.
- What types of requirements Argentine authorities are authorized to impose on DJAI applicants in connection with the DJAI application process as a condition of releasing an "observation" and thereby allowing the DJAI application to be granted; and
- The time periods that apply to DJAI "observations," including any time periods for agencies to respond to additional information provided by applicants, in connection with the DJAI application process.

3. Argentina Has Failed to Promptly with GATT 1994 Article X:1 Publication Requirements with Respect to the RTRR Requirement

38. With respect to the RTRRs, Argentina has failed to fulfill the GATT 1994 Article X:1 obligation to publish "promptly" and "in such a manner as to enable governments and traders to become acquainted with them," the "laws, regulations, judicial decisions and administrative rulings of general application" "pertaining to … requirements, restrictions, or prohibitions on imports ..." that a Member has "made effective."

39. The RTRRs, which pertain on their face to "requirement, restriction or prohibition on imports …," constitute "regulations" or "administrative rulings of general application" because they are rules prescribed for controlling importation and regulating the conduct of importers broadly, and because they are imposed and enforced by Argentine officials with authority, control and influence over such import transactions and importers. The evidence demonstrating that Argentine officials widely apply the aforementioned RTRRs vis-à-vis DJAI applicants and their prospective importations also makes clear that that these unpublished rules are "of general application."

40. The RTRRs have not been "published." Insomuch as Argentina has simply issued official press statements that reflect the existence of the RTRRs but not the actual RTRRs themselves, Argentina has not satisfied the GATT Article X:1 requirement to publish the RTRRs in a manner that would enable governments and traders to become familiar with them.

41. Argentina has failed to publish the RTRRs promptly, as required by Article X:1 of the GATT 1994. As discussed above, Argentine authorities made the RTRRs "effective" in conjunction with the DJAI Requirement no later than the effective date of the DJAI regulation, February 1, 2012, and made the RTRRs effective in conjunction with the CIs from at least 2010. To date, the RTRRs remain unpublished. An extended period of delay in publishing a measure for at least 18 months, and as much as three years, does not meet the requirement of "prompt" publication.

D. ARGENTINA HAS FAILED TO ADMINISTER ITS DJAI REQUIREMENT IN A UNIFORM AND REASONABLE MANNER AS REQUIRED BY GATT ARTICLE X:3(A)

42. Argentina has failed to meet the GATT Article X:3(a) requirements of reasonable and uniform administration. This conclusion is supported by extensive evidence showing, among other things, that Argentine authorities act without regard to directly relevant legal authorities, and treat similarly situated importers with great variance in terms of the delays, disposition and other aspects of their administration of the DJAI system.

E. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARGENTINA'S OBLIGATIONS UNDER ARTICLE 3.2 OF THE IMPORT LICENSING AGREEMENT

43. As a non-automatic import licensing requirement, the DJAI Requirement is subject to Article 3.2 of the Import Licensing Agreement. The first sentence of Article 3.2 requires an identification of the "restriction" being implemented by the non-automatic licensing procedures. However, the legal instruments and guidance concerning the DJAI Requirement, reference no such restriction or limiting condition implemented through the DJAI system, other than that imposed by the DJAI procedures themselves. Because the DJAI Requirement does not impose an underlying "restriction," it necessarily has "additional" "trade-restrictive" or "trade-distortive" effects, in violation of the first sentence of Article 3.2 of the Import Licensing Agreement.

44. The second sentence of Article 3.2 states, in part, that "non-automatic import licensing procedures … shall be no more administratively burdensome than absolutely necessary to administer the measure." However, the DJAI Requirement imposes excessive administrative burdens on importers and does not implement any identifiable measure. The DJAI system requires the importer to make an initial application, and contact any number of the six or seven agencies participating in the DJAI system that may lodge an "observation" without any guidance about how to contact those agencies, or what additional information or action an importer may be required to undertake. In contravention of the second sentence of Article 3.2 of the Import Licensing Agreement, this system is highly burdensome for the importer and is not necessary, as there is no identified measure implemented by the DJAI system.

F. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE 1.6 OF THE IMPORT LICENSING AGREEMENT

45. The DJAI Requirement is inconsistent with Article 1.6 because importers must separately approach up to seven agencies – AFIP, SCI, ANMAT, SEDRONAR, SENASA, INV, and INTI – in order to resolve observations and receive authorization to import; Article 1.6 provides that applicants may be required to approach more than one administrative body *only* if it is "strictly indispensable." From the purposes of the DJAI Requirement described in relevant legal instruments, there is no basis for requiring an applicant to approach more than one administrative body. None of the stated objectives of the DJAI Requirement render "absolutely necessary or vital" a system in which applicants must approach more than one agency. Further, Article 1.6 provides that a licensing system may not require an applicant to approach more than three administrative bodies under any circumstances. Under the DJAI system, an importer may be required to approach up to seven agencies.

G. ARGENTINA ADMINISTERS THE DJAI REQUIREMENT IN A MANNER INCONSISTENT WITH ARTICLE 3.5(F) OF THE IMPORT LICENSING AGREEMENT

46. The 30-day time limit in Article 3.5(f) applies to the DJAI Requirement, because applications are not considered simultaneously, but rather on a first-come first serve basis. The individual agencies have up to 15 days to lodge observations, and once an observation has been made, there is no time limit for the resolution of the observation. In practice, as demonstrated by the evidence, Argentine officials frequently fail to abide by the 15 day time limit.

H. ARGENTINA HAS ACTED INCONSISTENTLY WITH ARTICLES 5.1, 5.2, 5.3, AND 5.4 OF THE IMPORT LICENSING AGREEMENT BY FAILING TO PROVIDE NOTIFICATIONS

47. Argentina has not notified the DJAI licensing procedure, or any changes thereto, including changes made by *Resolution 3255* and the Updated Annex to *Resolution 3255*. As a result, Argentina has acted inconsistently with Articles 5.1, 5.2 and 5.3. In addition, Argentina has not notified the Committee of the publications in which the information required in Article 1.4 of the Import Licensing Agreement is published. For these reasons, Argentina has acted inconsistently with Articles 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement.

III. CONCLUSION

48. The United States respectfully requests that the Panel find that the DJAI Requirement is inconsistent with Articles X:3(a) and XI:1 of the GATT 1994 and Articles 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement, and that the RTRRs are inconsistent with Articles X:1 and XI:1 of the GATT 1994.

OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING

49. Argentina has adopted a system for limiting the importation of goods and for extracting concessions from importers and foreign companies that restrict trade. Argentina's actions and its lack of transparency, breach Argentina's WTO obligations. Unjustified delays in, and denials of, approvals to import goods, and the imposition of unpublished requirements that restrict their importation, are squarely prohibited by the WTO Agreement. In response to the U.S. submission establishing *prima facie* breaches WTO obligations, Argentina does not directly dispute any of the facts. Rather, Argentina attempts to avoid scrutiny of its measures.

I. ARGENTINA'S DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1

50. In its first written submission, Argentina abandons the text of the agreement, as well as the reasoning of multiple past panels, and asserts that Article XI:1 does not apply to measures of a procedural nature. No such limitation exists on the Article's scope.

51. The DJAI Requirement is not merely procedural but is itself a restriction on importation. In addition, nothing in the text of Article XI:1 limits its coverage in the manner Argentina contends. Any restriction made effective through *any* measure (other than duties, taxes or other charges) is within the provision's scope. Argentina's approach would undermine Article XI:1 by permitting a Member to restrict as much trade as it likes as long the means is "procedural."

52. A licensing requirement, which Argentina characterizes "procedural," is itself a "restriction" where it is non-automatic. That was the case with the licensing procedure at issue in *India – Quantitative Restrictions*. Even where an import licensing procedure may implement other identifiable restrictions, this does not mean the import licensing procedure is not a restriction itself. It may simply mean that the import licensing procedure should be examined according to the same justification as the underlying WTO-consistent restriction it implements. But that is not the case here; the DJAI system does not implement a WTO-consistent restriction.

53. The DJAI Requirement is a discretionary non-automatic licensing system that operates as an import restriction. The analysis may end there as the DJAI Requirement does not implement a substantive rule. Authorities use the DJAI Requirement to restrict the imports in a discretionary manner, including through imposing the RTRRs. Without a separate restriction implemented in accordance with a justification under the WTO Agreement, the Panel need only examine the restriction imposed by the DJAI Requirement itself.

54. It is not the case that the RTRRs should be evaluated as the substantive "restriction" imposed by the DJAI Requirement. First, the RTRRs are not related to a WTO-consistent restriction and so do not provide a justification for the DJAI Requirement. Second, the RTRRs are not necessarily implemented through the DJAIs. Rather, the discretion afforded agencies participating in the DJAI system enables SCI to implement the RTRRs. The DJAI Requirement is a "restriction" because (1) the DJAI Requirement is non-automatic; (2) authorities use the discretion to impose RTRRs; and (3) approvals may be granted only after delay.

55. Argentina also argues that the scope of Article XI:1 is more narrow than was found by past panels because they did not take into account the term "quantitative" in the title to Article XI:1. However, the carve-out of "duties, taxes, or other charges" from "prohibitions or restrictions" demonstrates that the obligation of Article XI is not limited to quantitative restrictions. The phrase "whether made effective through" confirms that the same logic applies to other types of measures that similarly may impose "restrictions."

56. Finally, Argentina's argument that co-complainants must demonstrate the "trade-restricting effects," of the DJAI Requirement is unfounded. That term is nowhere to be found in Article XI:1. Argentina relies on the Appellate Body's statement in *China – Raw Materials* to support its position. However, the Appellate Body's use of the term "limiting effect" is not materially different from the "limiting condition" referred to by the *India – Quantitative Restrictions* panel, and it does not ascribe a new meaning to the term. The DJAI Requirement has a limiting effect because Argentine officials have full discretion to approve or deny applications.

II. ARTICLE VIII IS NOT RELEVANT TO THE PANEL'S ANALYSIS UNDER ARTICLE XI:1

57. Argentina argues that the DJAI Requirement is a "formality" under Article VIII and that Articles VIII and XI are mutually exclusive. Argentina argues that Article XI:1 therefor does not apply at all. This argument is untenable. Argentina takes an expansive view of "restriction" in arguing that the "formalities" described in Article VIII would be prohibited under Article XI:1 if both provisions apply to the same set of measures. It is not the case that all "formalities" are "restrictions." To the extent that they are, Article XI:1 does discipline their imposition. Further, co-complainants are not challenging a "formality." It is not the "formal" aspects of the import licensing procedure that are at issue; it is the fact that importers cannot import until they have permission under the DJAI system – permission which Argentine officials have wide discretion to withhold. Finally, there is nothing in the text of either Article VIII or Article XI:1 that exempts licensing requirements from Article XI:1. Accordingly, Article VIII is not material to the Panel's consideration of the claims at issue in this dispute.

58. For the foregoing reasons, the co-complainants have made a *prima facie* case that the DJAI Requirement is inconsistent with Article XI:1 of the GATT 1994, and Argentina has offered no defense or facts to refute that conclusion under a correct interpretation of Article XI:1.

III. THE DJAI REQUIREMENT IS AN IMPORT LICENSE REQUIREMENT

A. The DJAI Requirement Is Not a Customs Formality Adopted in Conformity with the WCO SAFE Framework

59. Argentina argues that the DJAI Requirement is not a license requirement, but is instead "an advance electronic information customs formality specifically designed in accordance with the World Custom's Organization's ('WCO') SAFE Framework of Standards to Secure and Facilitate Global Trade ('SAFE Framework')." However, WCO Members established the SAFE Framework to "enhance security and facilitation of international trade" in order to counter vulnerabilities in the global trading system to "terrorist exploitation." In contrast, the DJAI system has nothing to do with a system of border security. Rather, it is a discretionary licensing system, untied to border-security measures. The SAFE Framework is built around four "core elements." The DJAI system departs markedly from each one.

B. The DJAI Requirement Is an Import Licensing Procedure

60. Argentina misreads Article 1.1 of the Import Licensing Agreement and mischaracterizes of the purpose of the DJAI Requirement. Argentina employs circular reasoning in support of a narrow definition of "import licensing," arguing that the phrase "used for the operation of import licensing regimes" in Article 1.1 informs the scope of "import licensing" in that provision. The fact that "import licensing" is "used for the operation of import licensing regimes" reveals little or nothing about the meaning of the term "import licensing."

61. As the Appellate Body observed, if a procedure requires "the submission of an application" for an import license as "a prior condition for importation," it is a licensing procedure. An "import license" involves a permission granted by a competent authority to bring merchandise into a Member from another Member. The exclusion in Article 1.1 of applications or documentation submitted for "customs purposes" demonstrates that import licensing procedures include all procedures other than those that are for "customs purposes." The footnote to Article 1.1 explains that licensing procedures include "[t]hose procedures referred to as 'licensing' as well as other similar administrative procedures."

62. Under the DJAI Requirement, an importer must submit an application for an import, and obtain an approval, demonstrated by the "exit" status, as a prior condition for import. The participating agencies determine whether to lodge an observation and thereby withhold approval for the importation to proceed. There are – undisclosed – bases for the withholding of approvals, *even if the DJAI is filled out appropriately*.

63. The DJAI is not for "customs purposes." Argentina's interpretation of "customs purposes" would swallow any procedure that could be considered import licensing. Argentina looks to the definition of "customs," in the sense of a governmental agency, which notes that customs services implement customs laws as well as other laws and regulations. Argentina uses this definition, to argue that any application or documentation required for the administration of customs laws, or any *"other laws and regulations related to importation, exportation, or the movement or storage of goods"* relates to "customs purposes." Article 1.1 does not relate to what customs, as an agency of government does, but whether a procedure has a "customs purpose," that is, whether it relates to a *customs* law or regulation. A customs agency may enforce aspects of an import licensing procedure or other measure on behalf of another agency. The question of who enforces a measure at the border is immaterial to the consideration of whether or not an application or document is submitted for customs purposes or for obtaining approval to import.

64. Argentina fails to refute the features of the DJAI system which demonstrate that it is used for purposes other than "customs purposes." That is, Argentina maintains separate customs procedures; AFIP, the only agency participating which has explained the reasons an observation may be lodged, has only listed tax reasons; and the other agencies participating in the DJAI system do not have customs administration responsibilities.

65. For these reasons, the DJAI Requirement is an import licensing procedure subject to the disciplines in the Import Licensing Agreement. Further, the DJAI Requirement is inconsistent with several provisions of that agreement, namely Articles 1.4(a), 1.6, 3.2, 3.3, 3.5(f), and 5.

IV. ORDER OF ANALYSIS

66. Argentina appears to argue that the Import Licensing Agreement is *lex specialis* in relation to GATT Article XI:1 (and Article VIII), and therefore that the Panel must consider the provisions of the Import Licensing Agreement before, and to the exclusion of, Article XI:1. However, Argentina is incorrect in its assertion that the Panel is precluded from considering Article XI:1 first. Not only could the Panel reach the claim under GATT 1994 even if it starts its analysis with the Import Licensing Agreement, we consider and respectfully request that the Panel should start its analysis with the GATT 1994. The logical relationship between Article XI:1 and Article 3.2 indicates that it is appropriate for the Panel to start with Article XI:1.

67. The DJAI Requirement is not so much as a set of procedures imposing import licensing than as a restriction on imports imposed through import licensing. As a result, the Import Licensing Agreement is not the more specific agreement in relation to the claims at issue. Rather, Article XI more specifically and in detail deals with the matter raised in this dispute. In *Turkey – Rice*, the panel began "its analysis of the substantive content of the measure," noting that "[i]f the Panel finds that the measure at issue is in breach of substantive obligations under either Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, then the question of how the measure has been administered by Turkey becomes irrelevant."

68. Implicit in the Import Licensing Agreement is that WTO-compatible non-automatic import licensing measures are adopted to secure compliance with other measures. The Import Licensing Agreement assumes that there is an underlying measure or restriction, and does not question the WTO compatibility of that measure or restriction. It is thus logical for the Panel to start its inquiry under Article XI:1 to determine whether (1) there is a restriction and (2) what is its content. If the Panel starts with an Article XI:1 analysis, it will find that the entire DJAI Requirement is inconsistent with Argentina's WTO commitments.

69. Argentina's conclusion that there is "no claim under Article XI" if the Import Licensing Agreement is examined first is incorrect. Argentina's argument rests on a faulty premise: simply because a measure is examined first under one agreement because it appears more specific, does not mean that the measure cannot be examined under the less specific agreement.

70. The Appellate Body has observed that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member." The Panel should consider the logical relationship between Article XI:1 of the GATT 1994 and the Import Licensing Agreement; this assessment will lead to the conclusion that the Panel should start its inquiry under Article XI of the GATT.

V. THE UNITED STATES HAS ESTABLISHED A *PRIMA FACIE* CASE THAT ARGENTINA HAS ACTED INCONSISTENTLY WITH ARTICLE X:3(A) OF THE GATT 1994

71. Argentina has failed to administer in a reasonable or uniform manner the DJAI system – which applies to all imports and importers – is a law, regulation or administrative ruling of general application that pertains to requirements, restrictions or prohibitions on imports and that has been made effective by Argentina since early 2012. Company affidavits and other evidence also reflect the unreasonable and non-uniform administration of the DJAI system. Argentine officials fail to follow domestic legal requirements; fail to explain the reasons for "observations" or delays; fail to provide effective contact points; and fail to administer the system in a consistent, predictable or reasonable manner – with wide variations in delays and the ultimate disposition of applications. This lack of uniformity occurs with respect to particular importers, and more broadly as well. Argentine officials also exercise their discretion by arbitrarily altering and adding to the demands they make of importers to secure release of an "observed" DJAI application, even after the importer has taken steps to meet the authorities' original demands. This evidence typifies administration that is neither reasonable nor uniform.

VI. THE RTRRS ARE INCONSISTENT WITH ARTICLES XI:1 AND X:1 OF THE GATT 1994

72. The evidence related to the RTRRs demonstrates that Argentina imposes this measure on a widespread basis across sectors of importers. Argentina requires compliance with the RTRRs as a condition for importation, either through the DJAI or another mechanism. This measure serves as

a "restriction" on imports because goods may only be imported to the extent that the importer is able to comply with the RTRRs. For that reason, the RTRRs are inconsistent with Article XI:1 of the GATT 1994. Likewise, WTO Members and traders would search Argentine legal sources in vain for any publication of the RTRRs consistent with GATT Article X:1. Despite the evidence found throughout hundreds of exhibits that Argentina is, in fact, imposing such RTRRs on importers, Argentina has failed to meet GATT Article X:1 publication obligations.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY
OF THE ARGUMENTS OF THE UNITED STATES

SECOND WRITTEN SUBMISSION

1. The United States has challenged two restrictions – the advance import affidavit ("DJAI") Requirement and the Restrictive Trade-Related Requirements ("RTRRs"). The DJAI Requirement is a discretionary, non-automatic import licensing procedure, and Argentine government officials (in particular the *Secretaría de Comercio Interior* or "SCI") have the ability to withhold approvals of applications for virtually any reason. With respect to the RTRRs measure, the United States has demonstrated a *prima facie* case as to its existence and inconsistency with Articles XI:1 and X:1, which Argentina has failed to rebut.

I. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

A. THE DJAI REQUIREMENT IS A RESTRICTION UNDER ARTICLE XI:1 OF THE GATT 1994 AND IS INCONSISTENT WITH THAT PROVISION

2. The DJAI Requirement is a non-automatic licensing system that operates as an import restriction; it allows officials to deny a license for discretionary reasons. Extensive evidence shows that, in fact, Argentine officials use this discretion to enforce the RTRRs.

3. Argentina appears to argue that the DJAI Requirement is not discretionary because "the basis on which a reviewing agency would consider a DJAI [application]" … "will depend upon the customs-related laws and regulations that it and other intervening agencies administer." Argentina has no factual basis for this assertion; none of the laws and regulations cited by Argentina contain criteria applicable to DJAI applications, the reasons an observation may be placed, or what further information or action may be needed. Argentina also argues that Article XI:1 cannot apply generally to non-automatic discretionary import licensing because if this is so, any time an importer fails to provide customs documentation, a Member denying importation will have violated Article XI:1. This argument is a *non sequitor*. Under the DJAI system, the denial is *not* conditioned on a failure to provide customs documentation. *Even if* an importer submits all required information, the application may be denied.

4. Article XI:1 applies to all restrictions, whether characterized as "procedural" or "substantive." Nothing in the text requires an artificial distinction between "procedural" and "substantive" measures, nor provides for the exclusion of measures characterized as "procedural." Article XI:1 prohibits "prohibitions or restrictions other than duties, taxes or other charges," *however* made effective. The DJAI Requirement is not merely "procedural;" it is a restriction because importers cannot import unless and until they receive approval, which can be withheld for undisclosed reasons. This constitutes a discretionary, non-automatic licensing regime. Whether the DJAI Requirement is "substantive" or "procedural," it is a restriction.

5. Contrary to Argentina's assertions, the *India – Quantitative Restrictions* panel correctly explained that discretionary import licensing may be used where one of the exceptions to Article XI applies. If an exception applies, a Member may apply discretionary import licensing procedures. Argentina argues that the panel should have considered the licensing measure under Article 3.2 of the Import Licensing Agreement, instead of Article XI:1. The Import Licensing Agreement disciplines the procedural aspects of licensing and not whether a restriction imposed by import licensing is consistent with the GATT 1994 under Article XI:1. A discretionary, non-automatic import licensing requirement is a restriction under Article XI:1 and prohibited under that provision. If another provision exempts the requirement, then the procedures must comply with the Import Licensing Agreement. As a result, it is appropriate for a panel to begin its analysis of a non-automatic import licensing requirement with Article XI:1.

6. The Import Licensing Agreement does not support the proposition that "procedural" aspects of a licensing regime are outside the scope of Article XI:1. Procedural features of an import

licensing regime may be inconsistent with both Article XI:1 as well as the Import Licensing Agreement, which provides additional obligations for procedures. The DJAI Requirement is inconsistent with Article XI:1 both because it is a non-automatic, discretionary import licensing procedure and because the procedures render it restrictive.

7. The *Korea – Beef* and *China – Raw Materials* panel reports are consistent with a correct understanding of Article XI:1 and *India – Quantitative Restrictions*. In all three disputes, the panels recognized that discretionary import licensing systems that do not implement any restrictions are inconsistent with Article XI:1. The *China – Raw Materials* panel observed that discretionary import licensing procedures "would not meet the test … to be permissible under Article XI:1 … if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria." There is no underlying measure implemented through the DJAI Requirement. Further, decisions to grant or deny approvals are based on unspecified criteria.

8. Argentina advances a "subsidiary" or "alternative" argument that Article XI:1 should apply to import formalities or other import procedures only to the extent that (1) "they limit the quantity or amount of imports to a material degree that is separate and independent of the trade-restrictive effect of any substantive rule of importation that the formality or requirement implements, and (2) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of this nature." Argentina's formulation is aimed at different factual situation than the one present in this dispute. To the extent a licensing procedure implements another identifiable restriction, that procedure should be examined according to the same justification as the underlying WTO-consistent restriction it implements. But, there is no WTO-consistent underlying restriction implemented by the DJAI Requirement.

9. Argentina argues that co-complainants are required to demonstrate that the DJAI Requirement has a limiting effect that is separate *from the RTRRs*, and that the U.S. arguments are flawed because some of the same evidence presented by the complainants relates to both the DJAI Requirement and RTRRs. Neither of these arguments have merit. The DJAI Requirement is a non-automatic, discretionary licensing measure. Argentine authorities may deny permission to import until an importer complies with RTRRs or for no reason at all. Similarly, RTRRs may be enforced by the withholding of permission to import, whether through the *Certificado de Importacion* ("CI") Requirement, the DJAI Requirement, or another measure. Because the two measures are distinct, the body of evidence with respect to the two is also distinct and only overlaps as it relates to both. It is false for Argentina to state that the evidence related to the two measures is "indistinguishable" or the "same," and Argentina has not explained what the relevance would be if that were the case. Further, the claims under Article XI:1 with respect to the measures are distinguished.

B. ARTICLE XI:1 DOES NOT REQUIRE A DEMONSTRATION OF "TRADE EFFECTS"

10. Argentina relies on the Appellate Body report in *China – Raw Materials* to support its argument that a party asserting a violation of Article XI:1 must demonstrate "quantitative" or "trade" effects on imports. This reliance is misplaced. The Appellate Body did not address "trade effects." Argentina ignores the Appellate Body's elaboration on "restriction" in subsequent reports which confirms that there is no requirement to show trade effects. The term "quantitative restrictions" does not appear in the text of Article XI:1. The carve-out of "duties, taxes, or other charges" from "prohibitions or restrictions" demonstrates that Article XI is not limited to "quantitative restrictions" in the strict sense of the term. Similarly, there is no basis in the text to conclude that the restrictions must have "quantitative effects." The word "effects" does not appear.

11. The Appellate Body and past panels have found that trade effects are not a necessary or sufficient factor in determining whether a measure is inconsistent with WTO obligations, including those under Article XI. Argentina points to the statement by the Appellate Body in *China – Raw Materials*. The Appellate Body did not state that such an "effect" must be demonstrated through trade data. No panel which has endorsed the term "limiting effect" to describe "restriction" concluded that trade effects are part of an Article XI:1 analysis. The Appellate Body considered "trade-restrictiveness" in *US – COOL* and *US – Tuna II (Mexico)*, and concluded that trade effects were not part of the analysis. This is despite the fact that, in *US – Tuna II (Mexico)*, the Appellate

Body relied on its consideration of "restriction" in *China – Raw Materials*, and in turn, in *US – COOL* referred to the *US – Tuna II (Mexico)* discussion.

12. The enforceability of commitments in the WTO agreements does not turn on whether a Member's current trade is directly impacted. Quantitative data may or may not demonstrate trade effects, but that does not excuse a Member's maintenance of a measure that is inconsistent with the WTO Agreement.

C. ARTICLE VIII DOES NOT LIMIT THE APPLICATION OF ARTICLE XI:1

13. Argentina puts forth a flawed interpretation of Article XI:1 in arguing that Article VIII and Article XI:1 of the GATT 1994 are "mutually exclusive" in their application. Article XI:1 is broad in its scope, and nothing in Article VIII limits, or creates an exception to, Article XI:1. The U.S. claim under Article XI:1 does not relate to the "formalities" connected to the DJAI requirement, but rather with the fact that import transactions cannot be completed until an importer receives approval, which may be withheld for nontransparent, discretionary reasons. As a result, the question of whether or not "formalities" are excluded from the scope of Article XI:1 is not directly relevant.

14. Article XI:1 relates to any prohibitions or restrictions on imports and carves out only "duties, taxes or other charges." Article XI:1 is definitive; it states that "*no prohibitions or restrictions … shall be maintained*." Nothing in the text exempts any overlapping coverage of Article VIII. It is not the case that "formalities" are "permitted" by Article VIII. Aspirational-type language, such as the Article VIII language, does not permit or prohibit anything. Argentina's reading of Articles VIII and XI:1 is inconsistent with principles of treaty interpretation and fails to give effect to the definitive language in Article XI:1; that "*no* prohibitions or restrictions *other than duties, taxes or other charges*," may be maintained.

15. Formalities may or may not restrict trade; to the extent they do, Article XI:1 disciplines their use. There is nothing inconsistent with the simultaneous application of the mandatory requirements in Article XI:1 and the aspirational language in Article VIII. Argentina essentially argues that Article VIII creates an exception to Article XI, even though the text of neither article describes such an exception. Further, Argentina's logic does not make sense when applied to other provisions of Article VIII. Article VIII:1(b) states that Members "recognize the need for reducing the number and diversity of fees and charges." Under Argentina's theory, this language would create an exception to Article XI:1 for "fees and charges." If that were the case, the carve-out for "charges" would be surplusage because they are already excluded in Article XI:1.

16. Contrary to Argentina's assertions, the Import Licensing Agreement is not "in essence, an elaboration upon Article VIII in the specific context of import licensing procedures." The preamble to the Import Licensing Agreement recognizes "provisions," plural, "of GATT 1994 as they apply to import licensing procedures" and states that Members desire "to ensure that import licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994." Thus by its terms, the Import Licensing Agreement acknowledges that various provisions of the GATT 1994 relate to import licensing procedures, not just Article VIII.

17. Argentina cites the panel in *China – Raw Materials*. However, that panel considered Article VIII:1(a), with respect to "fees and charges," and not formalities. So, it is unclear that the discussion in *China – Raw Materials* is applicable. That panel stated that "it seems appropriate to construe Article VIII as regulating something different from … GATT Article XI:1." However, the panel did not state that the provisions were mutually exclusive; but concluded that the scope of Article VIII:1(a) was narrower than Article XI:1.

D. THE PRINCIPLE OF *LEX SPECIALIS* DOES NOT BAR THE EVALUATION OF THE DJAI REQUIREMENT UNDER ARTICLE XI OF THE GATT 1994

18. Argentina misapplies the principle of *lex specialis* in arguing that it bars the evaluation of the DJAI Requirement under Article XI. The principle of *lex specialis* concerns situations where there is a *conflict* between two provisions such that they cannot be applied simultaneously. There is no conflict between Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. In this dispute, considering the logical relationship between Article XI:1 and Article 3.2, the United States submits that it would be appropriate for the Panel to first consider claims under

Article XI:1 before turning to Article 3.2. The United States is challenging the DJAI Requirement as a restriction on imports imposed through import licensing. As a result, Article XI more specifically and in detail deals with the nature of the matter raised in this dispute.

II. THE DJAI REQUIREMENT IS AN IMPORT LICENSING PROCEDURE SUBJECT TO THE IMPORT LICENSING AGREEMENT

19. Argentina does not dispute the essential characteristics of the DJAI Requirement, which demonstrate that the requirement it is an import licensing procedure. Rather, Argentina presents untenable l arguments and attempts to shield the DJAI Requirement from scrutiny under the Import Licensing Agreement. Argentina's reliance on the SAFE Framework is misplaced; that instrument does not create any exceptions to the WTO agreements, and the DJAI Requirement does not share the features of a procedure implemented according to the SAFE Framework.

A. THE DJAI REQUIREMENT IS AN IMPORT LICENSING PROCEDURE

20. The DJAI is an import licensing procedure because it (a) requires the "submission of an application or other documentation" (b) as a "prior condition for importation." An importer must submit an application for each import through the DJAI system and wait 15 days to determine whether an approval is granted ("exit" status) or withheld ("observed" status). If approval is withheld, the importer must approach the relevant agency and submit further, unspecified, information or documentation in the hope of obtaining the "exit" status.

21. Complainants are not required to "demonstrate that the DJAI procedure is 'used for the operation of import licensing regimes.'" Article 1.1 makes clear that "import licensing" is a procedure, and an "import licensing regime" is one "requiring the submission of an application or other documentation … as a prior condition for importation." The DJAI procedures are "used for the operation" of the DJAI regime, or system, as a whole, whereby Argentine agencies can review and either grant or block DJAI applications required as a prior condition of importation.

22. Not all applications or documentation submitted as a prior condition for importation are for import licensing. The Import Licensing Agreement explicitly carves out those required for "customs purposes." The DJAI is not for customs purposes. Argentina is not correct that additional (unspecified) application and documentation requirements are excluded. Such an interpretation of Article 1.1 is contrary to the text, which includes one carve-out for customs purposes. The examples of documents Argentina alleges would be covered by complainants' "overly expansive" interpretation of import licensing are not at issue in this dispute.

B. THE DJAI REQUIREMENT IS NOT FOR "CUSTOMS PURPOSES"

23. Argentina advocates for an overly broad interpretation of those applications and documentation which are for "customs purposes" and thereby excluded from the definition of import licensing procedures at Article 1.1 of the Import Licensing Agreement. Argentina argues that any application or document required for the administration of customs laws, or "*any other laws and regulations related to importation, exportation, or the movement or storage of goods*" is for "customs purposes." This interpretation contradicts the plain meaning of Article 1.1. Argentina's definition would prevent the application of the Import Licensing Agreement to any procedures whatsoever, as by definition, import licensing laws and regulations are "related to importation." "Customs purposes" relates to the implementation of a *customs* law or regulation. The ordinary meaning of the word "customs" in this context is "duty levied by a government on imports." Thus, "customs purposes" relates to the accurate identification, classification, valuation, determination of origin and ultimately levying of duties.

24. The DJAI Requirement is not maintained for customs purposes. First, Argentine agencies with no customs purpose whatsoever participate in the DJAI system and may place observations, withholding permission to import. Second, at the stage at which the DJAI submission must be made – prior to the issuance of a purchase order, information that is needed for "customs purposes" to determine classification, origin and valuation of an item is not even available. Third, Argentina maintains separate customs procedures which require the submission of more detailed data much later in the importation process. Fourth, the only guidance published by AFIP states that it intervenes for internal tax administration purposes, and does not list any "customs risks" of the type it purports to monitor under the SAFE Framework. Even if AFIP does make

"customs control" observations, the vast majority of reasons that AFIP, let alone any other agency, places an observation is for non-customs reasons. Finally, the DJAI Requirement is not a formality implemented in accordance with the SAFE Framework.

C. THE DJAI REQUIREMENT IS NOT IMPLEMENTED ACCORDING TO THE SAFE FRAMEWORK

25. Argentina argues that the DJAI Requirement is not a license requirement, but is instead "an advance electronic information customs formality specifically designed in accordance with the SAFE Framework." Argentina's arguments are legally irrelevant and factually incorrect. First, Argentina's arguments cannot justify a WTO-inconsistent measure, and so they do not have any direct legal relevance to the Panel's evaluation. Second, Argentina's arguments are factually incorrect, because the DJAI is not "specifically designed in accordance with the SAFE Framework." The DJAI system has nothing to do with a system of border security.

26. The DJAI Requirement does not "allow AFIP to determine, in advance of the arrival of the goods, whether a particular consignment should be targeted for physical inspection, non-intrusive inspection methods, or not be screened at all." The DJAI system is designed and operates in a manner that is disconnected from, and possibly detrimental to, the management of supply chain security risk in the global trading system or other import cargo risks. First, the DJAI system lacks any substantive basis upon which to manage supply chain security risk or to identify high-risk consignments. It contains no criteria relating to supply chain security risk; it does not reflect the standards set forth under the four "core components" the SAFE Framework; and it does not specify other criteria for identifying other "risks" associated with imported cargo shipments. Second, nothing in Argentina's response explains why or how the DJAI Requirement (and all of its trade restrictive and non-transparent features) is necessary or relevant to ascertaining risk on imports from other countries. Third, the DJAI system requires the submission and approval of an application before an importer can place an order for, or secure foreign exchange financing for, the goods – a point in time at which insufficient information would exist to allow a customs authority to "identify high-risk consignments" or to select "particular consignment[s for]… physical inspection, [or] non-intrusive inspection methods."

III. THE UNITED STATES HAS DEMONSTRATED THAT THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE 3.2 OF THE IMPORT LICENSING AGREEMENT

27. Argentina argues that both Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement cannot apply to the DJAI Requirement. Further, Argentina argues that the United States must show that the DJAI Requirement is more trade-restrictive than the RTRRs in order to prevail under Article 3.2. Both provisions apply to non-automatic import licenses such as the DJAI requirement, and the principle of *lex specialis* does not prevent either claim.

28. The DJAI Requirement and the RTRRs are separate measures, each of which restricts the importation of goods. The DJAI Requirement is a discretionary, non-automatic import licensing requirement that serves as a restriction because Argentine officials may withhold permission for virtually any reason whatsoever, including compliance with the RTRRs. The RTRRs impose requirements that restrict the ability to import goods, and are enforced through the withholding of permission to import through the DJAI system, and previously the CIs. Because the RTRRs and DJAI Requirement are separate, and because a WTO-inconsistent measure cannot justify the restrictions imposed by an import licensing measure, the United States is not required to show that the DJAI Requirement imposes trade-restrictive effects additional to those caused by the RTRRs. Because the DJAI Requirement does not impose an underlying "restriction," it necessarily has "additional" "trade-restrictive" or "trade-distortive" effects inconsistent with Article 3.2 of the Import Licensing Agreement.

IV. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE X:3(A) OF THE GATT 1994

29. Argentina has failed to rebut the evidence demonstrating that it has not administered the DJAI Requirement in a reasonable, uniform manner, consistent with GATT 1994 Article X:3(a). Argentina has failed to respond to the evidence showing, among other things, that Argentine authorities act without regard to legal authorities and treat similarly situated importers with great variance in their administration of the DJAI system as detailed in Exhibit US-1.

V. THE UNITED STATES HAS ESTABLISHED A PRIMA FACIE CASE OF THE EXISTENCE OF THE RTRRS MEASURE

30. There is no separate and higher burden on a party that alleges the existence of an unwritten measure. The burden is on complainants to provide sufficient evidence the RTRRs measure exists; the United States and co-complainants have done so.

31. Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC – Large Civil Aircraft* to support a higher standard of proof for unwritten measures is misplaced. The evidence required in *US – Zeroing (EC)* must be considered in the context of that dispute. That case concerned a "rule or norm" relating to how a particular law or regulation is applied. Similarly, the panel in *EC– Large Civil Aircraft* examined the "existence of an alleged unwritten measure with 'normative value.'" It is in this context that the panel and Appellate Body stated that a "high threshold" applies. In this dispute, the measure being challenged is not a "norm or rule", but a measure in the form of a decision by Argentina to impose the RTRRs. The facts are similar to those in *EC – Biotech*. The panel observed that "[i]t is … necessary to examine in detail whether the evidence supports the Complaining Parties' assertion." In *EC – Biotech*, the panel considered the evidence and concluded it was sufficient to establish the existence of the moratorium.

32. In some cases, the only evidence necessary to establish the existence of a measure is a written instrument that promulgates it, and in others additional evidence may be required. Complainants have submitted a large volume of evidence supporting the existence of the RTRRs measure. However, the fact that a *larger volume of evidence* is often involved where a complainant challenges an unwritten measure does not mean that a *higher standard of proof* applies. The Panel must examine this evidence and evaluate whether it is sufficient to meet the complainants' burden. Considered in its totality, this evidence meets this standard.

33. Argentina argues that complainants have failed to establish a *prima facie* case because they have not demonstrated the "precise content of the alleged 'overarching' RTRR measure." Argentina bases this argument on conclusory statements about the evidence submitted in this dispute and the creation of non-existent evidentiary hurdles. The RTRR measure is the decision by high-level Argentine officials to require commitments of importers as a prior condition for permission to import goods. The RTRR measure is demonstrated by statements of Argentine officials describing the measure and a large number of sources substantiating the application of the measure across sectors and product groups. The evidence amply demonstrates its content.

34. Argentina does not discuss individual pieces of evidence, claiming generally that sources published by *La Nación* and *Clarín* and related companies are less probative because of past actions and reporting. This evidence makes up only a small portion of the evidence submitted, and Argentina has not explained how past events impact the probity of the information. Argentina has not presented any grounds for the Panel to disregard any of the evidence. As part of its analysis of the factual issues, the Panel will accord probative weight to the various pieces of evidence and determine whether complainants have established their *prima facie* case.

35. Argentina obscures the questions before this Panel when it argues that the U.S. case is deficient because it has not "demonstrated whether and to what extent the precise content of such overarching [RTRR] measure is any different than the content of the various unwritten alleged requirements that supposedly comprise it." Argentina places significance on the term "overarching," but the United States cannot discern what that significance may be, how it relates the U.S. evidentiary burden, or why it is necessary to demonstrate a "difference" between the RTRR measure and the five types of requirements.

36. Argentina further argues that complainants have failed to demonstrate that the RTRR measure "has general and prospective application." Argentina again misplaces its reliance on the evaluation of the Appellate Body in *US – Zeroing (EC)* and the Panel in *EC – Large Civil Aircraft*. Even if the United States did need to demonstrate "general and prospective application," this element would be evidenced by statements of Argentine officials and the repeated imposition across sectors of the RTRRs up to, and after, the establishment of this Panel. The United States has satisfied its burden of proof as to the existence of the RTRRs measure, and Argentina has offered no facts or legal arguments which rebut the *prima facie* case.

VI. THE RTRRS MEASURE IS INCONSISTENT WITH ARTICLES X:1 AND XI:1

37. Argentina's RTRRs are a distinct measure that causes trade restrictions, and results in a separate breach of Article XI:1. The imposition of RTRRs constitutes a "restriction" under Article XI:1 because it serves as a "limitation" on imports. In particular, Argentina limits the importation of goods on the importer's ability to export goods, make investments in Argentina, produce or source locally, limit the volume or value of imports, or repatriate profits.

38. Argentina has failed to fulfill the Article X:1 obligation to publish "promptly" and "in such a manner as to enable governments and traders to become acquainted with them," the "laws, regulations, judicial decisions and administrative rulings of general application" "pertaining to … requirements, restrictions, or prohibitions on imports …" that a Member has "made effective." The RTRRs, which pertain to "requirement, restriction or prohibition on imports …," constitute "regulations" or "administrative rulings of general application." The evidence demonstrates that Argentine officials widely apply the RTRRs to DJAI applicants and their prospective importations and also makes clear that that these unpublished rules are "of general application." The RTRRs have not been "published" in a manner that would enable governments and traders to become familiar with them. Argentine authorities made the RTRRs "effective" from at least 2010. To date, the RTRRs remain unpublished. An extended period of delay in publishing a measure does not meet the requirement of "prompt" publication.

SECOND OPENING STATEMENT

I. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

39. Argentina mischaracterizes the U.S. positions and raises irrelevant matters. Argentina implies that complainants have accepted Argentina's categorization of measures as "procedural" or "substantive" in nature. The DJAI Requirement is not merely procedural but rather is itself a restriction on the importation of goods. Moreover, there is no basis for the procedural-substantive distinction. Further, *there are no rules under* the DJAI Requirement or elsewhere that limit the discretion of Argentine officials to restrict imports through the DJAI system. Argentina has pointed to no criteria for the evaluation of a DJAI application, potential reasons for denial, or requirements for resolution of an observation in Argentina's laws. Argentina enforces the RTRRs measure by withholding approvals in the DJAI system, which demonstrates the discretionary nature of the licensing requirement. However, this does not mean that the two measures are the same. DJAI approvals may be withheld for virtually any reason, or none at all. And, compliance with RTRRs may be a prior condition for approval of other import permissions.

A. The DJAI Requirement is Subject to Article XI of the GATT

40. The U.S. claim under Article XI:1 does not relate to the "formalities" connected to the DJAI requirement, but to the fact that import transactions cannot be completed unless and until an importer receives approval, which may be withheld for non-transparent, discretionary reasons. Argentina argues that, under the U.S. interpretation of Article X1:1, "*any* burden on trade" would be a "restriction" under Article XI:1. That is not the U.S. position. The U.S. claims do not relate to "*any* burden," but rather the DJAI Requirement.

41. Argentina cites negotiating text of the trade facilitation agreement in support of its position that "formalities" are excepted from Article XI. Argentina has not explained how the trade facilitation agreement has any interpretive relevance in this dispute. Argentina's approach ignores the interaction of the provisions of the GATT 1994. Article XI is independent from the trade facilitation text. The trade facilitation provision does not speak to whether a measure amounts to a restriction within the meaning of Article XI. In addition, Argentina ignores the fact that Members can and do impose restrictions that are inconsistent with Article XI:1 but that are excepted from that provision under Article XX or another provision. Argentina's argument that Article VIII creates an exception to Article XI:1 for "formalities" is without merit.

B. Article XI:1 Does Not Require a Demonstration of "Trade Effects"

42. Argentina reiterates its novel theory that Article XI:1 requires a statistical demonstration of quantifiable trade effects to show that a measure is inconsistent with that provision. The ordinary

meaning of Article XI:1 does not support Argentina's theory. Article XI:1 states that *no … restrictions … shall be maintained*. As a number of WTO panels have found, this obligation is not limited to quantitative restrictions or those with actual trade effects.

43. Article XI:1 does *not* contain any indication that it is limited to restrictions that can be demonstrated through quantifiable effects. Article XI:2(b) carves out from Article XI:1 "prohibitions or restrictions necessary to the application of standards or regulations … ." "Standards" or "regulations" can serve as "restrictions" inconsistent with Article XI:1. But, standards and regulations are not "quantitative" or "quantifiable." The title of Article XI does not support Argentina's position, and Argentina places far too much interpretive weight on the title. In each dispute cited by Argentina, the Appellate Body or panel noted that the title was *consistent with* the interpretation of the relevant article; the title did not imbue the article with a new and different meaning.

44. Within the context of Article XI:1, including the title, a restriction is not just any burden on an import transaction. Many documentation requirements may burden trade transactions, but they do not all *limit* or *restrict*. The DJAI Requirement *does* limit or restrict trade; even where all information is submitted, permission may be withheld. This interpretation is consistent with the Appellate Body's consideration of "restriction" in *China – Raw Materials* and subsequent disputes. The Appellate Body said in *China – Raw Materials* that Article XI covers prohibitions and restrictions that have a limiting effect. The logical leap, from *China – Raw Materials*, to the conclusion that a complainant must demonstrate trade effects contradicts the findings of the Appellate Body and past panels that the enforceability of commitments in the WTO agreements does not turn on whether a Member's current trade is directly impacted.

45. Argentina has put forward Exhibit ARG-65 to support its argument that the DJAI Requirement is not having a restrictive effect on trade. This evidence is not relevant to resolving the legal issue, but in any event, the exhibit is flawed and fails to demonstrate what Argentina contends. First, the analysis fails to include an adequate assessment of the impact of the DJAI Requirement. Second, the report examines the relationship between imports and Argentine economic growth using a simple model specification which does not adequately control for other variables that could impact imports. Third, aggregate trade data is not useful for understanding how trade flows across sectors and time are impacted. Finally, Argentina's approach cannot be expected to fully demonstrate a credible impact of the DJAI Requirement on imports.

C. The Evidence Presented by the United States Establishes a *Prima Facie* Case that the DJAI Requirement is Inconsistent with Article XI:1

46. The United States has presented more than sufficient evidence to establish a *prima facie* case that the DJAI Requirement is inconsistent with Article XI:1. Argentina mischaracterizes this dispute when it states that the "principal evidence relied on by the complainants" to support the claims related to the DJAI Requirement are the surveys conducted by the U.S. Chamber of Commerce and the Government of Japan. The surveys are one element of the extensive evidence submitted by the United States. The primary evidence consists of the legal instruments establishing the DJAI Requirement, and related guidance issued by the Argentine government. This evidence alone demonstrates that the DJAI Requirement is a discretionary, non-automatic import licensing requirement inconsistent with Article XI:1 of the GATT 1994.

47. The U.S. Chamber of Commerce survey is not scientific in nature; it is an informal voluntary survey. That said, it includes responses from 45 companies across a variety of sectors which, together, applied for a minimum of 2,650 DJAI approvals. The information contained therein is probative of the experience of U.S. companies. The United States has submitted extensive additional evidence, which is consistent and mutually supportive and confirms that Argentina does use the DJAI Requirement to restrict imports.

III. THE DJAI REQUIREMENT IS INCONSISTENT WITH THE IMPORT LICENSING AGREEMENT

48. Argentina speculates that the United States has "distanced" itself from its claims under the Import Licensing Agreement. The reason that the second U.S. submission does not contain new material on these claims is that Argentina has failed to respond to the U.S. *prima facie* case. The

United States is interested in receiving findings on Articles 1.4(a), 1.6, 3.3, 3.5(f), and 5 of the Import Licensing Agreement, in addition to Article 3.2.

A. The DJAI Requirement Is an Import Licensing Procedure

49. Argentina fails to present a viable argument for why the Import Licensing Agreement does not apply to the DJAI Requirement. Argentina argues that import licensing is an administrative procedure "used for the operation of import licensing regimes" – which is "understood as the administration of quantitative restrictions or other measures similarly aimed at regulating the importation of goods." Argentina presents no textual support for this position. Even under Argentina's proposed definition, the DJAI Requirement would be subject to the Import Licensing Agreement. Argentina also argues that the Appellate Body report in *EC – Bananas III* does not support the interpretation of Article 1.1 as explained by the United States. Argentina's logic is flawed. The Appellate Body "note[d]" that Articles 3.2 and 3.3 of the Import Licensing Agreement make clear that the Agreement is not limited to quantitative restrictions but relates to other "restrictions." This finding supports the conclusion that an import licensing procedure is one that (a) requires "the submission of an application" (b) as "a prior condition for importation."

B. The DJAI Procedure Is not for Customs Purposes

50. Argentina advocates for an overly broad interpretation of those applications and documentation which are for "customs purposes." If accepted, this definition would create an exception that would swallow the rule – rendering the entire Import Licensing Agreement meaningless. The DJAI Requirement is not maintained for "customs purposes," as it is does not relate to the implementation of a *customs* law or regulation.

51. Argentina's second written submission contains assertions as to the reasons the various agencies participate in the DJAI system. These assertions are unsupported by any legal instrument or other documentation that would limit the review of the participating agencies to the reasons cited. Moreover, Argentina only purports to provide examples of the reasons agencies participate in the DJAI system. Argentina's unsupported assertions – if credited – would support the conclusion that agencies' participation in the DJAI system goes well beyond "customs purposes." Moreover, nowhere does Argentina indicate how the information collected by agencies is evaluated or for what reasons a participating agency may make an observation.

52. Finally, the World Customs Organization ("WCO") Secretariat's letter helps to confirm that the DJAI Requirement does not implement the SAFE Framework. The SAFE Framework "focuses on the security risk related to terrorism;" "aims to facilitate – as much as possible – legitimate trade;" "contains very specific time limits for the submission of advance cargo data to Customs;" and sets out "data elements strictly limited to the maximum that should be required." The DJAI Requirement does not focus on security risks related to terrorism; it does not facilitate, but rather impedes trade. "None" of the purported reasons that agencies participate in the DJAI system are "covered by the SAFE Framework as interpreted by the (majority of) Members."

IV. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE X OF THE GATT 1994

53. As regards Article X, Argentina argues with respect to the DJAI Requirement that complainants must meet novel proof standards that have no basis in the GATT 1994. Argentina asserts that complainants must demonstrate that each of the thousands of individual instances in which the DJAI Requirement has been applied to an import transaction constitutes a separate measure of "general application." Argentina's proposed legal standard is inconsistent with the ordinary meaning of Article X:1, which disciplines *inter alia* "laws, regulations [and] … administrative rulings of general application" – not their individual instances of application. The DJAI Requirement is such a measure of general application.

54. Argentina persists in misrepresenting the U.S. claim under GATT Article X:3(a), characterizing that claim as a challenge to the underlying DJAI Requirement, rather than as a challenge to the administration of that requirement. This is not correct. The U.S. claim challenges the unreasonable and non-uniform administration of the DJAI Requirement by (as substantiated in Exhibit US-1) – not the DJAI Requirement itself. Argentina has not attempted a rebuttal addressed to the U.S. showing that the DJAI requirement breaches Article X:3(a).

V. THE UNITED STATES HAS CARRIED ITS BURDEN TO ESTABLISH THE EXISTENCE OF THE RTRRS MEASURES

A. The Evidence Presented by Argentina Does Not Rebut Evidence Presented by the United States

55. Argentina appears to argue that the limited evidence it has submitted demonstrates that companies are investing in Argentina not because of the need to comply with RTRRs, but because of favorable "economic opportunities." This argument is flawed. First, Argentina relies on general statements from corporate officials regarding investment in Argentina. Such explanations do not refute the claims of the United States. The United States has identified, at Exhibit US-6, statements by company officials, and from Argentine government sources, which specifically describe the RTRRs imposed on each company discussed by Argentina. Second, Argentina overreaches in its characterization of certain public statements. Third, the statements cited by Argentina must be viewed in context. Corporate officials have an incentive to publicly emphasize the positive factors for investment in Argentina to avoid retaliatory restrictions on imports. Finally, the volume of evidence demonstrating the existence and operation of the DJAI Requirement and the RTRRs far outweighs the citations raised by Argentina.

B. There Is no Special "Higher" Burden of Proof Applicable to Unwritten Measures

56. The United States has not characterized the RTRRs as "a single overarching unwritten measure whose content consists of various other measures." There is no basis for Argentina's assertions that the United States must explain how "disparate requirements … come together to form the 'overarching measure.'" There is only one measure at issue.

57. There is no special higher burden of proof on complainants who allege an unwritten measure. It is likely that a greater *volume* of evidence is necessary to demonstrate the existence of an unwritten measure than a written measure, which in many cases may be demonstrated by a statute or regulation alone. That does not mean that there is a *higher standard of proof* or that a party must do more than present sufficient evidence to raise a presumption of the existence of that measure.

58. Not all unwritten measures are subject to the three-element evidentiary standard on which Argentina bases its argument. Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC – Large Civil Aircraft*, both of which address "norms or rules," is misplaced. Argentina cites two additional panel reports in its second written submission, *US – Zeroing (Japan)* and *Thailand – Cigarettes (Philippines)*, both of which also concern "norms or rules" of administrative application. The United States is not challenging a "norm or rule" that governs the administrative application of another measure. The facts presented in this dispute are more analogous to those in *EC – Biotech.* The panel noted that the relevant question was "whether the evidence supports the Complaining Parties' assertion." The evidence submitted by the United States in this dispute meets the *EC – Biotech* standard and establishes the existence of the RTRRs measure.

C. The United States Has Submitted Sufficient Evidence to Meet the Burden Articulated by Argentina

59. Even under the standard articulated by Argentina, the United States has submitted more than enough evidence to establish a *prima facie* case. The United States has demonstrated: (1) that the RTRRs measure is attributable to Argentina; (2) the precise content of the RTRRs measure; and (3) that the RTRRs measure has general and prospective application. It is important to note that, although the Appellate Body has noted that "[p]articular rigour is required" of panels that examine whether an unwritten "rule or norm" exists, and has proposed the three elements for determining the existence of a rule or norm where it is alleged to govern the administrative application of another measure, the Appellate Body has *not* said that there is a higher evidentiary burden on the demonstration of a *prima facie* case. Rather, the "high threshold" is the application of the three evidentiary elements and a complainant must put "forth *sufficient evidence* with respect to each of these elements" *i.e.*, evidence sufficient to establish a *prima facie* case with respect to each element.

60. The evidence in this dispute demonstrates the existence of the RTRRs measure, its enforcement through the DJAI Requirement, and the fact that both measures are restrictions within the meaning of Article XI:1. With respect to the first element, Argentina does not even argue that the measure is not attributable to Argentina. The evidence submitted by the United States fulfills the second element – it demonstrates the precise content of the RTRRs measure. Pursuant to the RTRRs measure, Argentine officials require, as a prior condition for importation, commitments to export a certain dollar value of goods; reduce the volume or value of imports; incorporate local content into products; make or increase investments in Argentina; and/or refrain from repatriating profits. This measure has "precise content." The evidence with respect to the content is summarized at Section III.B of the U.S. first written submission.

61. Argentina argues that the United States must satisfy each of the three elements with respect to each of the five requirements imposed pursuant to the RTRRs measure. However, that is not the case. In no other dispute has a panel or Appellate Body required a complainant to demonstrate separately each part of the alleged rule or norm. Argentina claims that the evidence related to the requirement that importers make or increase investments in Argentina, incorporate local content into their products, and reduce the volume or value of imports is insufficient to demonstrate they are part of the RTRRs measure. That is not the case.

62. Finally, the RTRRs measure satisfies the third element; it has general and prospective application. Argentina asserted the complainants have only provided evidence of discrete one-off actions. However, the statements of Argentine officials indicate that the measure is both general and prospective, applying broadly to all types of goods and applying into the future. The hundreds of additional exhibits provided by complainants demonstrate that the RTRRs measure applies generally across products and sectors. The prospective application of the RTRRs measure is further supported by evidence of its repeated and continuing systematic application to importers. As the Appellate Body observed, evidence of prospective application "may include proof of the systematic application of the challenged 'rule or norm'."

D. The Evidence Submitted by the United States is Sufficient in Light of Prior Disputes Applying the Standard Advocated for by Argentina

63. The evidence that the United States has submitted is, at a minimum, comparable to the evidence submitted in *US – Zeroing (EC)* and *US – Zeroing (Japan)* and far exceeds that which was submitted in *Thailand – Cigarettes (Philippines)* and *EC– Large Civil Aircraft*. Argentina argues that the evidentiary case of the United States in this dispute is weaker than that in the zeroing disputes because zeroing was applied in all instances. It also argues that it suffers from the fact that it is not based on related written procedures or contracts. Argentina would have the Panel reward it for flouting its transparency obligations. None of these arguments are persuasive; the Panel should reject them and should reject Argentina's argument that the United States has not met its burden in demonstrating the existence of the RTRRs measure.

64. Argentina makes no attempt to rebut complainants' legal claims demonstrating that the measure is inconsistent with Articles X:1 and XI of the GATT 1994. Accordingly, if the panel finds that complainants have demonstrated the existence of the RTRRs measure, the panel should also find the measure to be inconsistent with Articles X:1 and XI.

ANNEX B-5

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

FIRST WRITTEN SUBMISSION

I. FACTUAL BACKGROUND

1. In this dispute, Japan challenges two protectionist, trade-restrictive measures imposed by Argentina to stimulate domestic production, localize investment, and keep imports out: the *Declaración Jurada Anticipada de Importación* (the "DJAI Requirement") and Argentina's Restrictive Trade Related Requirements ("RTRR").

2. In order to place a purchase order or initiate a foreign exchange transaction to purchase foreign goods, importers into Argentina must first electronically submit a DJAI, which six Argentine government entities then have an opportunity to review. If any of the government entities lodges a comment (*observación*) on the DJAI, then the importer may not proceed with the import transaction until the entity decides that it is satisfied with the importer's response. There are practically no legal constraints on the government entities' discretion, and in practice DJAIs often remain in an "observed" (*observada*) status for long periods of time without explanation. As such, they have a substantial impact on importers' abilities to import their goods into Argentina in a timely, effective, and cost-efficient manner.

3. The approval of DJAIs is often conditioned on compliance with the RTRR. The RTRR is a generally applicable measure that conditions the right to import goods upon the importer's compliance with certain conditions aiming to achieve Argentina's policy of trade-balancing and import substitution.

4. The existence and operation of the RTRR have been confirmed by the Argentine government's own statements and official press releases, its communications with industry associations, numerous press reports, and industry surveys. Indeed, the evidence confirms that Argentina has applied the RTRR to major importers in several industries.

5. The imposition of trade-restrictive requirements reflects a broader protectionist turn in Argentine economic policy since the mid-2000s. In an attempt to stimulate domestic production and keep imports out, Argentina has resorted to restrictions on imports, such as the RTRR as well as several non-automatic licensing schemes used to enforce it: the DJAI Requirement and *Certificados de Importación* ("CIs").

A. DJAI REQUIREMENT

1. Overview of the DJAI and Related Legal Instruments

6. Argentina's Federal Administration of Public Revenue (*Administracíón Federal de Ingresos Públicos*, or "AFIP") issued *Resolution 3252* on 5 January 2012. *Resolution 3252* established the DJAI Requirement for all imports of goods into Argentina. The DJAI Requirement became effective as of 1 February 2012. On 20 January 2012, AFIP issued *Resolution 3255*, which sets out guidelines for managing and processing DJAI applications.

7. Under the DJAI Requirement, importers of goods into Argentina must submit certain application information on the DJAI page of AFIP's website "prior to issuance of an order form, purchase order, or similar document used to purchase items from abroad."

8. Article 2 of *Resolution 3255* provides that a submitted DJAI transitions to "observed" ("observada") status, *i.e.*, pending indefinitely, if any agency comments on the DJAI within 13 days. Six agencies have the power to submit "observations" on DJAIs: AFIP, the Secretariat of Commerce (*Secretaría de Comercio Interior*, or "SCI"), the National Administration of Medicine, Food, and Medical Technology (*Administración Nacional de Medicamentos, Alimentación y Tecnología Médica*, or "ANMAT"), the Secretariat for the Prevention of Drug Abuse and Drug

Trafficking (*La Secretaría de Programación para la Prevención de la Drogadicción y la Lucha contra el Narcotráfico*, or "SEDRONAR"), the National Services of Food Quality and Safety (*Servicio Nacional de Sanidad y Calidad*, or "SENASA"), and the National Institute of Viniculture (*Instituto Nacional de Vitivinicultura*, or "INV"). Once a DJAI becomes "observed", the DJAI applicant bears the burden of contacting each relevant agency to persuade it to withdraw its observations.

9. Resolution 3256/2012 sets out further provisions regarding the mechanism through which Argentine government agencies comment on DJAIs, and thus delay or deny approval of the DJAI. In addition, Central Bank Communication "A" 5274 prevents banks from processing purchase orders and currency exchange transactions for foreign imports unless a DJAI-based approval is obtained for the relevant import beforehand.

2. Non-Automatic Nature of the DJAI Approval Process

10. DJAIs are granted on a discretionary, non-automatic basis. *Resolution 3255* explicitly provides that participating governmental entities may suspend approval of DJAI requests by submitting an "observation" related to the DJAI. In addition, ANMAT, SEDRONAR, SENASA, and INV have not issued any explanation or information regarding the criteria they apply – as a matter of their own autonomous, agency-level policy – in determining whether to comment on DJAI submissions. Official data (as discussed in a press report), industry surveys, and anecdotal evidence all confirm that DJAIs are regularly not approved, and that the DJAI system is entirely unpredictable.

3. Scope and Purpose

11. Argentine government officials have repeatedly linked the use of the DJAI to the policy of managing trade, including through the RTRR. For example, the Secretary of Internal Commerce Guillermo Moreno stated: "When we study the DJAI, we are going to consider the balance of foreign exchange, as well as the pace of the company's prices. We will do this on a company-by-company basis. And business owners understand what the right road is." Similarly, the head of the Argentine Chamber of Importers concluded: "It is very clear to us that the government is applying a policy of administering foreign trade to seek to maintain a trade surplus and to stimulate substitution of imports with domestic production."

4. License Delays

12. In practice, the Argentine government authorities' unfettered discretion in determining whether to suspend DJAI applications has led to widespread delays in the transitioning of DJAIs from formalized status to exit status. Although the DJAI system only dates to the beginning of 2012, several court cases involving lengthy delays in DJAI applications have already appeared. Broad industry surveys similarly confirm the same facts.

B. RESTRICTIVE TRADE RELATED REQUIREMENTS ("RTRR" OR "TRADE BALANCING REQUIREMENT")

1. Overview of the RTRR

13. The RTRR require key importers to undertake certain actions in order to obtain Argentine government approval for DJAIs and license applications. As noted above, these actions include but are not necessarily limited to any of the following:

(1) export a certain value of goods from Argentina related to the value of imports;

(2) limit the volume of imports and/or reduce their price;

(3) refrain from repatriating funds from Argentina to another country;

(4) make or increase investments in Argentina (including in production facilities); and/or

(5) incorporate local content into domestically produced goods.

14. Thus, the RTRR effectively functions as a trade balancing or localization requirement. This "one-to-one" requirement entails an overwhelming burden on importers whose business is to import but not to export.

2. Local Content Requirement

15. Over the last several years, and as part of the RTRR in general, the Argentine Government has required economic operators in Argentina to incorporate local content in their products by substituting imported products with products that are or can be produced in Argentina. Sometimes the local content requirement is imposed as a condition to continue importing some products. Indeed, the local content requirement is often imposed together with other RTRR requirements, especially the one-to-one requirement. In those cases, in order to reach the necessary trade surplus, a local content requirement is also imposed to lower the level of imported products. In other cases, the local content requirement is not necessarily a condition for the importation of products but, more generally, is seen as a requirement to do business in Argentina or to benefit from tax incentives or other types of support.

3. Methods of Enforcing the RTRR

16. The Argentine government enforces the RTRR, including the local content requirement, through a variety of legal tools, including DJAIs, CIs, and other legal and paralegal means. When importers fail to comply with the RTRR, Argentina responds by denying the right to import.

a. Enforcement Through DJAIs

17. As mentioned above, Argentina requires importers to undertake certain commitments in order to obtain Argentine government approval for DJAIs. The Argentine government has explicitly connected the application of the DJAI Requirement to the RTRR. For example, Secretary Moreno has told customs brokers that importers who wish to obtain government approval for DJAIs must begin by submitting price lists and an export program/project to the Secretary of Domestic Trade. Industry surveys also confirm that companies are systematically denied the approval of DJAIs until they agree to comply with the RTRR.

b. Enforcement Through Other Import License Requirements

18. In addition to securing compliance with the RTRR by withholding the issuance of DJAIs, the Argentine government has also ensured compliance by withholding the issuance of import licensing approvals, such as CIs, a non-automatic license requirement. Until 25 January 2013, CIs were required for the importation of goods falling in over 600 tariff lines, ranging from footwear and screws to automobiles. The Argentine government's use of CIs included practically no legal constraints on the Argentine government's discretion of whether to grant or deny CI applications. In practice, the Argentine government exercised this discretion to enforce the RTRR, as Argentine government officials have confirmed on many occasions.

c. Enforcement Through Paralegal Means and Threats

19. In addition to enforcement through the DJAI Requirement that importers have to meet and other import licensing and import-related requirements, Argentina has also implemented and enforced the RTRR through other, paralegal, and non-regulatory or official means.

20. One comment made by Secretary Moreno in March 2009 is particularly telling. "For every dollar that you demand to buy goods abroad," he said, "you will have to generate another locally. If it's not convenient for you, bring me the keys to the company and I will take over." Another report notes that Secretary Moreno "once put a handgun on a conference table during a meeting to show he meant business." Indeed, the prevalence of face-to-face meetings for enforcing the RTRR requirement allows the Argentine government to communicate threats to businesses behind closed doors and makes the entire situation all the more intransparent, threatening, and confusing.

4. Application of the RTRR in Specific Sectors

21. In applying the RTRR, the Argentine government has targeted importers of foreign-origin goods, including in the automobile, auto parts, motorcycle, agricultural machinery, metallurgical, mining, publishing, electronic, audiovisual, pharmaceutical, toy, and musical instrument sectors. This is confirmed by a wide range of evidence from official government press releases, press reports in domestic and international news media, official statements of Argentine government economic policy, industry surveys, and other evidence.

II. LEGAL ANALYSIS

A. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLES XI:1, X:3(A), AND X:1 OF THE GATT 1994

22. Argentina has established the DJAI Requirement in such a way that, in its application, as well as by its very design, structure and operation, it is inconsistent with core WTO rules.

1. The DJAI Requirement Is Inconsistent with Article XI:1 of the GATT 1994

23. The DJAI Requirement is a restriction on importation within the meaning of Article XI:1 because it is a non-automatic import licensing requirement. Therefore, it is inconsistent with Argentina's obligations under Article XI:1.

24. Article XI:I of the GATT 1994 states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Previous panels and the Appellate Body have interpreted Article XI:1 broadly to cover a wide range of restrictions and have noted that discretionary or non-automatic licensing systems are by their very nature inconsistent with Article XI:1.

25. As discussed above, under the DJAI, (i) at least six agencies have authority to suspend and prevent importation and the granting of an importation license, simply by making comments; (ii) the criteria for suspension or approval of importation are not specified; (iii) no meaningful explanation must be provided to importers for either suspension of the license application or rejection; (iv) the DJAI Requirement covers all or virtually all categories of goods; (v) the actual operation of the DJAI Requirement results in substantial delays in or suspension of importation (and the law itself allows and enables such delays and suspensions); (vi) in practice, Argentine agencies and officials will often make the grant of importation rights (including through DJAIs) contingent on trade balancing, import substitution, or local content requirements, as further detailed in section II below; and (vii) there is no indication that Argentina imposes any of these requirements for any reason other than to prevent or suspend importation and trade, and to encourage local investment, trade balancing and import substitution. The operation of the DJAI Requirement in practice confirms this assessment, as it has led to frequent and lengthy delays in importation.

26. In light of the foregoing, the DJAI Requirement, by its very design, structure and operation, as well as in practice, constitutes a non-automatic import licensing measure and is thus "by its very nature" *prima facie* inconsistent with Article XI:1 of the GATT 1994. In addition, the DJAI Requirement provides for open-ended discretion to the relevant Argentina government agencies to restrict imports and is thus inconsistent with Article XI:1 of the GATT 1994.

2. The Argentine Government's Administration of the DJAI Requirement Violates Article X:3(a) of the GATT 1994

27. Article X:3(a) of the GATT 1994 prohibits the administration of laws, regulations, judicial decisions and administrative rulings of general application in any manner that is not "uniform, impartial, and reasonable". Argentina has structured the DJAI Requirement in a way that affords at least six Argentine government agencies open-ended discretion in determining whether to approve or deny DJAI applications. In practice, moreover, this is precisely what they do. As a result, Argentina administers the DJAI Requirement in a manner that is neither uniform, nor impartial, nor reasonable, contrary to Article X:3(a) of the GATT 1994.

a. Article X:3(a) of the GATT 1994 Prohibits the Non-Uniform, Partial, and/or Unreasonable Administration of the Type of Measures Described in Article X:1 of the GATT 1994

28. The scope of Article X:3(a) of the GATT 1994 covers not only acts of administering covered measures under Article X:1, but also "legal instruments" that regulate the application or implementation of such measures. The obligations of Article X:3(a) of the GATT 1994 do not apply to the substantive content of covered measures, but rather to the administration of such measures, which includes not only acts of administering such measures, but also legal instruments that regulate the application or implementation of such measures.

b. The Administration of the DJAI Requirement Is Non-Uniform, Partial, and Unreasonable

29. *Resolutions 3252/2012*, *3255/2012*, and *3256/2012*, and *Central Bank Communication "A" 5274*, require importers to obtain import approval pursuant to a DJAI in order to import goods into Argentina, and they make it possible for multiple government agencies to prevent DJAI approval or to delay it indefinitely. Moreover, they do not impose any substantive constraints on government agencies' authority to do so, nor do they impose any requirement for consistency across government agencies, or from one application to the next, with respect to the criteria for commenting on DJAI applications or withdrawing such comments.

30. Through its DJAI Requirement, the Argentine government has created a regulatory maze of unknown and unpublished regulatory requirements and discretionary authority on the part of authorized government agencies that allows it to keep imports out or allow them to enter at its and the individual agencies' discretion.

i. The DJAI Requirement as reflected in *Resolution 3255/2012* and Other Instruments is the Type of Law and/or Regulation Covered By Article X:1 of the GATT 1994

31. Article X:1 of the GATT 1994 applies to "{l}aws, regulations, judicial decisions and administrative rulings of general application" that pertain to "restrictions or prohibitions on imports." Laws and regulations of "general application" are those that "affect … an unidentified number of economic operators". *Resolution 3252/2012*, *Resolution 3255/2012*, *Resolution 3256/201*, *Central Bank Communication* "A" 5274, and *Resolution SCI 1/2012* all (i) affect an unidentified number of importers of goods into Argentina, as well as foreign exporters, and (ii) pertain to the DJAI Requirement itself, which is a restriction on imports. Consequently, the DJAI Requirement composed of these legal instruments constitutes a "law" and/or "regulation" under Article X:1 of the GATT 1994.

ii. The Legal Instruments and/or the Features of the Administrative Process Governing the Implementation of the DJAI Requirement Lead to the *Unreasonable*, *Partial*, and/or *Non-Uniform* Administration of the DJAI Requirement

32. The DJAI Requirement and the various legal instruments related to it and that implement it, result in tremendous uncertainty and unpredictability for importers. As such, the legal instruments implementing the DJAI Requirement, and/or the features of the administrative process governing the application of the DJAI Requirement, by their very nature, structure, and design, lead to unreasonable, partial, and/or non-uniform administration.

33. The DJAI Requirement and its associated legal instruments lack definitions, guidelines or standards to guide the agencies involved in their administration of the measure. Argentine government agencies, moreover, are virtually unconstrained in their discretionary authority to apply the DJAI Requirement and to make "observations", *i.e.*, impose a halt on importation of a particular product or import. As such, this necessarily leads to the *unreasonable* administration of the DJAI Requirement, inconsistent with Article X:3(a) of the GATT 1994.

34. *Resolution 3256/2012* permits a multiplicity of agencies to participate in the review of DJAIs and *Resolution 3255/2012* gives government agencies the power to suspend DJAI applications without setting out any safeguards to guarantee that the agencies will exercise their administrative power in a consistent or uniform manner. Accordingly, both the legal instruments regulating the implementation of the DJAI Requirement, and the specific features of the administrative process governing the administration of the DJAI Requirement, lead to the risk of *non-uniform* administration of the DJAI Requirement.

35. The specific legal instruments implementing the DJAI Requirement and the DJAI-related administrative process also result in the *partial* administration of the law, not only (i) for all of the reasons mentioned above with respect to the lack of uniformity and reasonableness in the DJAI Requirement's administration; but also (ii) because Argentina administers the DJAI Requirement in a manner that systematically favors parties that comply with the RTRR.

3. Argentina's Failure to Publish the Laws, Regulations, Judicial Decisions, and Administrative Rulings Pertaining to the DJAI Requirement Is Inconsistent with Article X:1 of the GATT 1994

a. The Criteria for Deciding Whether to Comment on DJAI Applications, and Whether to Withdraw Such Comments, Fall Within the Scope of Article X:1

36. Article X:1 applies to laws, regulations, judicial determinations, and administrative rulings affecting an unidentified number of economic operators. The criteria according to which the DJAI are commented on and according to which such comments are withdrawn, affect an unidentified number of economic operators, because they determine whether and how quickly the importation of any good will be permitted under Argentine law. Therefore, they fall within the scope of Article X:1.

b. The Criteria for Deciding Whether to Comment on DJAI Applications, and Whether to Withdraw Such Comments, Have Not Been "published promptly in such a manner as to enable governments and traders to become acquainted with them."

37. Of the six agencies involved, five have not published any documents whatsoever that might illuminate the criteria they apply to DJAI applications. This is the case for SCI, ANMAT, SEDRONAR, SENASA, and INV. There is no legislative or other, broader, government guidance on this issue either. Although the DJAI User Manual issued by AFIP lists thirteen codes that may be displayed when a DJAI application is commented on, these codes are so vague as to be uninformative. Finally, the government of Argentina requires the submission of a *nota de pedido* in parallel with the DJAI application, even though no formal law or regulation mentions this requirement.

B. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLES 1.3, 1.4(A), 1.6, 3.2, 3.3, 3.5(F), 5.1, 5.2, 5.3 AND 5.4 OF THE ILA

1. The DJAI Requirement is a Non-Automatic Import Licensing Procedure Under Article 1.1 of the ILA

38. The procedures that Argentina uses for the operation of the DJAI Requirement "require the submission of an application or other documentation … as a prior condition" for importation into Argentine customs territory. Therefore, the DJAI Requirement falls squarely within the definition of Article 1.1, and thus, subject to the provisions of the ILA.

39. Argentina does not grant approval of DJAI applications in all cases and the maximum time period that Argentina takes to approve DJAI applications exceeds 10 working days. Therefore, the DJAI Requirement is properly characterized as a non-automatic import licensing procedure, and it is subject to the provisions of Article 3 of the ILA. Furthermore, the application and other documentation required to fulfill the DJAI Requirement is not "required for customs purposes" and therefore is not of the type excluded from the definition of "import licensing" in the ILA.

2. Argentina Administers the DJAI Requirement in a Manner That Is Inconsistent with Article 1.3 of the ILA

40. Argentina fails to administer the DJAI Requirement in a uniform, impartial and reasonable manner under Article X:3(a) of the GATT 1994. For those same reasons, and consistent with the Appellate Body, the DJAI Requirement is also inconsistent with Article 1.3 of the ILA.

3. Argentina Administers the DJAI Requirement In A Manner That Is Inconsistent With Article 1.4(a) of the ILA

41. Article 1.4(a) requires Members to publish "rules and all information concerning procedures for the submission of applications … in such a manner as to enable governments and traders to become acquainted with them." In addition, the publication must be performed in "sources notified to the Committee on Import Licensing".

42. Argentina has failed to publish the criteria for determining the eligibility of particular goods and/or exporters for DJAIs and has not notified any publications relevant to DJAIs to the Committee on Import Licensing. For both reasons, therefore, Argentina has breached Article 1.4(a) of the ILA.

4. Argentina Administers the DJAI Requirement in a Manner That Is Inconsistent with Article 1.6 of the ILA

43. The DJAI Requirement is inconsistent with Article 1.6 of the ILA application procedures because the procedures are not "as simple as possible," given that importers may need to approach more than three government bodies to remedy comments on DJAIs.

5. Argentina Administers the DJAI Requirement in a Manner That Is Inconsistent with Article 3.2 of the ILA

44. The design, structure and operation of the DJAI Requirement have created tremendous uncertainty for foreign exporters and Argentine importers. Argentina's failure to institute any safeguards limiting agencies' discretion to decide whether to approve DJAI applications, and the complete lack of transparency surrounding the entire process have distorted and restricted imports. Accordingly, the DJAI Requirement has trade-restrictive or distortive effects on imports, and only this fact is enough to be "additional to those caused by the imposition of the restriction" under Article 3.2 of the ILA.

6. Argentina Administers the DJAI Requirement in a Manner That Is Inconsistent with Article 3.3 of the ILA

45. Argentina has not imposed explicit quotas for imports of all of the goods subject to the DJAI Requirement. Therefore, pursuant to Article 3.3, Argentina has an obligation to publish sufficient information with respect to the DJAI Requirement for other Members and traders to know the basis for granting and/or allocating DJAIs, which it has failed to do. Consequently, the DJAI Requirement is inconsistent with Article 3.3 of the ILA.

7. Argentina administers the DJAI Requirement in a Manner That Is Inconsistent with Article 3.5(f) of the ILA

46. Under Article 3.5(f), the default time limit to consider non-automatic license applications is 30 days, but a 60-day time limit may apply if all applications are considered simultaneously and there is an announced "application period" with a specific closing day.

47. In the case of the DJAI Requirement, the 30-day time limit applies because applications are not considered simultaneously, nor is there an announced "application period". Because Argentina frequently fails to abide by this time limit, it has administered the DJAI Requirement in a manner that is inconsistent with Article 3.5(f) of the ILA.

8. Argentina Administers the DJAI Requirement in a Manner That Is Inconsistent with Articles 5.1, 5.2, 5.3, and 5.4 of the ILA

48. Argentina has failed to comply with the requirements of Articles 5.1, 5.2, 5.3, and 5.4 of the ILA because it has never notified the DJAI Requirement or the associated regulations implementing the Requirement to the Committee on Import Licensing, despite the fact that it is a non-automatic licensing requirement within the meaning of the ILA.

C. ARGENTINA'S RESTRICTIVE TRADE RELATED REQUIREMENTS ("RTRR") IS INCONSISTENT WITH ARTICLES XI:1, III:4 AND X:1 OF THE GATT 1994

49. The RTRR, including the local content requirement it specifically imposes, is inconsistent, both *as such* and *as applied*, with Articles XI:1, III:4 and X:1 of the GATT 1994.

1. The RTRR Is Inconsistent with Article XI:1 of the GATT 1994

50. As discussed above, Article XI:1 of the GATT 1994 broadly prohibits restrictions on importation. The prohibition extends to measures like the RTRR that make the right to import contingent on export performance, domestic investment, and the satisfaction of other limiting conditions.

51. The RTRR requirements, both on their own and collectively, operate as practical thresholds on the importer's ability to import. In addition, they function as a disincentive to importing by increasing the financial and bureaucratic burden on importing, for example through the use of trade balancing requirements and the requirement to navigate the DJAI application and observation process. Thus, Argentina's RTRR violates Article XI:1 both *as such* and *as applied*.

2. The RTRR Is Inconsistent with Article III:4 of the GATT 1994

52. To determine whether Argentina's RTRR is inconsistent with Article III:4 of the GATT 1994, it is necessary to examine whether (1) the goods at issue are like products, (2) the RTRR constitutes a "law, regulation or requirement"; (3) the RTRR affects the internal sale, offering for sale, purchase, transportation, distribution or use of imported products; and (4) imported products are accorded less favorable treatment than the treatment accorded to like domestic products. The answer to all four questions is yes. Thus, the RTRR, as well as the local content requirement that it incorporates and reflects, insofar as they impose limitations on the use of imported products, are contrary to Article III:4.

a. Argentina's Measures Satisfy the Like Product Requirement

53. It is well established in WTO jurisprudence that measures distinguishing between goods solely on the basis of national origin satisfy the "like product" requirement. Under the RTRR and the local content requirement it embodies, the Argentine government makes the granting of importation rights conditional on, *inter alia*, the purchase of domestically produced goods. This requirement is based exclusively on the products' origin. Thus, the goods manufactured in Argentina and imported from elsewhere are like products within the meaning of Article III:4 of the GATT 1994.

b. Argentina's Measures Constitute "Requirement[s]"

54. Panels interpreting Article III:4 have stated that the term "requirement" encompasses not only conditions that are mandatory, but also conditions whose fulfillment is necessary to obtain a commercial advantage.

55. Under the RTRR, and the local content requirement in particular, companies that want to obtain the right to import goods into Argentina must agree to undertake certain actions such as limiting the volume of their imports, reducing their prices, or incorporating local content into the goods they produce in the country. Even if one characterizes these commitments towards the government as conditions that importers "voluntarily" accept in order to obtain the "advantage" of being permitted to import, they constitute a "requirement" within the meaning of Article III:4 of the GATT 1994.

c. Argentina's Measures Affect the Internal Sale of Goods

56. Panels and the Appellate Body have interpreted this criterion as applying to measures which, like Argentina's RTRR, require the purchase of domestically produced goods.

57. Argentina's RTRR influences domestic manufacturers' choice between imported and domestic input products, because only domestic products count towards the RTRR, and purchases of domestically produced goods do not need to be offset with exports, purchases of local content, etc. Thus, the RTRR, and the local content requirement, adversely modify the conditions of competition between domestic and imported goods, and therefore affect the internal sale of goods.

d. Under Argentina's Measures, Imported Products Are Accorded Less Favorable Treatment Than Domestic Products

58. By setting local content targets as a condition to operate in Argentina or to have access to an advantage, the Argentine government alters the conditions of competition in Argentina, negatively affecting the possibilities for imported products to be used in Argentina.

59. First, Argentina's measures impose a burden on purchasers of goods only to the extent that they purchase imported goods, *i.e.*, they tilt the competitive landscape in favor of domestic products, because purchases of domestically produced goods do not need to be offset with exports, local investments, refraining from repatriating currency, etc. Second, Argentina's measures tilt the competitive landscape in favor of domestic products by conferring import "credits" for purchases of domestically produced goods, but not foreign goods. Thus, for example, firms that already import certain goods but are making a purchasing decision about other types of goods would prefer to purchase domestic rather than foreign-origin goods, because only domestic goods would enable the company to offset imports and thus continue importing. Both aspects modify the conditions of competition in favor of domestically produced goods, in violation of Article III:4. Moreover, this conclusion is confirmed by Paragraph 1(a) of the Illustrative List of the TRIMs Agreement, which provides that measures like local content requirements are inconsistent with Article III:4 of the GATT 1994.

3. Argentina's Failure to Publish the RTRR Promptly in Such a Manner as to Enable Governments and Traders to Become Acquainted with Them Is Inconsistent with Article X:1 of the GATT 1994

60. There are two relevant questions that a panel must address in determining whether a particular measure is consistent with Article X:1: (i) does the measure fall within the scope of Article X:1, and (ii) if so, has it been published promptly in such a manner as to enable governments and traders to become acquainted with them. For the RTRR, the answer to (i) is yes, and the answer to (ii) is no.

61. The RTRR falls within the scope of Article X:1, as interpreted by panels and the Appellate Body. At a minimum, the RTRR constitutes the "exercise of influence" by Argentine administrative bodies, because Argentine administrative authorities induce or guarantee compliance with the RTRR through the allocation of importation rights.

62. In addition, Argentina has failed to publish the RTRR in "such a manner as to enable governments and traders to become acquainted with them." Moreover, Argentina has also failed to publicly articulate the methods it uses to enforce the RTRR. Rather, Argentina often avoids the strictures of Article X:I by communicating the RTRR to individual companies verbally, thus avoiding

public scrutiny to some degree. For all of these reasons, Argentina's adoption and maintenance of the RTRR is inconsistent with Article X:1.

III. CONCLUSION

63. For the reasons set out above, Japan respectfully requests the Panel to find that the DJAI Requirement is inconsistent with Articles XI:1, X:3(a) and X:1 of the GATT 1994, and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the ILA, and that the RTRR, both *as such* and *as applied*, is inconsistent with Articles XI:1, III:4, and X:1 of the GATT 1994.

ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING

I. ARGENTINA FAILS TO REBUT JAPAN'S *PRIMA FACIE* CASE THAT THE DJAI REQUIREMENT IS WTO-INCONSISTENT, BOTH *AS SUCH* AND *AS APPLIED*

1. Japan's First Written Submission established a *prima facie* case that the DJAI Requirement is inconsistent with Articles XI:1 and X:3(a) of the GATT, as well as numerous provisions of the Import Licensing Agreement (ILA). Argentina responds with two arguments: First, Argentina advances the *factual* argument that the DJAI Requirement is an "advance electronic information procedure" adopted in conformity with the WCO SAFE Framework standards and best practices. Second, Argentina advances the *legal* argument that the DJAI Requirement falls under Article VIII of the GATT, and therefore cannot fall under any of the other provisions of the GATT or the ILA that the Complainants have invoked. Neither of these two arguments is persuasive.

A. THE DJAI REQUIREMENT IS DESIGNED AND FUNCTIONS AS A NON-AUTOMATIC IMPORT LICENSE REQUIREMENT

2. The DJAI Requirement is designed and functions as a discretionary, non-automatic import licensing requirement, and its trade restrictive effects have been widely reported in the press. It is a general condition for the importation of goods into Argentina. Upon submission of a DJAI through Argentina's MARIA information system, no less than six Argentine government agencies have the opportunity to review and submit comments on the DJAI within 15 days. Nothing constrains their decision to comment, other than the laws providing their general agency-wide mandates (which do not address DJAIs specifically). Agency comments automatically trigger the indefinite suspension of DJAI approval, which amounts to an indefinite suspension of the right to import the good. The burden is on the importer to remedy the situation by attempting to persuade the relevant government agency to withdraw its comment, and there are no clear guidelines governing this process.

3. Argentina does not contest any of these or most other facts on the record. Rather, Argentina seeks to shift the focus of the conversation to an issue that is essentially irrelevant: the WCO SAFE Framework. In truth, however, the SAFE Framework is an international set of guidelines to facilitate customs-to-customs cooperation in identifying and inspecting shipments that may pose national security risks. It has nothing to do with the problematic features of the DJAI Requirement, which is a far cry from the discretionary, trade-restrictive DJAI Requirement. Japan has no concerns with the WCO SAFE Framework itself.

B. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARGENTINA'S OBLIGATIONS UNDER ARTICLE XI:1 GATT AND THE ILA

4. Argentina argues that the DJAI Requirement is subject to Article VIII of the GATT and, *therefore*, cannot also be subject to Article XI:1. Argentina also argues that, to the extent that the DJAI Requirement is an import license requirement and quantitative restriction, Article XI:1 of the GATT does not apply – says Argentina – because the ILA is a *lex specialis*. However, an analysis of the WTO agreements confirms that Argentina's reading of the relevant provisions is fundamentally flawed.

5. Under the text of Article XI:1, *any* prohibition or restriction on importation or exportation falls within the ambit of Article XI:1 unless it is a "duty, tax, or other charge[]". In other words, the only limitation or exception specifically contained in Article XI:1 is that they cannot be duties, taxes, or other charges. The DJAI Requirement is not a duty, it is not a tax, and it is not another type of charge, and therefore, by the plain language of Article XI:1 itself, it falls under Article XI:1 as long as it is a "prohibition[] or restriction[] … on the importation of any product or … the exportation or sale for export of any [such] product …". Therefore, it is subject to, and inconsistent with, the disciplines of Article XI:1.

6. In addition, the DJAI Requirement is subject to the ILA. There are two criteria for determining whether a measure is subject to the ILA: (i) whether it is an administrative procedure for the operation of import licensing regimes, and (ii) whether it entails the submission of documentation to an administrative body, other than that required for customs purposes, as a prior condition for importation. The DJAI Requirement satisfies both criteria.

7. Furthermore, neither Article XI:1 nor the ILA contains any indication that the two are mutually exclusive, as Argentina incorrectly argues. Indeed, the text of the ILA itself contradicts this proposition. Argentina's interpretation is further undermined by the case law, and by its misunderstanding of the *lex specialis* principle. In fact, this principle is triggered where two laws *conflict*, but it need not be invoked otherwise. In this case, Article XI:1 and the ILA overlap but do not conflict, and therefore the *lex specialis* principle does not apply.

II. ARGENTINA HAS FAILED TO REBUT JAPAN'S ARGUMENTS REGARDING THE RTRR

8. Like the DJAI Requirement, the RTRR is also inconsistent with several provisions of the GATT. The RTRR requires economic operators to satisfy one or more of the following five conditions in order to obtain approval of imports:

(1) exporting a certain value of goods from Argentina related to the value of imports;

(2) limiting the volume of imports and/or reducing their price;

(3) refraining from repatriating funds from Argentina to another country;

(4) making or increasing investments in Argentina (including in production facilities); and/or

(5) incorporating local content into domestically produced goods.

9. To implement the RTRR, Argentina uses and has used a variety of different legal instruments, including not only DJAIs but also *Certificados de Importación* (CIs), another variety of non-automatic license that Argentina eliminated shortly before the establishment of this Panel, as well as other legal and paralegal means. Argentina has applied the RTRR to major importers in several industries, including importers and manufacturers of automobiles, auto parts, motorcycles, agricultural machinery, retail apparel, books and other publishers, and the metallurgical industry.

10. These requirements severely constrain the ability of importers to import goods into Argentina and create enormous uncertainty and unpredictability in the marketplace. The RTRR requirements, both on their own and collectively, operate as practical thresholds on the importer's ability to import. Moreover, through its local content and import substitution requirements in particular, the RTRR violates Article III:4 of the GATT as well.

11. Rather than responding substantively to these arguments, Argentina accuses the Complainants of relying on two media sources, *La Nación* and *El Clarín*, whose owners and/or managers allegedly have an anti-government bias, engage in monopolistic practices, and have even been involved in "crimes against humanity." Argentina also accuses the Complainants of citing "quotes and statements intended to discredit and insult public officials of different ranks."

12. To be clear, Japan does not have the "political intent" that Argentina imputes to it. The history of this dispute demonstrates that Japan's interest lies not in attacking the Argentine government, but in achieving a mutually acceptable solution involving the removal of Argentina's import restrictions – the DJAI Requirement and the RTRR. Furthermore, the two news sources that Argentina accuses of having an anti-government bias account for only 17 of these 734 exhibits provided by Japan. Moreover, the content of these news stories is corroborated by other evidence from domestic and international press reports and other types of evidence. Argentina has not contested the accuracy of any of this evidence thus far.

13. Japan did, as Argentina observes, submit evidence that relates to the conduct of certain high-ranking officials. Japan believes that such evidence demonstrates and helps confirm the nature, structure, and overall design and objectives of the RTRR measure. Furthermore, such evidence confirms that the RTRR is authorized by the top levels of the Argentine government.

III. ARTICLES X:1 AND X:3(A) GATT

14. Japan's First Written Submission explains that Argentina has acted inconsistently with Articles X:1 and X:3(a) of the GATT through the imposition of the DJAI Requirement and the

RTRR. These shortcomings point to a general lack of transparency that Argentina continues to exhibit through its arguments and litigation tactics in this dispute.

15. With respect to the DJAI Requirement, the criteria for determining whether to comment on DJAI applications, and whether to withdraw such comments, are rules of general application, as they apply to all importers and all imported goods. Argentina has failed to publish these criteria, and therefore has acted inconsistently with Article X:1. In response, Argentina attempts to defend its failure to be transparent by its own lack of transparency, arguing that the criteria used to grant or deny DJAIs are in fact not "universal" but rather vary according to the "nature of the goods concerned and the agency's regulatory authority." Argentina fails to explain precisely what it has in mind in making this statement, but in any event it is Argentina's burden to identify any such facts and explain how they are supposedly relevant.

16. Japan's First Written Submission also explains that the administration of the DJAI Requirement is inconsistent with Article X:3(a) both *as such* and *as applied*. Under the DJAI Requirement, Argentine government agencies have open-ended discretion to determine whether to approve or deny DJAI applications. Argentina responds by arguing that Japan's claims refer "to substantive rules" rather than "the administration of rules of general application." However, the Appellate Body has stated that the term "administration" as used in Article X:3(a) includes not only the act of administering the measures described in Article X:1, but also legal instruments that regulate the application or implementation of such measures. It also held that the features of an administrative process governing the application of laws and regulations described in Article X:1 may constitute relevant evidence for making a case under Article X:3(a). Accordingly, Japan's claims under Article X:3(a) properly target the legal instruments through which Argentina administers the DJAI Requirement, and the features of the administrative process governing the application of the DJAI Requirement.

17. With respect to the RTRR, Japan's First Written Submission explains that Argentina's failure to publish the Requirements and the consequences for not satisfying them is inconsistent with Article X:1. Argentina has so far responded only with silence.

18. Overall, Argentina's approach with respect to both the DJAI Requirement and the RTRR simply reconfirms and further emphasizes the very lack of transparency that is at the core of this dispute. Argentina meanwhile has not provided any contrary evidence as to RTRR. Argentina has not denied that it has made any of the requirements related to the RTRR to individual companies, neither has it denied that it has concluded agreements related to the RTRR with individual companies.

ANNEX B-6

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

SECOND WRITTEN SUBMISSION

I. INTRODUCTION

1. The measures challenged in this dispute have transformed Argentina into one of the most difficult places for importers and other traders to operate. According to press reports, the DJAI Requirement and the RTRR have led to severe supply chain shortages, layoffs, and an endless sequence of agreements between the Argentine government and importers to offset imports with exports, investments, price-decreases, etc.

2. A range of other domestic and international press reports all confirm that Argentina is restricting imports across the board by means of the DJAI Requirement – and to the extent that it deliberately lifts these restrictions, it is to reward compliance with the RTRR.

3. The Complainants have submitted more than 750 exhibits, which go well beyond the evidentiary standard required to establish a *prima facie* case that the DJAI Requirement and the RTRR are WTO-inconsistent. Moreover, Argentina has so far decided not to attempt to rebut this body of evidence with additional evidence, nor has Argentina even denied its accuracy.

4. One of the main themes in Argentina's defense is that it attempts to turn its own lack of transparency against the Complainants. In particular, Argentina faults the Complainants for not providing evidence that is in its sole possession. However, Argentina is the party that should provide this evidence to the Panel – and if it persists in its refusal to do so, then the Panel can infer that such evidence, if provided, would confirm the claims that Complainants have already substantiated through other evidence.

II. SCOPE OF THE FINDINGS SOUGHT

5. This dispute involves two measures: (i) the DJAI Requirement; and (ii) the Restrictive Trade Related Requirements (RTRR).

6. Japan has previously stated that it is seeking separate *as such* and *as applied* findings that the RTRR is inconsistent with Articles III:4, X:1, and XI:1 of the GATT 1994. With respect to the DJAI Requirement, Japan is not seeking separate *as such* and *as applied* findings. Rather, Japan is seeking findings that the measure *as such* is inconsistent with Articles XI:1, X:3(a), and X:1 of the GATT 1994, and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the ILA.

7. It is in the interest of an effective resolution of this dispute for the Panel to issue separate findings on each of these claims. If the Panel were only to address some claims but not others, this could hamper the Appellate Body's ability to complete the analysis on appeal and could jeopardize or be interpreted by Argentina to jeopardize Complainants' ability to ensure that Argentina complies with the DSB's eventual recommendations and rulings.

A. JAPAN'S REQUEST FOR *AS SUCH* AND *AS APPLIED* FINDINGS WITH RESPECT TO THE RTRR

8. Panels and the Appellate Body can make findings against measures *as such*, and such findings have important implications for a Member's obligations to ensure compliance with the DSB's recommendations and rulings. Japan specifically requests the Panel to issue three different sets of findings regarding the RTRR: (i) findings against the RTRR as an unwritten rule or norm as such; (ii) findings against the RTRR as an unwritten practice or policy, as confirmed by the systematic application of the measure; and (iii) findings against individual applications of the RTRR, as outlined in Japan's and the other Complainants' submissions.

B. JAPAN'S REQUEST FOR FINDINGS AGAINST THE DJAI REQUIREMENT

9. Japan also requests that the Panel make findings that the DJAI Requirement *as such* is inconsistent with Articles XI:1, X:3(a), and X:1 of the GATT 1994, and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the ILA. Such findings would obligate Argentina to eliminate the requirement to obtain a DJAI in order to import goods into Argentina.

10. It is important to issue recommendations and rulings with respect to both the RTRR and the DJAI Requirement, so as to create a clear compliance obligation for Argentina to both (i) allow companies to import freely, without having to offset imports through exports, domestic investment, import substitution, etc.; and (ii) to remove any elements of the DJAI Requirement that make it non-automatic and/or discretionary.

III. EVIDENTIARY ISSUES

11. Complainants' First Written Submissions established that the DJAI Requirement subjects imports to a non-automatic licensing procedure, in which multiple Argentine government authorities have open-ended discretion in delaying and/or denying DJAIs. In addition, the Complainants established that Argentina imposes the RTRR, a general and prospective measure, by concluding *ad hoc* agreements with individual economic operators, as a condition for them to import goods into Argentina. The Complainants have also established that the DJAI Requirement has trade-restrictive effects independent of the RTRR, and that the RTRR is implemented through tools other than the DJAI.

12. All of these facts are further confirmed by Argentina's responses and non-responses to the Panel's questions. For example, Argentina's response to Question 23 indicates that nine Argentine government entities failed to identify whether (i) more than 9 entities may make observations in the DJAI procedure; (ii) the reasons why the 9 entities identified or any other Argentine government agencies may place an observation; (iii) the specific provision in the relevant legal instruments that explains the reasons for an observation to be filed by each of these entities; and (iv) the specific information required by these entities to lift an observation. Argentina has also failed to provide any substantive response to Questions 13-14, 16-18, and 26.

13. In light of Argentina's refusal to provide the information requested by the Panel, the Panel may infer that the evidence submitted by the Complainants, and referred to in the Panel's questions, is entirely accurate, and would if submitted confirm the existence and general and prospective nature of the RTRR. The Panel may also infer that any information that is absent or is not clearly specified in Argentina's responses to the Panel's questions means that the information does not exist, and thus (i) more than 9 Argentine government entities may make observations in the DJAI procedure; (ii) the 9 entities identified, and any other Argentine government involved in the DJAI process, may place an observation for any reason whatsoever; (iii) there are no specific provisions in the relevant legal instruments that explains the reasons for an observation to be filed by each of these entities; and (iv) there is no limitation on the specific information required by these entities to lift an observation.

A. CONTINUED APPLICATION OF THE DJAI REQUIREMENT

14. Argentina continues to apply the DJAI Requirement to restrict imports. For example, in an interview on 17 July 2013, Aquiles Guillermo Arús, an Argentine customs broker, described that approximately 30% of DJAIs overall are being approved, and all sectors of the economy are affected. Importers state that the DJAI Requirement is part of the Argentine government's broader policy of import substitution, which previously was implemented through the CI Requirement.

B. CONTINUED APPLICATION OF THE RTRR

15. Argentina has also continued applying the RTRR in an effort to promote its policies of balancing trade deficits and import substitution. For example, in September, Secretary of Internal Commerce Guillermo Moreno began denying DJAIs for imports of agrochemicals and raw materials for processing them. Also, within the past year and a half, Secretary Moreno has asked executives in the agrochemical business to submit plans to offset their imports. In addition, the Argentine government has continued pursuing its policy of import substitution in the hydrocarbon exploration and refining sector and the automobiles and auto parts sectors.

C. BURDEN OF PROOF AND POSSESSION OF RELEVANT GOVERNMENT DOCUMENTS

16. A key issue in this dispute is which party has the burden to provide the documents that are responsive to the Panel's Questions 16-19 and 26. These documents corroborate other evidence already before the Panel showing the content of the RTRR, its attribution to the government of Argentina, and its general and prospective nature.

17. The Appellate Body has recognized that when one party has relevant evidence in its sole possession, the burden to provide that evidence must fall to that party. In this particular dispute, the information requested by the Panel is either in the sole possession of Argentina or, where it is not, Complainants have already diligently exhausted all means to acquire it and provide it to the Panel. Complainants have also demonstrated that there is a legitimate limit to information that they are able to provide, because individual economic operators have a legitimate concern about retaliation at the hands of the Argentine government. Such information is of the type that "a party cannot reasonably be expected" to adduce.

18. Argentina has failed to provide the requested information, but has not identified any justifiable cause. It is clear that Argentina does have direct possession of the information and does not have, nor has it claimed to have, any legitimate excuse not to provide it. It is thus Argentina's burden to provide the information – and its failure to do so only confirms the Complainants' *prima facie* case.

IV. ARGENTINA HAS FAILED TO REBUT JAPAN'S *PRIMA FACIE* CASE AGAINST THE DJAI REQUIREMENT

19. In its First Written Submission, Japan established a *prima facie* case that the DJAI Requirement was inconsistent with Articles XI:1, X:3(a), and X:1 of the GATT 1994, and that Argentina administers the DJAI Requirement in a manner that is inconsistent with Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the ILA. The DJAI functions as a non-automatic, highly discretionary license requirement that restricts importation. Therefore, it is *per se* inconsistent with Article XI:1 of the GATT 1994.

20. Argentina does not attempt to argue that the DJAI Requirement satisfies the requirements of Article XI:1 of the GATT 1994 or of the ILA. Rather, Argentina argues that customs formalities are subject only to the disciplines of Article VIII of the GATT 1994. However, Argentina's arguments fail to demonstrate that the DJAI Requirement is WTO-consistent.

A. THE DJAI REQUIREMENT IS SUBJECT TO – AND INCONSISTENT WITH – ARTICLE XI:1 OF THE GATT 1994

21. The DJAI Requirement is inconsistent with Article XI for two reasons: (i) it functions as a discretionary, non-automatic import license requirement, and (ii) it inherently creates open-ended discretion and uncertainty in the DJAI process, which not only leads to a denial of DJAI applications but also deters importers from applying at all.

22. Argentina attempts three counterarguments: (i) that Japan's argument would improperly allocate the burden of proof; (ii) that Article VIII shields the DJAI from review under Article XI, and (iii) that the DJAI Requirement is exempt from Article XI because it is a licensing procedure. However, all three attempted counterarguments fail.

1. It is Argentina's burden to establish any Article XX defense that it might invoke – not the Complainants' burden to establish that no such defense applies

23. Japan challenges the DJAI, which is an open-ended, discretionary, non-automatic import licensing procedure. If a Member imposes an import formality or requirement that constitutes a "non-automatic licensing requirement" or otherwise restricts imports, such a measure is inconsistent with Article XI:1. At that point, the Responding Member will bear the burden of establishing any affirmative defense, including under Article XX(d).

24. In this case, given that the DJAI Requirement violates Article XI, it is Argentina's burden to establish that it is nonetheless GATT-consistent by invoking an affirmative defense. Furthermore, the Complainants have established a *prima facie* case that the DJAI Requirement violates Article XI:1 of the GATT 1994. Therefore, it is up to Argentina to invoke any affirmative defense and bear the burden to establish a *prima facie* defense in that respect. Argentina has not done so, and indeed has not even invoked Article XX. Therefore, Argentina fails to rebut Japan's *prima facie* case that the DJAI Requirement is inconsistent with Article XI:1.

2. Article VIII does not shield the DJAI Requirement from review under Article XI:1

25. Argentina argues that Articles XI:1 and VIII are mutually exclusive, with customs formalities falling under Article VIII. Argentina argues further that the DJAI Requirement is a customs formality, so it falls under Article VIII rather than Article XI:1. However, these assertions are wrong, as is evident from the text of these two provisions, as well as evidence regarding the nature of the DJAI Requirement.

a. Articles XI:1 and VIII are not mutually exclusive.

26. The text of Articles XI and VIII shows that they in fact have overlapping coverage. Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions "other than duties, taxes, or other charges". This ban specifically covers not only "quotas" but also "import [and] export licenses" – two terms to which the text of Article XI:1 specifically refers. Moreover, the inclusion of the term "other measures" means that, under the text of Article XI:1, *any* prohibition or restriction on importation or exportation falls within the ambit of Article XI:1 unless it is a "duty, tax, or other charge[]".

27. Argentina argues that customs formalities are *a priori* excluded from the scope of Article XI:1. Such an interpretation has no basis in the treaty text, which does not distinguish between substantive rules and procedures. It would also lead to a dangerous imbalance between the GATT's treatment of "fees and charges" connected with importation and exportation on the one hand, and its treatment of "formalities and requirements" connected with importation and exportation on the other.

b. Even if Articles VIII and XI were mutually exclusive, the DJAI Requirement would fall under Article XI, because – contrary to Argentina's assertions – it is not a customs formality

28. Argentina is wrong to characterize the challenged measure as a customs formality. Argentina's argument starts from the false premise that the challenged measure is the "DJAI procedure," as opposed to the DJAI Requirement. However, the Complainants' Panel Requests identify the DJAI Requirement as the challenged measure, and the Panel's terms of reference are defined accordingly.

29. Argentina's invocation of the WCO SAFE Framework ("SAFE") only shows how far removed the DJAI Requirement is from customs formalities. Whereas SAFE provides for automated, security-based screening mechanisms of international cargo shipments, DJAIs are granted on a non-automatic, discretionary basis, at the whims of six or more government agencies. Whereas SAFE provides for inspection of potentially risky cargo in the least intrusive manner possible, the DJAI Requirement uses the bluntest, most trade-restrictive approach. Therefore, even if, as a legal matter, customs formalities fall under Article VIII but not Article XI – which is incorrect – this would be irrelevant, because the DJAI Requirement is not a customs formality, but rather a tool for administering Argentina's policy of restricting imports, trade balancing, and import substitution, both in and of itself, and also in support of and through the RTRR.

3. There is no exemption from Article XI for import licensing procedures

30. Argentina argues in the alternative that if the DJAI Requirement is not a mere customs formality, then it is a licensing procedure rather than a substantive rule restricting importation. Furthermore, Argentina argues that Article XI:1 does not apply to such procedures, by virtue of the *lex specialis* principle and the ILA. However, Argentina's syllogism relies on two false premises: (i) that the Article XI:1 analysis should be driven by Argentina's proposed rule/procedure

distinction; and (ii) that the ILA and the GATT 1994 conflict. Accordingly, Argentina's argument in the alternative fails.

B. THE DJAI REQUIREMENT IS SUBJECT TO – AND INCONSISTENT WITH – THE ILA

31. Japan made a *prima facie* case that the DJAI Requirement is inconsistent with multiple provisions of the ILA. In response, Argentina has not mounted any specific arguments or defenses under any of the specific provisions of the ILA that Japan and the other Complainants have invoked. Rather, Argentina argues that the DJAI Requirement is not subject to the ILA, because it is not a license requirement. However, this argument is incorrect.

1. The DJAI Requirement Is an Import Licensing Procedure Subject to the Import Licensing Agreement

32. There are two criteria for determining whether a measure is subject to the ILA: (i) whether it is an administrative procedure for the operation of import licensing regimes, or a similar administrative procedure, and (ii) whether it entails the submission of documentation to an administrative body, other than that required for customs purposes, as a prior condition for importation. The DJAI satisfies both criteria, and thus is subject to the ILA.

2. Argentina's reliance on *Turkey – Rice* is misplaced

33. Argentina attempts to argue that *Turkey – Rice* shows that the DJAI Requirement is not an import license requirement. In fact, however, *Turkey – Rice* indicates that a measure's structure, design, and operation determine whether it is, or is similar to, an administrative procedure for the operation of import licensing regimes. In this case, the DJAI Requirement is an import license requirement by virtue of its structure, design, and operation – and thus *Turkey – Rice* in fact confirms the Complainants' claims against the DJAI Requirement.

3. The DJAI Requirement is not for customs purposes

34. Argentina argues that the DJAI Requirement is for customs purposes. However, Argentina's responses to the Panel's questions indicate that each DJAI is subject to observation by at least eight Argentine government-related agencies, for reasons unrelated to customs. Argentina also fails to articulate a coherent account of what customs-related purpose the DJAI supposedly serves. Accordingly, Argentina's own responses to the Panel's questions contradict its argument that the DJAI Requirement is for customs purposes.

C. THE DJAI REQUIREMENT IS SUBJECT TO – AND INCONSISTENT WITH – ARTICLE X:1 OF THE GATT 1994

35. Japan established a *prima facie* case that the DJAI Requirement is inconsistent with Article X:1, because the criteria governing whether agencies comment on DJAI applications, and whether they withdraw such comments, are rules of general application, and Argentina has not published them. In response, Argentina argues that it published the statutory authority for the DJAI Requirement. However, this is insufficient to satisfy the requirements of Article X:1. Accordingly, Argentina's argument fails.

D. THE DJAI REQUIREMENT IS SUBJECT TO – AND INCONSISTENT WITH – ARTICLE X:3 OF THE GATT 1994

36. Japan also made a *prima facie* case that the administration of the DJAI Requirement is inconsistent with Article X:3(a). Under the DJAI Requirement, Argentine government agencies have open-ended discretion to determine whether to approve or deny DJAI applications. Once an agency merely comments upon a DJAI, the importation is halted indefinitely, until the importer persuades the agency/-ies involved to remove the comments. This process is inherently non-uniform, partial, and unreasonable, contrary to Argentina's obligations under Article X:3. Argentina simply fails to engage with these points, and accordingly, it fails to rebut Japan's *prima facie* case.

V. ARGENTINA HAS FAILED TO REBUT JAPAN'S *PRIMA FACIE* CASE AGAINST THE RTRR.

A. JAPAN HAS ESTABLISHED A *PRIMA FACIE* CASE THAT THE RTRR IS INCONSISTENT WITH ARTICLES III:4, X:1, AND XI:1 OF THE GATT 1994, BOTH *AS SUCH* AND *AS APPLIED*

37. Japan and the co-Complainants have submitted over 750 exhibits illustrating the substantive content of the RTRR, as well as examples of instances where it has been applied. Japan also demonstrated that these instances of the RTRR's application are instances of systematic application of a broader measure that applies both generally and prospectively. In particular, the RTRR applies *generally* in the sense that it is not applied in particular instances only, but with respect to companies across sectors, over a substantial period of time. In addition, Japan has demonstrated that the RTRR applies *prospectively*, *i.e.*, on an ongoing basis since 2009.

38. Previous panels have recognized that measures with general and prospective application may be WTO-inconsistent *as such*, even if they are *de facto* and/or unwritten measures. They have also recognized that *de facto* policies or practices may constitute violations of WTO provisions, on either an *as such* or *as applied* basis. In this case, there is a repeated pattern of imposing a range of import-restrictive requirements, the RTRR. Thus, the RTRR is challengeable *as such* and *as applied* as a *de facto* or unwritten practice or policy.

B. ARGENTINA FAILS TO UNDERMINE JAPAN'S *PRIMA FACIE* CASE THAT THE RTRR IS WTO-INCONSISTENT, BOTH *AS SUCH* AND *AS APPLIED.*

39. Argentina does not actually contest or deny most of the evidence as to the actual operation of the RTRR. When the Panel gave Argentina the opportunity to comment on the instances of the RTRR's application, Argentina did not deny that any of them had occurred, nor did it provide evidence to rebut them. When the Panel asked Argentina for copies of agreements with individual economic operators pursuant to the RTRR, as well as other information identified in Questions 16-18 and 26, Argentina did not deny that the requested information exists.

40. Furthermore, the evidence fully supports the proposition that the RTRR exists, that it has the precise content that Complainants articulated in their Panel Requests, that it has a general and prospective character, and that it can be attributed to the government of Argentina.

41. Argentina argues that the Complainants have not defined the RTRR sufficiently clearly. Argentina also questions the credibility of a limited set of evidence demonstrating ten particular instances of the RTRR's application. However, these arguments are incorrect and, in any event, fail to undermine Japan's and the other Complainants' claims.

1. Argentina fails to establish that the Complainants have not defined the RTRR with sufficient precision

42. Argentina argues that the Complainants have defined the RTRR in such a way that it "include[s] virtually any aspect of [Argentina's] economic policies." However, there is no support for this assertion. Japan's response to Question 10 already clarified that Japan is not challenging Argentina's overall economic policies. Rather, Japan is challenging the RTRR itself (as well as the DJAI Requirement).

43. Moreover, there is no legal support for Argentina's position that an unwritten measure must be defined with perfect precision in order to be subject to a WTO legal challenge. Indeed, the Appellate Body has made clear that complainants challenging an unwritten or *de facto* measure are not required to specify its "precise contours" in ways that are necessarily the same as one might expect for a written, *de jure* measure.

2. Argentina's Attacks on the Credibility of Evidence Fail – and Would in Any Event be Insufficient to Undermine Complainants' *Prima Facie* Case.

44. In its efforts to undermine the evidence, Argentina has accused Complainants of forming a "coalition of world powers against the Argentine Republic" with "political objectives" rather than a "trade interest". It insinuated several times that Complainants "waived" "crimes against

humanity". It has dismissed one exhibit as "a worthless piece of evidence, which can be characterized as a legal puppet[]". Yet, despite all this rhetoric, Argentina has not pointed to any specific inaccuracy in the factual statements submitted by the Complainants, nor has it identified any inaccuracies in the underlying exhibits, let alone provided any evidence to the contrary.

a. EU-14 (Question 13)

45. The evidence that Argentina described as "worthless legal puppet" is Exhibit EU-14, an affidavit signed by a notary public, Richard Rodriguez, who practices in Geneva, Switzerland. Exhibit EU-14 identifies the name of the declarant, the eight documents presented to him, and it notes that Argentine government officials signed all eight documents. Nothing about the notary certification appears on its face to be "inappropriate", as Argentina incorrectly asserts, nor does Argentina identify any specific defect. Accordingly, Argentina fails to establish that there are actually any flaws in Exhibit EU-14.

46. Furthermore, Argentina does not deny the accuracy of the information in the affidavit, nor does it deny that the underlying agreements exist. At the very least, this confirms that the description of the documents in the affidavit matches others with which Argentina is familiar.

b. JE-306 and JE-307 (Question 14)

47. Argentina also attempted to cast doubt on the credibility of Exhibits JE-306 and JE-307, two affidavits submitted by employees of U.S. companies. Argentina did not identify any specific flaws with the documents, but rather speculated about the way that notarized documents in general could be inaccurate. Argentina also did not deny the accuracy of the information in these two exhibits. Therefore, at the very least, Argentina's response to Question 14 in fact confirms that employees working on behalf of Secretary Moreno and the Argentine government have reached out to foreign companies and their Argentine branches to have discussions similar to those described in the affidavits of Company X and Company Y.

c. Press reports (Question 42)

48. Previously, Argentina criticized the Complainants for including press reports published by *La Nación* and *El Clarín* as 17 of 734 exhibits supporting their First Written Submissions. Now, in its written responses to the Panel's Questions, Argentina implicitly acknowledges that most of the press reports cited by the Complainants do not have any connection to these two newspapers. However, Argentina belatedly made the much more sweeping argument that "none of the journalistic material [submitted by Complainants to support their demonstration of the existence of the RTRR], regardless of its source, can be considered to have any probative value."

49. Argentina does not cite any legal basis for this extreme assertion – and indeed, panels have been inclined to accept the information provided by newspapers, and especially in cases like the present one, where the respondent did not challenge the truth of the facts reported by those newspapers. Furthermore, in this particular case, there is other evidence confirming the accuracy of the press reports. Accordingly, Argentina's argument fails.

C. JAPAN'S *AS APPLIED* CLAIMS AGAINST THE RTRR ARE WITHIN THE SCOPE OF THIS DISPUTE, CONTRARY TO ARGENTINA'S ASSERTIONS.

50. Previously, Argentina argued that Japan's claims against the RTRR were outside the scope of the dispute because they were not identified in Japan's Consultation Request. The Panel rejected this argument, finding that "The so-called 'Restrictive Trade Related Requirements' (RTRRs) were identified by the complainants as a measure at issue in their respective requests for consultations; therefore, the inclusion of the RTRRs in their panel requests is not inappropriate and these measures are within the Panel's terms of reference[]". However, Argentina continues to argue that Japan's *as applied* claims against the RTRR are outside the scope of the dispute.

51. There is no basis for Argentina to persist in arguing that Japan's Consultation Request was somehow defective. The Panel has already found that the Consultation Request properly identified the RTRR as a measure subject to consultations. There is no legal requirement that requests for consultations specify whether a measure is being challenged on an *as such* or an *as applied* basis. Because Japan's Consultation Request identified the RTRR, and Japan's Panel Request did not

expand the scope of the dispute by challenging the RTRR on an *as applied* (as well as an *as such*) basis, Japan's *as applied* claim against the RTRR (as well as its *as such* claim against the RTRR) is properly within the scope of this dispute.

VI. CONCLUSION

52. Argentina fails to point to any evidence that would undermine Complainants' legal claims. In most instances, Argentina has not even tried to rebut Complainants' claims on their merits. It has not denied the existence of the RTRR or the basic facts underlying the Complainants' DJAI-related claims.

53. Japan continues to respectfully request that the Panel find that the DJAI Requirement is inconsistent, both *as such* and *as applied*, with Articles XI:1, X:3(a) and X:1 of the GATT 1994, and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the ILA, and that the RTRR is inconsistent, both *as such* and *as applied*, with Articles XI:1, III:4, and X:1 of the GATT 1994.

ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Japan will first review the evidence thus far provided by the Complainants and, to a much lesser extent, the Respondent. Next, Japan will discuss compliance-related issues. Finally, Japan will turn to the DJAI Requirement, emphasizing again why separate findings are important, and demonstrating why each of Argentina's attempted rebuttal arguments fails.

II. *PRIMA FACIE* BURDEN AND EVIDENTIARY ISSUES RAISED BY THIS DISPUTE

2. Argentina has thus far failed to even try to rebut many of the core facts at issue in this dispute. The Panel asked Argentina a series of questions, including Questions 13-14, 16-18, 23, and 26. Argentina again responded by not responding. The Panel noted Argentina's non-responsiveness in its communication to the Parties of 6 November 2013.

3. The Panel then *again* instructed Argentina to provide responses to Questions 13-14, 16-18, 23, and 26 in its Second Written Submission. Argentina once again demurred and its Second Written Submission failed to respond to the Panel's questions for a third time.

4. The Panel has issued two preliminary rulings rejecting Argentina's procedural objections to Japan's claims against the RTRR. If Argentina continues in its refusal to cooperate, then Japan considers it would be reasonable to interpret such a failure to cooperate as further confirmation of the extensive *prima facie* evidence provided by complainants. With respect to the DJAI Requirement, the Panel can then infer from Argentina's failure to respond that there are no relevant limitations on the reasons why each of the government entities participating in the DJAI system may place observations; and there are no specific provisions in any legal instruments explaining the reasons for an observation, or the information required to lift it.

III. DEFINITION OF THE RTRR MEASURE AND SPECIFIC REQUEST FOR SEPARATE FINDINGS ON EACH OF JAPAN'S THREE TYPES OF RTRR CLAIMS

5. Japan has made a specific request for findings on each of three separate types of RTRR claims that it has raised: (i) *as such*; (ii) a broader *as applied* finding, and (iii) findings with respect to each instances of the RTRR's application. Japan reiterates that it has established a *prima facie* case with respect to each.

A. DEFINITION OF THE RTRR MEASURE

6. Japan defined the RTRR in its Panel Request and First Written Submission as an Argentine government measure requiring economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Japan identified the five types of actions Argentina requires as a prior condition for permission to imports.

7. Japan's Panel Request also noted that the requirements comprising the RTRR are not themselves stipulated in any published law or regulation. Thus, the RTRR is itself "unwritten", and Argentina has failed to "published [it] promptly in such a manner as to enable governments and traders to become acquainted with [it]." By the same token, however, Argentine government writings explicitly describe the "one-to-one" requirement, which is one element of the RTRR, and a range of other evidence confirms the same thing. It would be systemically harmful if a WTO Member were able to hide behind the lack of transparency of its own legal system in order to defend against the kinds of claims at issue in this dispute, particularly because that very lack of transparency is part of the problem at hand.

B. JAPAN HAS ESTABLISHED A *PRIMA FACIE* CASE THAT THE RTRR IS WTO-INCONSISTENT *AS SUCH*

8. Japan requests that the Panel find that the RTRR, *as such*, is inconsistent with Argentina's obligations under Articles XI:1, III:4, and X:1 of the GATT 1994. This type of finding would indicate that the RTRR as a whole is inconsistent with WTO law. Accordingly, *as such* findings would require that for compliance, Argentina withdraw the RTRR as a whole, and cease any instances of its application by Argentina including those might occur in the future.

9. Argentina has contested whether the Complainants have identified the RTRR with sufficient precision. Japan recalls its observations about the appropriate definition of the measure at issue, the very intransparency, arbitrariness and lack of a formal, written basis that characterize it, and the implications this has for Complainants' obligations to define the measure as precisely as possible. Japan also recalls the Appellate Body's findings in *US – Zeroing (EC)* recognizing the uncertainty as to the content of unwritten measures. And Japan notes, finally, the Panel's second preliminary ruling, which found that the Complainants "have identified the alleged RTRRs in a 'sufficiently precise' manner so as to 'present the problem clearly'". The second preliminary ruling also found that Japan's definition of the RTRR does not prejudice Argentina's ability to defend itself. These preliminary findings should put to rest Argentina's arguments about the Complainants' *identification* of the RTRR.

10. Argentina also contests whether the Complainants have established the *general and prospective nature* of the RTRR. However, the Complainants' Second Written Submissions demonstrated that there is ample evidence showing the general and prospective nature of the RTRR. In particular, the measure is *general*, in the sense that Argentina could apply it across all sectors of the Argentine economy. The RTRR has applied *prospectively*, *i.e.*, on an ongoing basis since 2009 and continuing into the future.

11. Finally, the absence of specific RTRR-related agreements from the record does not detract from the Complainants' *prima facie* case of *as such* inconsistency. If anything, Argentina's unwillingness to provide them can be interpreted as further confirmation of the Complainants' *prima facie* case.

12. A panel's determination as to whether the *prima facie* threshold has been met should be informed, *inter alia*, by what it is reasonable for the complainants to provide, in light of the particular circumstances of a dispute. Argentina has sole possession of the specific RTRR-related agreements and there are real impediments for the Complainants to provide any further information. Complainants have "diligently exhausted" all other possible ways to substantiate the content and purpose of these agreements. Accordingly, Japan and the other Complainants have established that the RTRR is *as such* inconsistent with Articles XI:1, III:4 and X:1 of the GATT 1994, and Argentina has not rebutted this argument.

C. JAPAN HAS ESTABLISHED THAT THE SYSTEMATIC APPLICATION OF THE RTRR IS WTO-INCONSISTENT

13. Japan also asks the Panel to make *as applied* findings regarding the RTRR's application collectively. This type of finding would indicate that application of the RTRR has been and continues to be inconsistent with Argentina's obligations under Articles XI:1, III:4, and X:1 of the GATT 1994, including those instances that the Complainants have not specifically identified and including any future *application* of the RTRR.

14. The unwritten or *de facto* character of Argentina's RTRR should not prevent the Panel from making findings against the systematic application of the RTRR. Argentina does not allege that any instances of the RTRR's application are *consistent* with Articles XI:1, III:4, and X:1 of the GATT 1994. The evidence supporting Japan's *as such* claim, and to the extent necessary for an *as applied* claim such as the one raised by Japan in this dispute, also supports this broad *as applied* claim.

D. THE INDIVIDUAL INSTANCES OF THE RTRR'S APPLICATION INCLUDING THOSE IDENTIFIED BY JAPAN AND THE OTHER COMPLAINANTS ARE WTO-INCONSISTENT

15. Japan also asks the Panel to find that each and every *instance* of the RTRR's application is inconsistent *as applied* with the various legal provisions identified in Japan's Panel Request. Argentina has not attempted to rebut these claims with regard to individual instances of the RTRR's application.

E. THE INTERRELATIONSHIP BETWEEN THE THREE TYPES OF FINDINGS REGARDING THE RTRR

16. Having each of the three types of findings requested by Japan would ensure that the Panel's findings collectively have the broadest possible coverage, and leave as little room as possible for Argentina to attempt to implement its compliance obligations in a manner that would continue to nullify or impair benefits accruing to Japan under the covered agreements. In addition, the three types of findings would ensure that the Panel develops its factual and legal findings to the maximum extent possible, which could be important in the event of an appeal. Thus, even though the requested findings would overlap, they are required to fully resolve this dispute. Japan reiterates its request that the Panel make separate findings on each.

IV. FINDINGS REQUESTED WITH REGARD TO THE DJAI REQUIREMENT AND ARGENTINA'S FAILURE TO REBUT JAPAN'S CLAIMS

A. JAPAN'S REQUESTED FINDINGS WITH RESPECT TO THE DJAI REQUIREMENT

17. Japan requests *as such* findings with respect to the DJAI Requirement. Such findings would obligate Argentina to eliminate the requirement to obtain a DJAI in order to import goods into Argentina. Japan is not requesting separate *as applied* findings for the DJAI Requirement.

18. In some instances Argentina uses the DJAI Requirement as a tool for implementing the RTRR, but this is not always the case. They are separate measures and independent of each other.

B. ARGENTINA HAS FAILED TO REBUT JAPAN'S ARGUMENT WITH RESPECT TO THE DJAI REQUIREMENT.

19. Argentina has either not rebutted or failed to rebut Japan's and the other Complainants' arguments with respect to the DJAI Requirement. Japan will address some of Argentina's most recent statements and submissions in particular.

20. First, the DJAI functions like a non-automatic import license requirement, which a certain number of Argentine government entities have the power to deny.

21. Second, Argentina has failed to articulate a coherent explanation of the customs purpose that the DJAI Requirement supposedly serves.

22. Third, the DJAI Requirement is not a conformity assessment procedure aimed at ensuring compliance with Argentina's domestic regulations in other areas. Indeed, if it were, then Argentina would presumably need to impose a parallel DJAI-like scheme for domestic goods. Argentina does not even argue that it has done so.

23. Fourth, the DJAI Requirement is not a mere formality. Rather, it is a non-automatic, discretionary, often arbitrary system for allocating the right to import, which is, if anything, the very opposite of a mere customs "formality".

24. Fifth, the DJAI Requirement does not implement the SAFE Framework, as recently confirmed by the WCO's 2 December 2013 letter to the Panel.

25. Sixth, in its Second Written Submission, Argentina attempted to demonstrate that the DJAI Requirement does not have trade effects. As a legal matter, this argument is irrelevant. Article XI:1 is designed to protect the competitive opportunities of foreign products – not to guarantee actual trade results. Moreover, as an empirical matter, it is false that the DJAI has not restricted imports.
26. Thus, all of Argentina's attempted arguments fail.

C. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

27. Given that the DJAI Requirement is a non-automatic, highly discretionary import licensing requirement, the analysis under Article XI:1 is relatively straightforward. The text states that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any [Member] on the importation of any product". The DJAI Requirement restricts imports by making the right to import conditional on obtaining a DJAI. Furthermore, the DJAI Requirement is not a duty, tax, or other charge. Accordingly, the DJAI Requirement is prohibited by Article XI:1.

1. Article XI:1 is not limited to quantitative restrictions expressed in numerical terms

28. According to Argentina, a measure is only a "restriction . . . on importation" within the meaning of Article XI:1 if it is "expressed in terms of quantity or that are quantifiable in nature." Argentina acknowledges that this interpretation is inconsistent with the panel reports in *India – Quantitative Restrictions*, *India – Autos*, and *Colombia – Ports of Entry*.

29. Argentina's interpretation is also contradicted by the text of Article XI. If Article XI only covered quantitative restrictions "expressed in terms of quantity or that are quantifiable in nature", then the phrase "duties, taxes or other charges" would have been superfluous.

30. Argentina's argument is also not supported by Appellate Body's statements in *China – Raw Materials*. In particular, the (quantitative) "limiting effect" discussed by the Appellate Body can flow either from a numerical restriction on imports, or from a measure which has a restrictive or limiting effect on importation. The DJAI Requirement fails in the latter category, and thus is inconsistent with Article XI.

2. The trade facilitation negotiations do not indicate that Article VIII shields the DJAI Requirement from the disciplines of Article XI:1

31. Argentina also argues that the recent multilateral negotiations over a possible trade facilitation agreement support its argument that Article VIII circumscribes Article XI. Because the text that Argentina refers to was under negotiation as of the establishment of the Panel, it cannot be taken into consideration. Moreover, contrary to Argentina's arguments, there is nothing in the negotiating text that is inconsistent with Japan's interpretation. Thus, Argentina's arguments regarding the trade facilitation negotiations also fail.

D. ARGENTINA ADMINISTERS THE DJAI REQUIREMENT IN A MANNER THAT IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLES 1.3, 1.4(A), 1.6, 3.2, 3.3, 3.5(F), 5.1, 5.2, 5.3, AND 5.4 OF THE ILA.

32. Argentina's Second Written Submission does not discuss Japan's ten claims under the ILA in any meaningful way. Japan reiterates its request that the Panel issue specific findings on each of its claims under the ILA.

V. CONCLUSION

33. Argentina's overall approach in this dispute has been to avoid engaging with the facts and evidence before the Panel, and instead to resort to distractions. The real issue in this dispute is that Argentina's policies are fundamentally trade-distortive and raise deep commercial, economic and indeed, even systemic trade concerns – for example about the degree to which a WTO Member's own intransparency can shield it from WTO legal disciplines and how best to deal with unwritten measures and *de facto* policies in terms of a Panel's findings and the implications these

will have for the compliance phase. In the context of the *EC – Approval and Marketing of Biotech Products* dispute, Argentina urged the Panel to take a strict line on these issues, and to interpret the law in a manner that would not permit circumvention in the future. Japan wishes to echo these same concerns in this dispute.

ANNEX B-7

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

I. Introduction

1. The complainants in this dispute have advanced claims in respect of: (1) the Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación* – DJAI), a customs formality that Argentina has established in accordance with Article VIII of the GATT 1994 to implement the SAFE Framework of Standards to Secure and Facilitate Global Trade ("SAFE Framework") adopted by the World Customs Organization (WCO); and (2) the alleged "restrictive trade-related requirements" (RTRRs). As the complainants have failed to establish a *prima facie* case of inconsistency, either in respect of the DJAI procedure or in respect of the alleged RTRRs, Argentina respectfully requests that the Panel reject the claims of the complainants in their entirety.

2. In respect of the DJAI procedure, the complainants have wrongly interpreted the relevant legal provisions and have brought claims under multiple provisions of different covered agreements without clearly distinguishing between the measures, claims and evidence relevant to each. Moreover, the complainants have failed to meet their burden of proof with regard to showing that the DJAI procedure has trade-restricting effects on imports which are separate and distinct from the trade-restricting effects that they seek to attribute to the alleged RTRRs.

3. In relation to the alleged RTRRs, the complainants have failed to prove the existence of an unwritten "overarching" measure of general and prospective application. Instead, they have opted simply to ignore the relevant legal standard applicable to their claims.

II. Argentina Objects to the Politically Motivated Arguments of the Complainants and their Disdainful/Disparaging Tone

4. The Argentine Republic is a founding Member of the World Trade Organization (WTO), its actions comply with the principles and commitments arising from its capacity as a Member and it actively participates in all of the Organization's bodies, as has been stressed on several occasions by other Members of the WTO. In the present dispute, Argentina has participated fully in the consultation process and has addressed the concerns expressed by third party Members.

5. In spite of this, the complainants continue to misrepresent Argentina's trade policy and business environment and set forth their claims in a politically hostile and offensive tone while disparaging Argentina's good faith participation in the WTO. This insulting attitude and the political motivations behind it go far beyond the limits of a complaint submitted under the WTO's Dispute Settlement Understanding.

6. Furthermore, much of the evidence adduced by the complainants is tendentious, unfounded, inadmissible and irrelevant for the interpretation of the measures at issue. Accordingly, all the documentary evidence on which the complainants seek to base their claims should be rejected and removed from the case file.

III. The Panel should take into Consideration Argentina's Economic/Trade Performance, its Development Model and its Bilateral Trade Relationship with the Complaining Countries

7. The absence from the complainants' written submissions of any mention of objectively verifiable data on Argentina's international trade amounts to a significant concealment. The data on Argentina's international trade reveal the growing openness of the Argentine economy and the increase in its imports, including in bilateral trade with the European Union, the United States and Japan. Given this trade information, the argument that the Argentine Republic is seeking

* This text was originally submitted in Spanish by Argentina.

to prevent trade deficits by promoting exports and limiting imports is untenable and does not stand up to the slightest logical analysis.

8. The reality is that, since 2003, Argentina has pursued a macroeconomic policy based on the growth of foreign demand and the domestic market, supported by strong industrial and productive development; a dynamic trade policy; and an income policy that promotes social inclusion.

9. The significant increase in imports is objective proof that Argentina is not restricting its external purchases. The complainants have yet to show how a country can increase its openness coefficient and its imports, above and beyond comparable benchmarks, while at the same time restricting international trade.

10. In fact, the Argentine Republic has increased its imports from all sources by more than those of the complaining Members and by more than the global average. Moreover, the increase in its imports from the complaining Members has been as much as four times greater than the increase in its exports to those Members.

11. In view of the economic and commercial realities, the complainants' allegations are particularly damaging for Argentina and other developing countries, since the present dispute is one in which three developed country Members have brought a case against an emerging country. It would appear that the complainants have filed their claims as a warning to developing countries that dare to decide their own policies and take measures independently of those dictated by the developed countries.

IV. The Complainants have Failed to Establish a *Prima Facie* Case of Inconsistency in Respect of the DJAI Procedure

A. The complainants have not accepted the operation of the covered agreements and the distinction between substantive rules and procedures in relation to their claims in respect of the DJAI procedure

12. The complainants have based their case on a misunderstanding of the relevant provisions in relation to the DJAI procedure.

13. The covered agreements draw a sharp distinction between prohibitions and restrictions on imports, on the one hand, and the administrative procedures, formalities, and requirements in connection with importation, including those by which such prohibitions and restrictions are implemented, on the other. This is a distinction between the substantive rules that determine whether imports are permitted into the territory of a Member (and in what amounts) versus the procedures that are used to implement those substantive rules.

14. Broadly speaking, Article VIII of the GATT governs formalities or requirements imposed in connection with importation, while Article XI of the GATT governs substantive rules of importation that give rise to a quantitative restriction on imports. To the extent that a formality or requirement imposed in connection with importation constitutes an import licensing procedure, other than an import procedure required for customs purposes, this procedure is governed by the Agreement on Import Licensing Procedures (ILP Agreement) as *lex specialis* relative to the more general provisions of Article VIII and Article XI.

15. Another difference between these provisions of the covered agreements is that they are quite different in terms of the disciplines that they impose upon a Member's conduct. To the extent that a particular rule of importation constitutes a quantitative restriction or prohibition on imports, it is prohibited altogether by Article XI, subject only to the exceptions set forth in Article XI itself and the general exceptions set forth in Article XX. Article VIII, by contrast, affirmatively recognizes the need for Members to maintain formalities and requirements in connection with importation, including import licensing procedures.

16. The distinction between substantive rules of importation and the procedures by which they are implemented becomes most apparent in the ILP Agreement, which distinguishes between the trade-restrictive impact of a substantive rule of importation (which is not governed by the

ILP Agreement) and the trade-restrictive impact of an import licensing procedure that is used to implement such a rule (the subject matter of the ILP Agreement).

17. In light of these differences in their respective scope and content, the proper application of Articles VIII and XI of the GATT and of the ILP Agreement requires careful attention to how these provisions relate to any particular set of measures and claims. Above all, it is essential to distinguish between those measures and claims that pertain to substantive rules of importation, on the one hand, and those measures and claims that pertain to formalities, requirements, and procedures connected with importation, on the other. To the extent that a complainant alleges that a substantive rule of importation *and* the procedures used to implement that rule violate particular provisions of the covered agreements, it is necessary first to differentiate between the rule and the procedure (e.g. in terms of which measures implement the rule and which measures implement the procedure), and then to assess the rule and the procedure in relation to their respective disciplines.

18. The need to separate and distinguish between different measures and claims is particularly important where, as in the present dispute, the complainant alleges that both the substantive rules of importation and the procedures used to implement those rules have trade-restricting effects. In such case the complainant must prove that the substantive rule imposes a restriction or prohibition on imports (e.g. in order to demonstrate that the substantive rule constitutes a quantitative restriction prohibited by Article XI of the GATT), and separately demonstrate that the procedures used to implement that rule have trade-restricting effects that are distinguishable from the trade-restricting effects of the rule itself. To prove a violation with respect to the trade effects of the procedures, as opposed to the substantive rule, the complainant must show that these trade effects violate the relevant discipline found within the covered agreements.

19. The fundamental problem with the complainants' claims and arguments, as reflected in their first written submissions, is that they have failed to separate and distinguish between the DJAI as a procedure, on the one hand, and the alleged RTRRs, on the other. In fact, their claims and arguments are intrinsically contradictory. The complainants repeatedly characterize the DJAI as a procedure that is used to implement and enforce the alleged RTRRs, which the complainants consider to be distinct measures that limit or restrict trade in violation of Article XI. At the same time, the complainants contend that the DJAI procedure is itself a quantitative restriction that violates Article XI. At no point do the complainants distinguish between the alleged trade-restricting effects of the DJAI as a procedure and the alleged trade-restricting effects of the alleged RTRRs that the DJAI supposedly implements.

20. Proper delimitation is also crucial with respect to Articles VIII and XI of the GATT, since, as noted by the panel in *China – Raw Materials*, it is "appropriate to construe Article VIII as regulating something different from that addressed by GATT Article XI:1".[1] It is clear from the context of GATT Articles VIII and XI that these are provisions that are mutually exclusive within their respective disciplines and spheres of application. Article VIII expressly acknowledges the need for Members to maintain customs formalities, while Article XI prohibits any measure that constitutes a quantitative restriction (within the meaning of that provision). It cannot be the case that customs formalities that are *permitted* under Article VIII are *prohibited* quantitative restrictions under Article XI.

21. In addition, the mutually exclusive relationship between Article VIII and Article XI is further evidenced by the fact that Article VIII already contemplates that customs formalities can have at least some restrictive effect on trade. In acknowledging "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements", the drafters of Article VIII were aware that customs formalities are potentially an impediment to trade. Because the potential effects of customs formalities are governed by Article VIII (including as they may be modified by the trade facilitation negotiations), and because Article VIII envisages that such effects may occur, it cannot be the case that these same permitted effects render a customs formality a prohibited quantitative restriction under Article XI. Otherwise, Members could not maintain customs formalities, since they would be prohibited under Article XI.

[1] Panel Report, *China – Raw Materials*, paragraph 7.831.

22. Moreover, because Article VIII recognizes that formalities and requirements will have at least some degree of trade-limiting effect, the separate and independent trade effect of the procedure must be greater than the trade effect that one would ordinarily associate with a procedure of its nature. The stringent application of these standards is required to ensure that import formalities and requirements – which are an ordinary and necessary feature of international trade and expressly permitted under Article VIII – are not classified as prohibited quantitative restrictions.

B. The DJAI procedure is a customs formality under Article VIII of the GATT

23. The DJAI procedure is a formality or requirement imposed by governmental authorities in connection with importation and is therefore subject to Article VIII of the GATT, which covers all formalities and requirements imposed "in connection with importation", including "documents, documentation and certification". Article VIII recognizes the need for Members to maintain import formalities and requirements for the purposes of implementing and enforcing their domestic laws, and recognizes "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements".

24. It is an undisputed fact that the DJAI procedure is a procedure. The DJAI is an advance electronic information procedure aimed at facilitating the customs control functions of the Directorate-General of Customs (*Dirección General de Aduanas* – DGA), a subdivision of the Federal Public Revenue Administration (*Administración Federal de Ingresos Públicos* – AFIP), on the basis of the concepts of risk assessment and management, thereby allowing it to address and mitigate risk, in accordance with the SAFE Framework of the WCO, without unnecessarily hindering international trade.

25. Through the DJAI procedure, AFIP collects advance information that is relevant to the exercise of its customs control function, such as the identity of the importer and its agent, the volume, value, and origin of the merchandise, and its customs classification. On the basis of such advance information, AFIP, in conjunction with other participating agencies with complementary control authority, assesses and manages risk. The DJAI essentially allows AFIP to identify high-risk consignments in advance, and allocate resources more efficiently. The DJAI procedure also informs AFIP's work in developing and implementing a more robust risk management system. Prominent among the changes implemented on the basis of information collected through the DJAI procedure is the development of a scoring system for risk assessment. The DJAI procedure also allows AFIP to allocate its resources more efficiently.

26. The complainants mistakenly attribute to the DJAI procedure a number of import-restrictive objectives which are completely alien to the instrument. The DJAI procedure does not contain any substantive rules governing the importation of goods into Argentina. On the contrary, the DJAI procedure is linked to laws and regulations contained elsewhere in Argentina's legal regime. The DJAI procedure simply anticipates customs information that previously would have been provided only upon the initiation of customs clearance procedures.

27. It is important to note that, contrary to the complainants' suggestion, the DJAI procedure does not provide participating agencies with "unfettered" discretion to make "observations" and prevent imports. Their participation is confined to the functions assigned to each specific agency by law.

28. Given that the complainants have brought no claims under Article VIII in this dispute, this should end the Panel's analysis in respect of the DJAI procedure.

C. The DJAI procedure is not an import licensing procedure subject to the disciplines of the ILP Agreement

29. The complainants have alleged that the DJAI procedure is a non-automatic import licensing procedure used for other than customs purposes that is subject to the ILP Agreement. However, Article 1.1 of the ILP Agreement makes clear that, in order to constitute an "import licence", a given measure has to fulfil two cumulative requirements. First, it must be "administrative procedures [defined as 'licensing' or other similar procedures] used for the operation of [an] import licensing regime". Second, these administrative procedures must require

"the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation".

30. With respect to the first requirement, the DJAI procedure is not a "licence" of any kind, and thus there should be no issue as to whether it is an "import licensing procedure" subject to the provisions of the ILP Agreement.

31. As recognized by the panel in *Turkey – Rice*, importation is a very complex process in which a number of different documents, certificates, invoices, and other paper or electronic formalities are required for the purpose of verifying compliance with a wide variety of legal requirements. Without these documents, certificates, or electronic formalities WTO Members will not allow importation to be effected. This does not automatically convert any formalities which operate as a prerequisite for importation into "licences" under Article 1.1 of the ILP Agreement.

32. In Argentina's view, the term "licences" under the ILP Agreement must be used for the operation of "import licensing regimes", which relates to the administration of quantitative restrictions or other similar measures. The complainants have failed to demonstrate that the DJAI procedure is "used for the operation of import licensing regimes" and therefore have failed to demonstrate that it constitutes a "licence" subject to the disciplines of the ILP Agreement.

33. With respect to the second requirement, even if the Panel were to find that the DJAI procedure could be considered a "licence", as previously explained, the DJAI was created, and is used, by the AFIP "for customs purposes" and hence does not fall within the scope of the ILP Agreement.

34. Finally, even if the Panel were to conclude that the DJAI procedure is a licensing procedure that is within the scope of the ILP Agreement, under Article 3.2 of this Agreement, to establish a *prima facie* case the complainants would need to demonstrate that the DJAI procedure has trade-restrictive or distortive effects on imports additional to those caused by the imposition of the underlying restriction, which the complainants consider (at least implicitly) to be the alleged RTRRs.

35. This is where the complainants' claims and arguments become particularly incoherent. Notwithstanding their repeated assertions that the DJAI procedure is a non-automatic import licensing procedure used to implement the alleged RTRRs, the United States and the European Union argue that the DJAI procedure is *per se* inconsistent with Article 3.2 because it is not used to implement *any restriction at all*. In their view, this means that any trade-restricting effects of the DJAI procedure can be attributed *entirely* to the DJAI procedure, and not to any underlying restriction that it is used to implement. This internal contradiction is illustrated by the European Union's assertion in one part of its written submission that the DJAI procedure is used "as a tool in order to impose on importers commitments that are often trade-restrictive themselves", and its contradictory assertion in a later part of its submission that the DJAI procedure "is not a 'tool' used for the implementation of an 'underlying' quantitative restriction".

36. Japan, for its part, does not even attempt to distinguish between the DJAI procedure and the alleged RTRRs that it is allegedly used to implement. Instead it employs the arguments made under GATT Article XI:1 about the DJAI procedure, including the assertion that it restricts trade because it is used to implement the alleged RTRRs. It then asserts, quite categorically, that the DJAI procedure "has trade-restrictive or distortive effects on imports", and that "this fact alone is enough to be 'additional to those caused by the imposition of the restriction'" under the standard prescribed by Article 3.2 of the ILP Agreement. At no point does Japan distinguish between the effect of the DJAI procedure and the effect of the alleged RTRRs that it allegedly implements, let alone present any evidence of the separate and additional trade-restricting effects of the DJAI procedure, as required by Article 3.2.

37. Once again, the complainants cannot have it both ways. For their part, the United States and the European Union cannot seek to attribute the trade-restricting effects of the alleged RTRRs to the DJAI procedure for the purpose of arguing that the DJAI procedure is a quantitative restriction under Article XI:1, but then argue under Article 3.2 of the ILP Agreement that the alleged trade-restricting effects of the DJAI procedure result entirely from the procedure itself

and not from the alleged RTRRs. If, as they claim, the DJAI procedure is a non-automatic import licensing procedure used to implement the alleged RTRRs, then the complainants must demonstrate under Article 3.2 of the ILP Agreement that the DJAI procedure has trade-restricting effects additional to those caused by the alleged RTRRs. The United States and Japan have not even attempted to make this showing, and the European Union has sought to make this showing only in misleading and circular terms.

38. To sum up, the Panel must require the complainants to assume the burden of establishing a *prima facie* case under Article 3.2 of the ILP Agreement to show that the DJAI procedure has trade-restrictive effects additional to those caused by the alleged underlying RTRRs which the DJAI procedure is allegedly used to implement. The complainants have failed to satisfy this burden of proof.

D. The complainants have failed to establish a *prima facie* case of inconsistency under Article XI:1 of the GATT in respect of the DJAI procedure

39. As previously discussed, Article XI:1 governs substantive rules of importation or exportation. It is an undisputed fact that the DJAI procedure is not a substantive rule of importation but a procedure. This is the necessary foundation for the complainants' claims under the ILP Agreement, which "relates to import licensing procedures and their administration, not to import licensing rules". If the complainants maintain that the DJAI procedure is a non-automatic import licensing procedure subject to the ILP Agreement, then they cannot simultaneously maintain their claims under Article XI in respect of the DJAI procedure, because the ILP Agreement is *lex specialis* in relation to the trade effects of import licensing procedures. Moreover, the complainants have not alleged, let alone demonstrated, that the measures establishing the DJAI procedure contain any substantive rules that affect importation. Consequently, the DJAI procedure is not subject to Article XI:1 of the GATT.

40. Furthermore, as explained in the preceding paragraphs, the DJAI procedure is a customs formality used to monitor the risk of non-compliance with substantive rules of importation set forth elsewhere in Argentine law. As was pointed out, Argentina does not consider that customs formalities can be assessed under Article XI of the GATT. To the extent that customs formalities have some effect on the quantity or volume of imports, that effect must be assessed under Article VIII or, where appropriate, under the ILP Agreement. Nevertheless, if the Panel were to conclude that customs formalities are subject to assessment under Article XI:1 of the GATT, then the Panel would have to determine how to assess the alleged trade-restrictive effects of the DJAI procedure under Article XI:1.

41. Article XI:1 of the GATT relates to the "general elimination of quantitative restrictions". Import formalities and requirements can be considered a prohibited quantitative restriction under Article XI to the extent that: (1) they limit the quantity or volume of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (2) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of this nature.

42. This is the basis for the distinction between Articles VIII and XI of the GATT suggested by the reports of the panels in *Korea – Various Measures on Beef* and *China – Raw Materials*. Article VIII governs the *procedures* used to implement substantive rules – with the aim of "minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements", whereas Article XI:1 is concerned with the trade-restricting effects of the *substantive rules* of importation (or exportation). Article XI:1 clearly distinguishes between the quantitative "prohibitions" and "restrictions" that are the subject of this provision and the manner in which such prohibitions and restrictions are "made effective". What is prohibited under Article XI:1 are the quantitative restrictions and prohibitions themselves, not the means by which they are made effective. As is evident from the reference to "other measures", the method by which a particular quantitative restriction or prohibition is implemented is immaterial to Article XI:1.

43. Thus, for a procedure to be inconsistent with Article XI, the complainant must prove that the procedure limits the quantity or volume of imports (or exports) separately and independently

of the trade-limiting effect of the underlying measure which it implements. With respect to the DJAI procedure, any assessment under Article XI:1 would require the complainants to demonstrate, at a minimum, that the DJAI procedure has a limiting effect on the quantity or volume of goods imported into Argentina, separate and apart from the limiting effects that the complainants seek to attribute to the alleged RTRRs under Article XI:1, and separate and apart from the ordinary and incidental effects of such formalities. The complainants have failed to demonstrate such an effect.

44. In addition, Article XI:1 of the GATT relates to prohibitions and restrictions that are "quantitative" in nature. The Appellate Body in *China – Raw Materials* observed that "the use of the word 'quantitative' in the title of the provision informs the interpretation of the words 'restriction' and 'prohibition'" and, consequently, it is appropriate to consider that Article XI of the GATT 1994 covers "those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[2] It follows that a complainant making claims under this provision must show that a particular measure institutes or maintains a "prohibition" or "restriction" on imports or exports that has a "limiting effect on the quantity or amount of a product being imported or exported". The complainants have not provided any evidence in this respect.

E. The complainants have failed to establish a *prima facie* case under Articles X:1 and X:3(a) of the GATT with respect to the DJAI procedure

45. The complainants have also failed to establish a *prima facie* case that Argentina has acted inconsistently with Articles X:1 and X:3(a) of the GATT with respect to the publication and administration of certain aspects of the DJAI procedure.

46. In order to show a violation of Article X:1, the complainants must demonstrate that Argentina has made effective "laws, regulations, judicial decisions and administrative rulings of general application", and that it has not "published [them] promptly" in such a manner as to enable governments and traders to become acquainted with them. The complainants have failed on both counts.

47. The complainants have failed to establish that specific aspects of the DJAI procedure which they challenge under Article X:1 are measures "of general application". There is no "universal" set of criteria that applies to all goods, because distinct goods and distinct import transactions pose distinct risks. The observations made by each participating agency are not therefore measures of "general application", but rather administrative requests for supplementary information that are made on a case-by-case basis, depending on the information provided by the declarant.

48. Moreover, Argentina has promptly published the statutory authority of each agency that participates in the DJAI procedure and has adopted a standardized model of the accession instrument (*Convenio de Adhesión*) on the basis of which each agency may accede to the DJAI procedure. Information concerning the agencies that participate in each DJAI is readily available to the customs broker or importer in the "My Customs Operations" (*Mis Operaciones Aduaneras* – MOA) window of the AFIP website.

49. As regards the complainants' claims under Article X:3(a), they reflect the same misunderstanding of the basic obligations that apply, on the one hand, to substantive rules governing importation into Argentina and, on the other hand, to the administration of those rules. These claims should be rejected in their entirety.

50. In *EC – Bananas III*, the Appellate Body held that the text of Article X:3(a) "clearly indicates that the requirements of 'uniformity, impartiality, and reasonableness' do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings".[3] To the extent that a Member's challenge relates to the substantive content of these types of measure, "the WTO consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994".[4] The Appellate Body underscored the gravity of allegations that a Member

[2] Appellate Body, *China – Raw Materials*, paragraph 320.
[3] Appellate Body Report, *EC – Bananas III*, paragraph 200.
[4] Appellate Body Report, *EC – Poultry*, paragraph 115.

acted in a biased or unreasonable manner, and for this reason "the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a)".[5]

51. Applying these standards against the complainants' claims under Article X:3(a) and supporting evidence, it becomes clear that the complainants have failed to meet this burden. To begin with, Argentina's alleged failure to publish the criteria pursuant to which each participating agency may make observations under the DJAI procedure could only entail an inconsistency under Article X.1 of the GATT, which deals with publication requirements, and not under Article X:3(a), which establishes disciplines for the administration of measures of general application.

52. More importantly, the complainants' claims concerning Argentina's alleged exercise of discretion to authorize imports by operators that have undertaken to comply with certain trade-restrictive requirements do not refer to the administration of rules of general application, but rather to substantive rules which allegedly govern importation of goods into Argentina. As mentioned above, the Appellate Body has indicated that the WTO consistency of such substantive rules must be assessed under other provisions of the covered agreements.

53. Finally, the United States adds, on the basis of a single "sworn affidavit" by an anonymous company executive, that Argentina's administration of the DJAI procedure is not uniform, impartial and reasonable because the same importer has had DJAIs "exited" and DJAIs "observed" in comparable situations. However, as the Appellate Body stated in *EC — Selected Customs Matters*, "… non-uniformity or differences in administrative processes do not, by themselves, constitute a violation of Article X:3(a)".[6]

V. The Complainants have Failed to Establish a *Prima Facie* Case of Inconsistency in Relation to the Alleged "Restrictive Trade-Related Requirements"

A. The European Union, Japan and the United States have impermissibly expanded the scope of the dispute in relation to the alleged "Restrictive Trade-Related Requirements" or "RTRRs"

54. There is a glaring inconsistency between the complainants' requests for consultations and their panel requests. The European Union, Japan, and the United States each have entire sections of their panel requests devoted to what they call "Restrictive Trade-Related Requirements" (RTRRs). This is a term which does not appear in any of the complainants' requests for consultations, and seems to have been jointly invented by the complainants for purposes of their panel requests. The new measures are separate and legally distinct from the measures included in the complainants' consultations requests, inasmuch as they bear no relationship whatsoever to the measures actually identified in those requests.

55. The measures identified by the complainants in their requests for consultations are confined to the DJAI and Import Certificates (*Certificados de Importación* – CI). In their requests for consultations the complainants explain that these "measures" are maintained through specific "legal instruments", which are identified in the Annexes to each of the consultations requests. The complainants also mention in their consultations requests certain "commitments" that Argentina allegedly requires importers to undertake, as well as the alleged relationship between these "commitments" and the issuance of CIs and the approval of DJAIs.

56. There is no reference whatsoever by any of the complainants to the alleged "commitments" as independent "measures" that might be subject to challenge, or to any other "legal instruments" – written or unwritten – providing for such measures. Rather, the complainants' description of the "commitments" appears to be nothing more than a discussion of purported evidence relating to the allegedly "non-transparent" issuance of CIs and approval of DJAIs.

57. Thus, nothing in the text of the consultations requests gives any indication that the complainants would be bringing claims in respect of measures related to the alleged

[5] Appellate Body Report, *United States – Oil Country Tubular Goods Sunset Reviews*, paragraph 217.
[6] Appellate Body Report, *EC – Selected Customs Matters*, paragraph 224.

"Restrictive Trade-Related Requirements". Thus, the complainants' requests for consultations did not allow Argentina to anticipate reasonably the scope of the dispute or prepare its defence in relation to the alleged "Restrictive Trade-Related Requirements" that the complainants are now seeking to challenge.

58. In relation to the complainants' uniform failure to identify in their consultations requests the broad unwritten measure that they are all now attempting to challenge, Argentina considers this omission to be particularly problematic given both the nature of the measure and the nature of the complainants' claims in respect of that measure. In light of the Appellate Body's statements about the clarity with which unwritten measures should be identified in the context of a panel request, it is difficult to imagine that a responding party would not, at the very least, be entitled to notice in the request for consultations that such a measure was potentially subject to challenge in the dispute. This is precisely the case in the present dispute in which the unwritten measure is subject to "as such" or other equally broad claims.

59. Under the provisions of Articles 4 and 6 of the DSU and pursuant to the interpretation of previous panels and the Appellate Body, the addition of these new measures impermissibly expands the scope of the dispute and changes its essence and, accordingly, the measures are outside the Panel's terms of reference.

B. Argentina was surprised by the Panel's decision to issue a preliminary ruling on whether the alleged "RTRRs" are within its terms of reference before the First Substantive Meeting

60. In light of the well-founded arguments developed in its first written submission, Argentina was surprised to hear of the Panel's very summary decision to issue a preliminary ruling on whether the alleged "RTRRs" are within its terms of reference before the First Substantive Meeting, without Argentina having first been offered an opportunity to respond to the complainants' submissions concerning its timely jurisdictional objections. It is a sign of the importance of jurisdictional challenges that the clear trend in recent dispute settlement proceedings has been to allow for comprehensive briefing on such issues before the panel renders its preliminary ruling.

61. The Argentine Republic disagrees with the Panel's decision to defer a ruling on other jurisdictional objections. Considering that this question is of crucial importance within the context of this case, Argentina respectfully requests the Panel to rule as a matter of urgency on the following: (1) with respect to the "as applied" claims, and (2) on how the alleged 23 separate measures which the EU identifies "in the alternative" could possibly be within the terms of reference when, although they predate the consultations request, they were not the subject of consultations.

62. The settling of these questions will provide the necessary certainty with respect to the points at issue. This will undoubtedly make it easier to address them within the context of the present case.

C. The complainants have failed to establish a *prima facie* case with respect to the alleged RTRRs

63. Notwithstanding its concerns with the Panel's preliminary rulings, the Argentine Republic considers that the ruling in question has provided some needed clarity with regard to the nature of the complainants' challenges. In its preliminary ruling, the Panel referred to the claims relating to a "single overarching RTRR measure" and considered that all of the complainants were challenging this measure "as such".

64. The complainants expressly acknowledge that the "overarching RTRR measure" they are challenging is an "unwritten measure". When an unwritten measure is challenged within the WTO, the burden of proof on the complaining party to establish the existence of that measure is a great deal more exacting than when it is a written measure that is being challenged. In particular, the practice of "zeroing" on the part of the United States remains the only instance in the history of the WTO dispute settlement mechanism in which an unwritten measure was found to be the proper subject of a WTO challenge. Given this history, and the complainants' leading role in it, it is nothing short of remarkable and reflects a striking omission that not one of them has even

acknowledged the legal standards and heavier burden of proof that govern the claims in respect of the unwritten "overarching RTRR measure" made in their first written submissions.

65. The most recent instance of a panel being faced with a claim regarding an unwritten measure was in *EC – Aircraft*. In that case, drawing on relevant Appellate Body rulings, the panel explained that a panel "must not lightly assume [the] existence" of an unwritten measure.[7] Rather, a panel must "carefully and rigorously" examine the evidence and arguments advanced by the complainant, with a view to assessing whether "at least the precise content of the alleged unwritten measure, that it is attributable to the responding Member and that it has general and prospective application" has been clearly established.[8] It is only by satisfying this "high threshold" that a complainant will succeed in establishing the existence of the challenged measure.[9] Conversely, where any one of the above elements cannot be established, the complaining party will have failed to make its case.[10]

66. On applying this evidentiary standard to the alleged "overarching" RTRR measure, Argentina considers that the complainants have failed to meet their burden in at least two crucial respects. Firstly, the complainants have failed to establish the precise content of the alleged "overarching" RTRR measure. According to the complainants, the unwritten "overarching" measure they seek to challenge consists of various requirements that Argentina allegedly imposes on various "economic actors", all of which, in their turn, "are not stipulated in any published law or regulation". Thus, the validity of the case depends, firstly, on establishing the existence of each of these various different unwritten requirements and, secondly, on demonstrating that these unwritten requirements somehow constitute a distinct "overarching" measure of general and prospective application. The mere articulation of the case framed by the complainants illustrates the complexity of the burden of proof with which they are faced.

67. In its first written submission, Argentina explained the reasons why the Panel should discount the evidentiary weight of the merely circumstantial and speculative evidence produced by the complainants in their effort to establish the existence of the alleged overarching RTRR measure. What is more, even if despite its blatant weaknesses all of the evidence produced were to be taken into account, the complainants could only hope to demonstrate a series of unrelated "isolated" actions whose content varies so widely that it is insufficient even to demonstrate the content of a series of distinct requirements, let alone a single "overarching" RTRR measure.

68. In fact, rather than demonstrating the existence of an "overarching" RTRR measure, the evidence on the record demonstrates that no such measure exists. By seeking to transform a series of alleged distinct and unrelated "isolated" commitments, first into a series of individual unwritten "requirements", and then into a single "overarching" measure, the complainants are seeking to avoid their burden of proof with respect to the alleged "single, overarching" RTRR measure that is the subject of their claims. Remarkably, among the 734 exhibits jointly produced by the complainants there is not a single piece of evidence seeking to demonstrate whether and to what extent the precise content of this overarching measure differs from the content of the various alleged unwritten requirements that supposedly comprise it. Argentina therefore respectfully requests that the Panel find that the complainants have failed to meet their burden of proof in this respect.

69. Secondly, the complainants have failed to demonstrate that the alleged single overarching "RTRR" measure they challenge has general and prospective application. The evidence produced by the complainants clearly falls short of demonstrating the existence of a generally applicable rule or norm governing the importation or sale of all goods in Argentina. More importantly, the Panel will search the record in vain for evidence that the alleged overarching "RTRR" measure is meant to have prospective application. As anticipated, even assuming that all of the evidence were to be taken into account, in spite of its blatant shortcomings, that evidence would reflect nothing more than a number of "isolated" actions and would fail to show that the Argentine Government was enforcing any sort of prospective measure. In and of themselves, the alleged commitments

[7] Panel Report, *EC and certain member States – Large Civil Aircraft*, paragraph 7.520.

[8] Panel Report, *EC and certain member States – Large Civil Aircraft*, paragraph 7.520. See also Appellate Body Report, *US – Zeroing (EC)*, paragraph 198.

[9] Panel Report, *EC and certain member States – Large Civil Aircraft*, paragraph 7.520.

[10] Panel Report, *EC and certain member States – Large Civil Aircraft*, paragraph 7.520.

described by the complainants do not have any normative content at all, since they neither require nor entail prospective courses of action.

70. Finally, the Argentine Republic emphasizes and reiterates that the complainants cannot ignore the consequences of their decision to advance claims against a single unwritten "overarching" RTRR measure. The Argentine Republic therefore respectfully requests that the Panel reject *in limine* the complainants' attempt to assert into existence an amorphous and ill-defined "overarching" RTRR measure.

ANNEX B-8

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

SECOND WRITTEN SUBMISSION

1. There are two measures at issue in this dispute: the so-called "Restrictive Trade-Related Requirements" measure ("RTRR") and the Advanced Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*) (the "DJAI procedure"). The Argentine Republic will demonstrate in this submission that the complainants' claims in respect of these two measures are unfounded and must be rejected by the Panel.

I. The Complainants' "As Applied" and "Alternative" Claims Are Outside the Panel's Terms of Reference

2. The European Union has explained that it "is not challenging … separate instances of application" of the alleged "overarching" measure. Rather, it is challenging, as "separate measures", and expressly in the alternative, 23 "specific instances where the Argentine Government has imposed some RTR requirements on individual economic operators." It has to be acknowledged that the European Union appears to have understood that if it fails to establish the existence of the "overarching RTRR measure", then it would necessarily follow as a matter of logic that it would not be able to demonstrate the "application" of that non-existent measure.

3. Although the Panel agrees with the European Union that the description of the alleged "commitments" in its request for consultations covers the "overarching" RTRR measure that the European Union seeks to challenge, it cannot be the case that this same language also encompasses 23 separate measures involving "certain specific instances" of alleged government action against "individual economic operators". It is precisely because the form and nature of an unwritten measure are substantially different from the form and nature of a written measure or a measure involving a specific instance of alleged governmental conduct that the Appellate Body has deemed it necessary to articulate clear standards for panels to evaluate whether complainants have established the existence of such unwritten measures. The fact that the European Union expressly raises its claims in respect of these 23 measures "in the alternative" to what can only be interpreted as an "as such" claim against the "overarching RTRR measure" also makes clear that it has impermissibly expanded the scope of this dispute. This being the case, the Panel should conclude that these measures and the EU's alternative claims in respect of these measures are outside its terms of reference.

4. The same conclusion is warranted with respect to Japan's "as applied" claims, given that Japan failed to identify any measure subject to its "as applied" claims in its request for consultations. Japan explained in response to Panel question 2 that it was not required to identify specific instances of application covered by its "as applied" claims because it is asking the Panel to "express the WTO-inconsistency of *any* application of the measure".

5. Given the apparent breadth of Japan's "as applied" claims, the Argentine Republic fails to understand how these claims are separate and distinct from its "as such" claim with respect to the alleged "overarching" measure. This confusion seems to be shared by the Panel, which noted in its Preliminary Ruling that Japan's "as applied" claims "[seem] to be part of a broad argument against the RTRRs and not a separate articulation of claims against the RTRRs 'as applied'". Leaving aside this lack of clarity, on which the Panel obviously agrees, Japan's failure, in its request for consultations, to identify specific measures covered by its "as applied" claims should place these claims outside the Panel's terms of reference.

* This text was originally submitted in Spanish by Argentina.

II. The Complainants Have Failed to Make a *Prima Facie* Case in Respect of the "Overarching" RTRR Measure They Challenge Because They Have Not Met the High Threshold for Establishing the Existence of an Unwritten Measure

A. Introduction

6. On the basis of the complainants' written submissions and their oral statements at the first substantive meeting, it is now clear that all three of the complainants are challenging a single "overarching RTRR measure" in this dispute. Unquestionably, moreover, the single "overarching RTRR measure" they are challenging, and its alleged constituent parts, are unwritten.

7. As discussed in detail below, Panel and Appellate Body jurisprudence makes it clear that a complainant's burden of proof when seeking to challenge an unwritten measure is exacting. Yet not one of the complainants, either in their lengthy first written submissions or in their opening statements at the first substantive meeting, has even acknowledged the legal framework that the Panel must apply to determine whether they have, in fact, met this burden. The complainants apparently hope that their silence will lead the Panel to conclude that there is nothing unusual about their claim in respect of the single "overarching RTRR measure" they are challenging and to treat it no differently than any other common or ordinary claim before the WTO. But the complainants' claim is, in fact, quite extraordinary.

8. The complainants have come before the Panel to challenge a single overarching unwritten measure whose content consists of various other measures, which themselves are acknowledged to be unwritten and whose very existence is also in dispute. Argentina will proceed to demonstrate that the complainants have not come close to meeting the "high threshold" for establishing the existence of the single, "overarching RTRR measure" they challenge.

B. The Appellate Body Has Established a "High Threshold" for Demonstrating the Existence of an Unwritten Measure

9. In *US – Zeroing (EC)*, the Appellate Body explained that "we see no basis to conclude that 'rules or norms' can be challenged, as such, *only* if they are expressed in the form of a written instrument". However, the Appellate Body also explained that "a panel must not lightly assume" the existence of an unwritten measure. On the contrary, "[p]articular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is not expressed in the form of a written document".

10. The Appellate Body stated that in order to support a finding as to the existence of an unwritten measure of general and prospective application, "a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application". Only by meeting this "high threshold" and putting forward "sufficient evidence with respect to each of these elements" can a complainant establish the existence of an unwritten measure that may be challenged "as such".

11. In order to demonstrate just how far the complainants in this dispute are from establishing the existence of an unwritten measure pursuant to the Appellate Body's standard, it is worth examining the few other WTO dispute settlement cases where the complainants have attempted to challenge unwritten measures.

1. *US – Zeroing (EC)* and *US – Zeroing (Japan)*

12. In *US – Zeroing (EC)*, the European Union challenged, "as such", the consistency of the United States' unwritten "zeroing methodology" with Article 2.4.2 of the Anti-Dumping Agreement, and the Panel agreed with the European Union that it was not consistent. The Panel disagreed with the US argument that the "zeroing methodology" was an "abstraction". The Panel found that the unwritten "zeroing methodology" was manifested in the "Standard Zeroing Procedures", a reference to specific written lines of computer code contained in the Standard AD Margin Program. The Panel explained that, under the "Standard Zeroing Procedures", the United States Department of Commerce (USDOC) "invariably" excluded any consideration

of transactions where the export price exceeded normal value, when calculating the overall dumping margin.

13. There was also substantial evidence of the "general and prospective application" of the "zeroing methodology". The Panel found that the "Standard Zeroing Procedures" were "a *constant feature* of the computer program[s] used by USDOC to perform dumping margin calculations". In fact, the United States was unable to identify a single instance where USDOC had ever given a credit for non-dumped sales over a period of several decades.

14. In the light of the substantial evidence concerning the precise content of the "zeroing methodology", as well as its general and prospective application, the Appellate Body upheld the Panel's finding that the "zeroing methodology" was an unwritten measure properly subject to challenge and inconsistent, "as such", with the Anti-Dumping Agreement. The Appellate Body reached the same conclusion in *US – Zeroing (Japan)*.

2. *Thailand – Cigarettes (Philippines)*

15. In *Thailand – Cigarettes (Philippines)*, the Panel recognized that "the burden of proving the existence of an *unwritten* norm or rule … is rather high, specifically because of the very fact that it does not exist in the form of a written document". In that case, the Panel was not convinced that the complainant had set forth sufficient evidence to satisfy the "high standard" established by the Appellate Body. For example, the Panel found the statements in one of the memoranda relied on by the Philippines to be "too broad and vague to be considered as constituting a rule or norm systematically rejecting declared transaction values or using the deductive valuation method." The Panel also found that the secondary evidentiary sources offered by the Philippines were not sufficient, in the absence of other direct evidence, to prove the existence of an unwritten general rule or norm.

16. In the light of the flaws in the complainant's evidence, the Panel concluded that the Philippines had failed to prove that the alleged measure was generally applicable, and also noted that the Philippines had acknowledged that it did not know whether the alleged general rule would apply in future cases. The Panel concluded that the Philippines had not discharged its "rather high" burden of proving that Thailand maintained an unwritten rule.

3. *EC and certain member States – Large Civil Aircraft*

17. In the most recent WTO dispute to address a complainant's challenge to an unwritten measure, *EC and certain member States – Large Civil Aircraft*, the Panel once again found that the complainant had failed to meet the "high threshold" established by the Appellate Body.

18. In *EC and certain member States – Large Civil Aircraft*, the United States sought to challenge what it characterized as the so-called LA/MSF "Programme". The United States alleged that the LA/MSF "Programme" was an unwritten measure pursuant to which the European Union and certain of its member States were providing Airbus, in a systematic and methodical manner, with launch aid subsidies for the purpose of developing and launching large civil aircraft. The United States explained that it was not seeking to challenge the LA/MSF "Programme" "as such", but the Panel found that the standard established by the Appellate Body in *US – Zeroing (EC)* was nonetheless applicable.

19. After carefully examining the evidence submitted by the United States in the light of the Appellate Body's standard, the Panel was not convinced that the United States had met the "high threshold" required to demonstrate the existence of an unwritten measure of general and prospective application. Despite its "clear understanding" of the precise content of the alleged measure, the Panel concluded that the multiple individual LA/MSF contracts did not constitute sufficient evidence to demonstrate the existence of an unwritten LA/MSF "Programme" pursuant to which the European Union and certain of its member States were providing launch aid subsidies to Airbus, "in a systematic and methodical way", for the purpose of developing and launching large civil aircraft. The Panel explained that the "repetition of government action over time does not necessarily prove that the government has adopted a general rule governing its future conduct".

20. The Panel also examined various statements made by the Member States, the European Commission and Airbus officials that were submitted by the United States as evidence of the existence of the challenged LA/MSF Programme. Finally, the Panel concluded that, while "[s]ome pieces of evidence appear not to be inconsistent with the existence of an unwritten Programme of the kind described by the United States", there was "no piece or category of evidence … [that] positively demonstrates the existence of the alleged unwritten LA/MSF Programme".

C. The Complainants Have Failed to Establish the Precise Content and the General and Prospective Application of the Alleged Unwritten "Overarching RTRR Measure"

21. Applying the Appellate Body's evidentiary standard to the alleged unwritten "overarching RTRR measure", Argentina considers that the complainants have failed to establish the precise content of the alleged "overarching measure" they challenge, or that it is of general and prospective application. The complainants' claims in this case do not merit comparison with the challenge to the unwritten "zeroing methodology" in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. In each of those disputes, the complainants were challenging unwritten measures, but the measures in question were based on either written contracts (*EC and certain member States - Large Civil Aircraft*), or written standard procedures, including specific lines of computer code (*US – Zeroing (EC)* and *US – Zeroing (Japan)*).

22. In contrast, the unwritten "overarching RTRR measure" that the complainants seek to challenge in this dispute consists of various "requirements" that the Argentine Republic allegedly imposes on "economic operators". The complainants affirm that none of these alleged "requirements" is "stipulated in any published law or regulation", and thus concede that the alleged constituent elements of the "overarching measure" they are challenging are, in themselves, unwritten. To date, the complainants have not made the slightest effort to explain how these very disparate alleged requirements somehow combine to form the "overarching measure" that they are challenging. In fact, they have done nothing more than invent this "overarching" measure for the purposes of this dispute. Furthermore, the complainants themselves have admitted that the content of the alleged "overarching RTRR measure" they are challenging is not limited to the "requirements" listed in their panel requests. The Argentine Republic fails to understand how the complainants can demonstrate the precise content of an "overarching measure" which allegedly consists of unwritten "requirements" that have not even been identified or specified, still less how such an unwritten "overarching" measure has "general and prospective" application.

23. Nor does the Argentine Republic know how the complainants can demonstrate the "precise content" of the unwritten "overarching RTRR measure" when it is alleged to include "one or more" of a total of five, and possibly more, distinct alleged requirements. The Argentine Republic believes that these obvious logical failings in the case which the complainants have chosen to make regarding the alleged "overarching RTRR measure" present insurmountable obstacles in their efforts to demonstrate its existence, which no doubt explains why the complainants have still not made the slightest effort to tackle them.

24. The Argentine Republic does not bear the burden of disproving a case that the complainants have not even attempted to make, nor does it have any intention of doing so. Nevertheless, it stresses that, because the alleged unwritten "overarching" measure under challenge is itself comprised of unwritten measures, the complainants bear the burden of proving the existence of these constituent unwritten "requirements". In other words, in accordance with the Appellate Body's standard for establishing the existence of unwritten measures, the complainants bear the burden of demonstrating the precise content and the general and prospective application of each of the alleged "requirements".

25. As in the case of the "overarching" measure itself, the complainants have made no attempt at such a demonstration. This is probably because, even if the Panel were to accept in its entirety the complainants' characterization of the evidence with respect to the alleged "requirements", the most that such evidence could possibly demonstrate is a series of discrete, "isolated" actions involving a limited number of individual "economic operators", whose particular content varies widely and which lacks anything even resembling the general and prospective application one

would expect to find in the operation of an unwritten rule or norm. This is the case for each of the alleged requirements identified by the complainants.

26. The complainants must demonstrate affirmatively, on the basis of positive evidence, the existence of the "overarching" measure that they have invented for the purposes of this dispute. Simply asserting that there must be "government-wide direction" because the lack thereof "would be surprising", or that the alleged measure must be prospective because the Argentine Republic has not proved the contrary, does not constitute positive evidence. As long as the complainants do not explain how the evidence they have submitted demonstrates the precise content and the general and prospective application of the alleged "overarching" measure, they will have failed even to make a *prima facie* case that the measure exists.

27. Accordingly, the Panel must find that the complainants have failed to establish the existence of the alleged "overarching" RTRR measure that can be challenged under the WTO's dispute settlement mechanism, and must therefore reject the complainants' claims under Articles XI:1 and III:4 of the GATT 1994 in their entirety.

III. The Complainants Have Failed to Establish a *Prima Facie* Case that the DJAI Procedure Is Inconsistent with the GATT 1994

28. In their opening statements at the first substantive meeting, and in their responses to the Panel's questions, the complainants continue to evince considerable confusion about the nature of their claims in relation to the DJAI procedure. At various times, the complainants have characterized the DJAI procedure as a procedure that is used to implement the alleged overarching RTRR measure. At other times, the complainants have appeared to disavow any connection between the DJAI procedure and the alleged RTRR measure, and to treat the two as entirely separate measures. This lack of coherence has made it difficult to identify the precise factual and legal basis for the complainants' position that the DJAI procedure is inconsistent with the covered agreements.

29. Bearing in mind this lack of clarity in the complainants' positions, Argentina considers that it would be useful to begin this discussion with what appear to be some important points of agreement. First, the complainants do not appear to dispute that the DJAI is a *procedure*. The complainants acknowledged as much when they chose to bring claims in respect of the DJAI under the Agreement on Import Licensing Procedures (ILP Agreement), which relates exclusively to import licensing procedures and not to substantive rules affecting the importation of goods. Consistent with this fact, the complainants likewise do not appear to dispute that the DJAI procedure contains no substantive rules governing the importation of goods into Argentina. Argentina has explained, and the complainants have not disputed, that the substantive rules affecting the importation of goods into Argentina are established elsewhere in Argentine law. Consequently, there can be no remaining doubt that the DJAI is purely procedural, even if the parties differ as to the nature and purpose of that procedure, for example, as to whether it constitutes an "import licensing procedure" or whether it is administered for customs purposes in accordance with Article VIII of the GATT 1994.

30. The second point of apparent agreement between the parties is that any claim in respect of the DJAI procedure must be based on evidence and legal arguments pertaining to the DJAI procedure itself, and not on evidence and legal arguments pertaining to any substantive import rule that the DJAI is allegedly used to implement, such as the alleged overarching RTRR measure. In other words, the parties appear to agree that any claim in respect of the DJAI procedure must be based on proof that the procedure itself has effects that render it inconsistent with the provisions of the covered agreements invoked, separately and independently of the alleged use of the DJAI procedure as a means of implementing what the complainants consider to be a separate quantitative restriction.

31. In the light of the foregoing, Argentina will focus on the evidence and legal arguments that the complainants have put forward in support of their claims against the DJAI procedure under Article XI:1. As Argentina will proceed to demonstrate, the complainants have failed to establish a *prima facie* case that the DJAI procedure is inconsistent with that provision.

32. The first and most fundamental flaw in the complainants' claims under Article XI is that they have failed to demonstrate that import formalities and requirements such as the DJAI procedure are subject to this provision at all. As Argentina explained in its first written submission, import formalities and requirements are the subject of Article VIII of the GATT 1994. Argentina further explained that, when properly interpreted in accordance with their ordinary meaning and context, Article VIII and Article XI are mutually exclusive in their respective spheres of application. Until now, the complainants have not provided any serious response to these points of interpretation. Their argument that import formalities and requirements can be analysed under Article XI is based on mere assertions.

33. Even if import formalities and requirements were subject to the disciplines of Article XI, the complainants would still need to demonstrate that the DJAI procedure constitutes a quantitative restriction within the meaning of that provision. The complainants' claims against the DJAI procedure under Article XI, however, are based on a steadfast refusal by the complainants to interpret the term "restriction" in the light of the reference to "*quantitative* restrictions" in the title of Article XI. This is the proper context to be taken into account when interpreting Article XI, and it leads to the conclusion that Article XI encompasses only those "restrictions" that are expressed in terms of quantity or that are quantifiable in nature. It is clear that the complainants would prefer to ignore this interpretative requirement and rely instead on reports of previous panels that failed to take this context into account.

34. Because the complainants have misinterpreted Article XI, they have not even attempted to make the necessary *prima facie* showing that the DJAI procedure results in a quantitative restriction on imports. None of the limited evidence put forward by the complainants in support of their claims against the DJAI procedure even purports to demonstrate, let alone establish, that the introduction of this procedure has resulted in such a quantitative restriction.

35. The main evidence put forward by the complainants in support of their claims against the DJAI procedure are two "surveys" of companies that import goods into Argentina, one conducted by the United States Chamber of Commerce and the other by the Government of Japan. These "surveys" were not genuine study instruments and, consequently, are fatally flawed as evidence.

36. For example, the US Chamber of Commerce "survey" is flawed in numerous respects, including: (1) that it provides no precise information about the number of DJAI applications covered by the "survey"; (2) that it does not indicate what portion of *total* DJAI applications during this period (submitted by US enterprises, members of the US Chamber of Commerce, or otherwise) were covered by the "survey"; (3) that it provides no information about the volume and value of trade represented by the enterprises that responded to the "survey" questionnaire; and; (4) that it does not provide sufficient information to determine the number of DJAI applications that were subject to delay during the period surveyed.

37. The "survey" conducted by the Government of Japan shows similar shortcomings. For example, only ten enterprises submitted responses to the Government of Japan's questionnaire, which raises serious doubts as to whether this is a representative sample of Japanese enterprises that export to Argentina. Moreover, this appears to have involved a self-selected group of respondents who had already submitted complaints to the Government of Japan about the alleged impact of the DJAI procedure, which suggests that it was not an objective group of respondents.

38. Even more importantly, these "surveys" do not even purport to show that the DJAI procedure has given rise to a quantitative restriction on the importation of goods into Argentina. These "surveys" do not even ask, let alone reveal, whether importers have experienced any quantitative reduction in their imports into Argentina as a result of the introduction of this procedure. For example, although the "surveys" allegedly demonstrate that importers have experienced delays in the approval of DJAI applications, they provide no evidence that the imports that were the subject of these applications did not take place. Leaving aside their obvious deficiencies as study tools, these "surveys" provide no evidentiary support for asserting that the DJAI procedure has imposed a quantitative restriction on imports within the meaning of Article XI.

39. Since the complainants have furnished no evidence that the DJAI procedure has given rise to a quantitative restriction on imports, it must be concluded that they have failed to make a *prima facie* case that the DJAI procedure is inconsistent with Article XI of the GATT 1994. This should be the end of the Panel's evaluation of the complainants' claims under Article XI in relation to the DJAI procedure.

IV. The Complainants Have Failed to Establish that the DJAI Procedure Is Inconsistent with the Agreement on Import Licensing Procedures (ILP Agreement)

40. In their oral statements and responses to the Panel's questions, the complainants seem to have distanced themselves from their claims under Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3 and 5.4 of the ILP Agreement. The complainants' reluctance to focus on their claims under the ILP Agreement is understandable, given that these claims are predicated on the awkward proposition that the DJAI procedure is both a substantive rule governing importation of goods into Argentina (i.e., a "quantitative restriction") and an import licensing procedure used by Argentina to implement alleged quantitative restrictions. As Argentina has emphasized throughout these proceedings, the Panel will search the record in vain for any evidence tending to demonstrate independently that the DJAI procedure has a restrictive effect on imports beyond the effects of the alleged trade-restrictive measure it allegedly seeks to implement.

41. Notwithstanding these shortcomings, Argentina will take this opportunity to address some of the arguments made by the complainants with respect to the central issue of whether the DJAI procedure constitutes an "import licence" subject to the disciplines of the ILP Agreement. Indisputably, in order to meet the definition of "import licensing" under Article 1.1 of the ILP Agreement, the DJAI procedure would have to constitute an administrative procedure "used for the operation of import licensing regimes", and it would have to require " the submission of an application or other documentation (other than that required for customs purposes)" as a prior condition for importation. The complainants have failed to demonstrate that the DJAI procedure meets these two criteria.

42. In its first written submission, Argentina demonstrated that the DJAI cannot be considered an "import licence" within the meaning of Article 1.1 of the ILP Agreement because it is not an administrative procedure "used for the operation of import licensing regimes". Argentina explained that import conditionality alone is not sufficient for any documentation to fall within the scope of the ILP Agreement, as claimed by the complainants. This is because in the importation process many documents and certificates are required for the purpose of certifying compliance with a wide variety of legal requirements, such as sanitary and phytosanitary regulations. As the Panel found in *Turkey – Rice*, the fact that imports may not take place in the absence of such documents does not automatically transform them into "import licences".

43. The complainants' excessively broad interpretation of the term "import licence" would bring within the scope of the ILP Agreement any and all "formalities … in connection with importation" under Article VIII.4 of the GATT, including, *inter alia*, "consular invoices and certificates" and "quarantine, sanitation and fumigation" certificates. Argentina urges the Panel to give meaning to the terms "used for the operation of import licensing regimes" in Article 1.1, by determining that "import licensing procedures" are only those administrative procedures used for the purpose of regulating the importation of certain goods.

44. Even in the unlikely event that the Panel were to disagree with Argentina and determine that the DJAI procedure is an "import licensing procedure", the complainants have failed to demonstrate that the DJAI procedure requires "the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member".

45. In its first written submission and its responses to questions from the Panel, Argentina demonstrated that the DJAI procedure is purely for customs purposes and is therefore not subject to the disciplines of the ILP Agreement. The Revised Kyoto Convention (referred to by the Appellate Body for guidance in *Thailand – Cigarettes (Philippines)*) defines "customs" as the "Government Service which is responsible for the administration of Customs law … and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods". On the basis of this definition, an application or other

documentation that is required for the purpose of facilitating the administration or implementation of a Member's customs laws cannot constitute an "import licensing procedure", even if it operates as a prior condition for importation.

46. Argentina has established that the DJAI procedure involves the advance provision of information that is required for the purpose of facilitating the administration of Argentina's customs laws and regulations. Argentina explained that the advance customs information collected through the DJAI procedure is processed and reviewed by Argentina's customs body, AFIP, and by other agencies with additional customs responsibilities, as relevant according to the potential risks. Depending on the products covered by each DJAI, SCI, ANMAT and SEDRONAR also take part in the DJAI procedure, in addition to AFIP. Argentina has also demonstrated that the advance information provided by customs brokers and/or importers relates exclusively to AFIP's authority to secure compliance with Argentina's customs laws, thereby mitigating risks arising from illegal trade, such as classification fraud, duty evasion, counterfeit goods, and drug trafficking, among others. Lastly, Argentina emphasized that the DJAI procedure is an integral part of customs clearance procedures, inasmuch as the advance information provided is automatically transferred into the MARIA (SIM) system for customs clearance purposes.

47. The complainants have failed to rebut Argentina's arguments, and thus have failed to establish that the DJAI procedure constitutes an import licensing procedure within the meaning of Article 1.1 of the ILP Agreement. Accordingly, the DJAI procedure is not subject to the disciplines of the ILP Agreement and the Panel should reject, in their entirety, the complainants' claims under Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3 and 5.4 of the ILP Agreement.

V. The Complainants Have Failed to Demonstrate that the DJAI Procedure Is Inconsistent with Article X of the GATT 1994

48. Finally, with regard to the complainants' claims under Articles X:1 and X:3(a) of the GATT, Argentina has demonstrated that these challenges must fail: (i) because the complainants have failed to demonstrate that the agencies' observations in specific DJAI applications are measures "of general application" and (ii) because the alleged "discretion" of participating agencies to make or lift observations on a DJAI is not related to the "administration" of measures of general application, but rather to the substantive rules governing the importation of goods into Argentina.

VI. Conclusion

49. For the foregoing reasons, the Argentine Republic respectfully requests, as a preliminary matter, that the Panel find that the "as applied" claims of Japan (and the United States) against the alleged "overarching" RTRR measure and the "alternative" claims of the European Union against 23 separate RTRR measures fall outside its terms of reference. The Argentine Republic requests further that the Panel find that the complainants have failed to demonstrate the existence of an alleged "overarching" RTRR measure that could be subject to challenge under the WTO dispute settlement mechanism, and therefore reject the complainants' claims under Articles XI:1 and III:4 of the GATT 1994 in their entirety.

50. The Argentine Republic also respectfully requests that the complainants' claims in relation to the DJAI procedure under Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2 and 5.4 of the ILP Agreement and Articles X:1, X:3(a) and XI:1 of the GATT 1994 be rejected in their entirety.

ORAL STATEMENTS AT THE SECOND SUBSTANTIVE MEETING

I. The Complainants Have Yet to Establish the Existence of the "Overarching RTRR Measure" They Are Challenging

1. In order to establish the existence of the "overarching RTRR measure", the complainants must demonstrate the precise content of the alleged measure and its general and prospective application. As Argentina demonstrated in its second written submission, the complainants have failed to make their case in respect of the three elements of the Appellate Body's legal standard. Even after acknowledging, in their second written submissions, that this legal standard does in fact

apply to their claims, the complainants' arguments boil down to little more than unsubstantiated assertions.

2. The unwritten "overarching RTRR measure" that the complainants seek to challenge in this dispute consists of various "requirements" that Argentina allegedly imposes on "economic operators". The complainants have explained that these alleged "requirements" are not "stipulated in any published law or regulation", so that it is clear that the unwritten "overarching RTRR measure" is itself made up of unwritten measures. Moreover, the content of the alleged unwritten "overarching RTRR measure" is not limited to the unwritten "requirements" listed in the complainants' panel requests. The complainants have explained that while the "overarching RTRR measure" includes the unwritten "requirements" identified in their panel requests, it may also include other unstated "requirements".

3. Argentina does not know how the complainants can demonstrate the precise content of an "overarching measure" whose content allegedly consists of unwritten "requirements" which to date have been neither identified nor specified. Nor does Argentina understand how the complainants can demonstrate the precise content of the alleged measure when that measure may include "one or more" of a total of five, or possibly more, different "requirements". It cannot be the case that the "precise content" of an unwritten measure is the same regardless of whether it has one, three, five or even more components, some of which have yet to be specified; however, that is precisely what the complainants are asking this Panel to accept.

4. Furthermore, as Argentina explained in its second written submission, even if the alleged "overarching measure" were expressly limited to the five "requirements" identified in the complainants' panel requests, the complainants would still have to demonstrate that these unwritten "requirements" actually exist in order to be able to demonstrate the content of the "overarching RTRR measure" that they allegedly comprise. In other words, in accordance with the Appellate Body's standard for establishing the existence of unwritten measures, the complainants would have to demonstrate the precise content and the general and prospective application of each of the alleged "requirements".

5. At this advanced stage in the dispute, the complainants have as yet made no attempt to demonstrate this. Argentina assumes that the complainants' reluctance to carry out the necessary analysis is due to the fact that, even if the Panel were fully to accept their characterization of the evidence relating to the alleged "requirements", the most that such evidence could possibly be hoped to demonstrate is a series of isolated, individual actions involving a limited number of "economic operators", in a limited number of sectors, whose content varies enormously and which lacks anything resembling the general and prospective application one would expect to find in a rule or norm.

6. In their second written submissions, the complainants rebut this characterization of the evidence that they have put forward. The European Union argues that the evidence shows "not simply a series of distinct and unrelated actions" but rather "a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives". The European Union claims that "the RTR requirements are not isolated cases, but an overarching measure applied to a wide range of situations, and has become the 'rule' for companies doing business in Argentina." Japan asserts that there is "evidence of a consistent and repeated pattern of application of the RTRR" and maintains that it has "demonstrated that these instances of the RTRR's application are not one-off instances of WTO-inconsistent action, but rather instances of systematic application of a broader measure that applies both generally and prospectively." Similarly, the United States argues that it has "submitted substantial proof of the repeated and systematic application of the RTRRs measure".

7. Argentina considers it useful at this point to pause and examine the meaning of the terms that the complainants casually attribute to the evidence they have put forward. The term "systematic" means "arranged or conducted according to a system, plan, or organized method". The term "consistent" means "constantly adhering to the same principles of thought or action". The term "rule" means "a principle regulating practice or procedure" or "a prescribed guide for conduct or action". The term "general" means "not specifically limited in application; related to a whole class of objects, cases, occasions, etc.; (of a rule, law etc.); true for all or nearly all cases coming under its terms". The term "systemic" means "… affecting the system or body

as a whole". While the complainants assert that they have demonstrated that the "overarching RTRR measure" reflects a "rule", or a "consistent and repeated pattern", or a "systematic" approach that applies "generally", these assertions are belied by the way in which the complainants themselves describe the operation of the alleged measure.

8. The complainants maintain that the measure applies to "certain economic operators" in Argentina, and that these economic operators are required to comply with one or possibly more unwritten "requirements" (which may or may not be among the five "requirements" identified in the complainants' panel requests), "depending on their contribution to achieving [trade balancing and import substitution] objectives". In other words, according to the complainants' own characterization, it is unclear in any given instance to which of the "certain" economic operators in Argentina the alleged measure will potentially apply, how their "contribution to achieving" trade balancing and import substitution objectives will be measured and evaluated, or what precisely will be required of those economic operators when the determination – obviously a subjective one - is made that the alleged measure must be applied to them. Where is the "organized method", the "guide for conduct" or the "consistent" pattern in this description of the alleged "general" measure and how it purportedly operates? The answer is that none is to be found.

9. Given that the complainants rely on the "systemic application" of the alleged "overarching RTRR measure" in order to demonstrate its general and prospective application, the complainants' failure to demonstrate that the alleged measure is applied systematically taints their arguments in relation to these elements of the Appellate Body's legal standard.

10. The Panel in *EC and certain member States – Large Civil Aircraft* explained that "[t]he repetition of government action over time does not necessarily prove that the government has adopted a general rule governing its future conduct". In this respect, the Panel was echoing the European Union's argument in that dispute that "the fact that several government decisions over a period of over 30 years are perceived as 'consistent' does not collapse these into one 'mega-measure' for the purpose of an 'as such' claim. Rather, these remain separate decisions, relating to separate aircraft, involving separate amounts and different terms and conditions".

11. The European Union's argument seems far more relevant in the context of the current dispute than it did in *Aircraft*, where there was substantially more evidence of "consistent" government decisions over a much longer period of time. The complainants in the current dispute are undoubtedly trying to transform "separate decisions, relating to separate [economic operators], involving … different terms and conditions" into a "mega-measure" by arguing, without supporting evidence, that the measure has been "systemically applied". As Argentina has demonstrated in its previous submissions, the complainants' "overarching RTRR 'mega-measure'" simply does not exist.

II. The Complainants Have Yet to Demonstrate that the DJAI Procedure Is Inconsistent with Article XI:1 of the GATT 1994

12. Argentina will now address the complainants' claim in respect of the DJAI procedure, beginning with their claims under Article XI:1 of the GATT 1994 before going on to their claims under the Agreement on Import Licensing Procedures ("ILP Agreement"). The first and fundamental problem with the complainants' claims under Article XI:1 is that they have yet to establish that import formalities and requirements such as the DJAI procedure are subject to Article XI:1 at all. Even if the DJAI procedure were subject to Article XI:1, the complainants have failed to establish a *prima facie* case that the DJAI procedure would constitute a prohibited quantitative restriction under a proper interpretation and application of that provision.

13. It is remarkable that, at this late stage in the proceedings, the complainants have yet to engage in any serious effort to interpret Article XI:1 of the GATT 1994 – the provision that forms the basis of their claims in respect of the DJAI procedure. The complainants have failed to grasp the meaning of the one word – "quantitative" – that previous panels have not properly considered in their interpretations of Article XI:1, a word that the Appellate Body has made clear *must* be taken into account as relevant context. The complainants keep trying to shift the focus of the discussion – for example, to the meaning of the term "restriction" – without addressing the contextual significance of the title of Article XI.

14. Let us be clear. The parties to this dispute do not appear to question the meaning of the term "restriction" in Article XI:1. As the Appellate Body held in *China – Raw Materials*, the term "restriction" means "'[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation', and thus refers generally to something that has a limiting effect." But not all "restrictions" fall within the scope of Article XI:1. As the Appellate Body went on to observe, the term "restriction" in Article XI:1 must be interpreted in the context of the title of Article XI. The title of Article XI indicates that Article XI:1 encompasses not just any measure that meets the definition of a "restriction", but only those restrictions "that have a limiting effect *on the quantity or amount of a product being imported or exported*".

15. The complainants have mischaracterized Argentina's argument as one relating exclusively to "actual trade effects" or to restrictions "expressed in numerical terms" in an effort to disguise the shortcomings of their affirmative case. Argentina has never taken the position that Article XI only covers numerical quotas or that it requires demonstration of an actual decline in imports. Rather, Argentina simply stated that Article XI, properly interpreted, requires the complainants to demonstrate that the DJAI procedure has a "limiting effect on the quantity or amount of a product being imported or exported". The complainants continue to deny that they have any obligation in this respect, and therefore have refused to provide this Panel with any evidence to establish a *prima facie* case under Article XI:1.

16. There is no suggestion in this dispute that the DJAI procedure imposes a restriction on imports that is expressed "in terms of quantity". The Panel must therefore reject these assertions by the complainants.

III. The Complainants Have Failed to Demonstrate that the DJAI Procedure Is Inconsistent with the Agreement on Import Licensing Procedures (ILP Agreement)

17. The complainants' attempt to elicit additional findings with respect to the DJAI procedure under the ILP Agreement illustrates the confused nature of their claims and highlights how far they are asking this Panel to exceed its authority. The complainants implausibly suggest that the DJAI procedure is simultaneously a quantitative restriction, an import licensing procedure through which that quantitative restriction is implemented, and an import licensing procedure through which an alleged "overarching" RTRR measure is implemented.

18. Leaving aside the confused nature of the complainants' submissions, it is evident that in order to succeed in their claims under the ILP Agreement, the complainants must establish that the DJAI procedure is an "import licensing procedure" subject to the provisions of the ILP Agreement, and that the administration of such import licensing procedures has created trade-restrictive effects that are additional to the underlying substantive rule that they allegedly implement.

19. The complainants have failed on both counts. For the complainants, the fact that the DJAI operates as a prior condition for importation is considered sufficient to demonstrate that it is an "administrative procedure used for the operation of import licensing regimes". However, this excessively broad interpretation would have the effect of leaving the words "used for the operation of import licensing regimes" out of the ILP Agreement altogether, and would mean that the term "import licence" covers a wide range of documents and certificates that are ordinarily required as a prior condition for importation in order to certify compliance with a wide variety of domestic laws and regulations, such as sanitary or phytosanitary requirements.

20. Even in the event that this Panel were to conclude that the DJAI is an "import licence", the complainants have failed to demonstrate that it is not "for customs purposes". The DJAI procedure is an integral part of Argentina's clearance procedures. On the basis of the information collected in advance through the DJAI procedure, Argentina's customs authorities can assess and manage customs-related risks, and determine in advance of importation the appropriate level of inspection (physical inspection, document inspection, or no inspection) to be carried out once the goods are presented at the point of importation for customs clearance purposes. Argentina has additionally underscored that the customs information advanced through the DJAI procedure is automatically transferred and utilized in the MARIA system.

21. Should the Panel nonetheless consider that the DJAI procedure is an import licensing procedure subject to the disciplines of the ILP Agreement, the complainants have still failed to establish, in substance, that the administration of the DJAI procedure has created trade-restrictive effects that are additional to the quantitative restriction it allegedly constitutes. Consequently, the Panel should reject the complainants' claims under the ILP Agreement in their entirety.

22. Argentina concludes its statement at the second substantive meeting with the request that the Panel reject the claims submitted by the complainants in this dispute.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. WHETHER A CUSTOMS FORMALITY CAN BE EVALUATED UNDER ARTICLE XI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

1. Argentina has argued that the Declaración Juradas Anticipadas de Importactión (DJAI) is a customs formality and therefore cannot be evaluated under Article XI of the General Agreement on Tariffs and Trade (GATT 1994).[1] Australia does not necessarily accept that the DJAI is a customs formality, but considers that customs formalities *can* be evaluated under Article XI.

2. Article XI:1 of GATT 1994 provides that:

> No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

3. Since the only types of measure expressly excluded from this provision are "duties, taxes and other charges", Australia considers that a customs formality could breach Article XI:1 by amounting to a "restriction".

4. In *China – Raw Materials*, the Panel referred to findings of other GATT and WTO panels that types of measures "other" than quotas, import or export licenses, duties, taxes or charges that have a "limiting effect" or impose a "limiting condition", are prohibited under Article XI:1, and noted that panels have assessed such measures by examining their design to determine whether they have a "limiting" or "restrictive" effect.[2] The Panel in *China – Raw Materials* noted that it saw no merit in seeking to determine whether a measure is permissible under Article XI:1 based solely on its label.[3]

5. In *India – Autos* the Panel noted that Article XI:1 refers to restrictions "made effective through quotas, import or export licences or other measures". The Panel stated that this formulation, which includes a "broad residual category" of "other measures", suggests that Article XI:1 has a broad scope.[4]

6. Australia notes that there is some question as to whether it is enough that the measure places a limiting effect or condition on importation, or whether it must also be shown that the measure affects the competitive opportunities available. Proponents of the latter view argue that a panel would likely also require that the measure have an impact on the competitive opportunities available, otherwise any restricting effect, no matter how minimal, would be enough to find a Member in breach of Article XI:1. Accordingly, the Panel in *India – Autos* noted the following:

> The question of whether [the] measure can appropriately be described as a restriction on importation turns on the issue of whether Article XI can be considered to cover situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.[5]

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[1] Argentina's first written submission, para. 181.
[2] Panel Report, *China – Raw Materials*, para. 7.914.
[3] Panel Report, *China – Raw Materials*, para. 7.915.
[4] Panel Report, *India-Autos*, para. 7.246.
[5] Panel Report, *India – Autos*, para. 7.269.

7. The Panel in *Colombia – Ports of Entry* noted that:

> … a number of GATT and WTO Panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer.[6]

8. Australia therefore considers that even if the Panel accepts Argentina's argument that the DJAI is a customs formality, the measure may still be evaluated under Article XI:1. Australia notes that Article XX(d) of GATT 1994 provides that nothing in GATT 1994 shall be construed to prevent the adoption or enforcement of measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement. The application of such an exception to measures relating to customs enforcement clearly suggests that other provisions of GATT 1994 (such as Article XI) do apply to such measures.

II. THE PURPOSE AND FOCUS OF ARTICLE VIII OF GATT

9. As noted above, Argentina has argued that the DJAI is a customs formality, and has made some comments about Article VIII of GATT 1994 in arguing that Article VIII and Article XI are mutually exclusive and that the DJAI, as a customs formality, must be evaluated under Article VIII and not Article XI of GATT 1994. [7]

10. Article VIII:1(c) of GATT states that:

> … the contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

11. Argentina has argued that this provision expressly acknowledges the need for Members to maintain customs formalities,[8] and has also argued that Article VIII contemplates that customs formalities can have at least some restrictive effect on trade. Argentina states that:

> By acknowledging "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements", the drafters of Article VIII were aware that customs formalities are potentially an impediment to trade…Because the potential trade-restricting effects of customs formalities are governed by Article VIII… and because Article VIII contemplates by its terms that such effects may occur, it cannot be the case that these same effects render a customs formality a prohibited quantitative restriction under Article XI.[9]

12. Argentina argues in its submission that customs formalities cannot be evaluated under Article XI, and that if customs formalities have some effect on the quantity or amount of imports, this must be evaluated under Article VIII or, in the case of import licensing procedures other than for customs purposes, under the Import Licensing Agreement.[10]

13. Another statement made by Argentina is that "it cannot be the case that customs formalities that are *permitted* under Article VIII are *prohibited* quantitative restrictions under Article XI".[11]

14. Argentina also stated that:

> Article VIII recognizes the need for Members to maintain import formalities and requirements in the ordinary course of implementing and enforcing their domestic laws. Article VIII:1(c) acknowledges "the need for minimizing the incidence and

[6] Panel Report, *Colombia – Ports of Entry* para. 7.240.
[7] Argentina's first written submission, para. 176.
[8] Argentina's first written submission, para. 163.
[9] Argentina's first written submission, para. 177.
[10] Argentina's first written submission, para. 181.
[11] Argentina's first written submission, para. 176.

> complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements", but otherwise does not impose more specific disciplines in respect of these types of procedures.[12]

15. Australia disagrees with Argentina's characterisation of the purpose and focus of Article VIII of GATT 1994. Article VIII does not primarily aim to permit and govern customs formalities, and only mentions import and export formalities in order to state the need for contracting parties to minimize their incidence and complexity.

16. Argentina argues that the trade restrictive effects of customs formalities can *only* be evaluated under Article VIII, while noting that Article VIII does not impose any specific disciplines in relation to these procedures.[13] If this argument succeeded it would mean that the trade restrictive effects of customs formalities would effectively not be able to be evaluated at all.

III. WHETHER A NON-AUTOMATIC IMPORT LICENSING PROCEDURE CAN ALSO BE A PROHIBITED QUANTITATIVE RESTRICTION UNDER ARTICLE XI OF GATT

17. Argentina argues that the Import Licensing Agreement sets forth specific and more detailed disciplines concerning the trade restricting effects of import licensing procedures and that the trade-restricting effects of import licensing procedures must therefore be analysed under the relevant provisions of the Import Licensing Agreement and not under Article XI.[14] This argument does not pertain to the order of analysis, since Argentina is arguing that if the Panel considers the DJAI to be a non-automatic import licensing system, then the DJAI should not be evaluated under Article XI at all.[15] Argentina has noted, however, that its raising of this issue does not mean that the DJAI procedure *is* subject to the Import Licensing Agreement, as Argentina considers that it is not.[16]

18. Australia considers that the trade-restrictive effects of the DJAI can be analysed under both the relevant provisions of the Import Licensing Agreement *and* under Article XI of GATT. In *Argentina – Footwear*, the Appellate Body considered the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards, and stated:

> … the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members…a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.[17]

19. In *EC – Bananas*, the Panel noted that it had to ascertain whether the provisions of the Import Licensing Agreement and the Agreement on Trade-Related Investment Measures (TRIMS Agreement), contain any conflicting obligations which are contrary to those stipulated by Articles I, III, 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.

20. The Panel explained that wherever the answer to this question is affirmative, the obligation or authorization contained in the Import Licensing Agreement or TRIMs Agreement would, in accordance with the General Interpretive Note, prevail over the provisions of the relevant Article of GATT 1994. Where the answer is negative, both provisions would apply equally.[18]

21. The Panel in *EC – Bananas* found that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the Import Licensing Agreement, the TRIMs Agreement and GATT 1994.

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[12] Argentina's first written submission, para. 163.
[13] Argentina's first written submission, para. 163.
[14] Argentina's first written submission, para. 171.
[15] Argentina's first written submission, para. 180.
[16] Argentina's first written submission, para. 301.
[17] Appellate Body Report, *Argentina – Footwear*, para 81 (emphasis in original).
[18] Panel Report, *EC – Bananas III*, para. 7.161.

Indeed, the Panel noted that the first substantive provision of the Import Licensing Agreement, Article 1.2, requires Members to conform to GATT 1994 rules applicable to import licensing.[19]

22. Australia also notes that the preambular provision in the Import Licensing Agreement provides that Members recognise the provisions of GATT 1994 as they apply to import licensing procedures, and also notes a desire to ensure that import licensing procedures are not utilised in a manner contrary to the principles and obligations of GATT 1994.

23. Australia considers that Members can comply with both Article XI of GATT and the relevant obligations of the Import Licensing Agreement. As such, the DJAI can be evaluated under both Article XI of GATT 1994 and relevant obligations of the Import Licensing Agreement.

IV. OTHER ISSUES

24. Australia notes that due care must be taken in determining the existence of unwritten measures. However, it is equally important that the Panel recognise the importance of appropriately applying WTO rules to WTO Members' unwritten measures. In particular, the lack of transparency associated with such measures creates uncertainty for exporters from other countries and can cause a "chilling effect" on trade.

25. With regard to the factual issues raised by the complainants, Australia notes that the overall picture they describe accords with Australia's experience.

[19] Panel Report, *EC – Bananas III*, para. 7162.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA*

I. INTRODUCTION

1. Madam Chairperson, distinguished Members of the Panel, the Government of Canada appreciates this opportunity to provide its views on certain matters arising in this dispute. Canada is participating as a third party because of its systemic interest in the matter, particularly with respect to the scope of application of GATT Article XI and the Agreement on Import Licensing Procedures (ILA).

2. The Complainants argue that Argentina's *Declaración Jurada Anticipada de Importación* (DJAI) regime, which requires all importers of all goods to obtain prior approval to import, violates GATT Article XI. They argue that Argentina established a non-automatic import licensing regime without publishing the criteria for approval or denial of the DJAI. Under the DJAI regime the various Argentinian regulatory agencies have complete discretion over when and how to respond to DJAI applications. According to the Complainants, this discretion is used to prevent or delay the import of goods. The Complainants also argue that the DJAI regime has trade-restrictive or distortive effects on imports in violation of ILA Article 3.2.

3. Argentina, in response, argues that the DJAI regime is not an import licensing regime, but rather a customs formality that may only be evaluated under GATT Article VIII and not under GATT Article XI. In the alternative, Argentina argues that if the DJAI regime is found to be an import licensing regime, it can only be evaluated under the ILA as it is exclusively an *administrative procedure* used for the operation of an import licensing regime.

4. The Panel's characterization of the DJAI regime will determine which legal provisions apply to it. In our statement today, we will demonstrate that if the DJAI is characterized as an import licensing regime or a customs formality it needs to be assessed under GATT Article XI. If it is an administrative procedure used for the operation of an import licensing regime it needs to be assessed under ILA Article 3.2.

5. In doing so, we will demonstrate that regardless of which agreement applies this Panel will have to assess whether the DJAI regime is trade-restrictive in violation of Argentina's WTO obligations.

A. If the DJAI regime is an import licensing regime then it must be analyzed under GATT Article XI

6. GATT Article XI specifically states that import restrictions made effective through import licenses are not permitted. The term "import license" is not defined in the GATT 1994. However, the panel in *Turkey – Rice*, considered the meaning of "discretionary import licensing" under footnote 1 of Article 4.2 of the Agreement on Agriculture. The panel indicated that an import licensing practice that demonstrates that an importing country's authorities have discretion over whether to grant or refuse a particular document that is necessary to import a good, can be characterized as a practice of discretionary import licensing in violation of Article 4.2 of the Agreement on Agriculture.[1]

7. In that dispute, the panel noted the similarity between the scopes of application of Article 4.2 of the Agreement on Agriculture and GATT Article XI. The panel's interpretation of the term "discretionary import licensing" under the Agreement on Agriculture should therefore be equally applicable when assessing whether a measure constitutes an import license restricting trade in violation of GATT Article XI.[2]

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* Canada requested that its oral statement serve as the executive summary.

[1] Panel Report, *Turkey – Rice*, para. 7.133.

[2] Ibid., para. 7.48.

8. Further, WTO panels have found that measures that can be characterized as discretionary import licensing regimes, by their very nature, constitute a restriction on imports in violation of GATT Article XI.[3]

9. Therefore, if the Panel finds that the DJAI regime constitutes a discretionary import licensing regime, it should conclude that the DJAI regime violates GATT Article XI.

B. Even if the DJAI regime is a customs formality it must be analyzed under GATT Article XI

10. Argentina argues that the DJAI regime is a customs formality that should be analyzed exclusively under GATT Article VIII. This is incorrect. A customs formality must also be analyzed under GATT Article XI.

11. Article XI:1 forbids Members from instituting or maintaining import prohibitions or restrictions, other than duties, taxes or other charges, whether made effective through quotas, import licenses or other measures. Article XI therefore applies to all measures that constitute an import prohibition or restriction, other than "duties, taxes and other charges".

12. With respect to the residual category of "other measures", the jurisprudence confirms that this category is comprehensive. It applies to all measures that constitute an import prohibition or restriction that are not specifically excluded under GATT Article XI.[4] Therefore, even if the DJAI regime is properly characterized as a customs formality, it is subject to GATT Article XI.

13. GATT Article VIII, for its part, does not set out a comprehensive regime for the regulation of customs formalities. It only contains obligations with respect to fees and charges, and penalties for minor breaches of customs regulations. Article VIII mentions import and export formalities only to state the need for WTO Members to minimize their incidence and complexity. As Australia noted, if Argentina's GATT Article VIII argument were to succeed, it would result in the trade restrictive effects of customs formalities effectively being unreviewable under the GATT 1994.[5]

14. Thus, if the Panel finds that the DJAI regime is a customs formality that restricts imports it clearly falls within the broad residual category of "other measures" and violates GATT Article XI.

C. If the DJAI regime is exclusively an administrative procedure used for the operation of an import licensing regime, then it is only subject to ILA Article 3.2

15. The ILA specifies that import licensing procedures are administrative procedures used for the operation of import licensing regimes that require the submission of documentation as a prior condition for importation. Documents required for customs purposes are specifically excluded from the scope of the ILA.

16. The Appellate Body has confirmed that the scope of application of the ILA is limited to the administration of import licenses. It excludes the other aspects of import licensing regimes such as the import licensing rules themselves.[6] Thus, import licensing measures will only be subject to the ILA if they constitute administrative procedures for the operation of the import licensing regime, rather than the import regime itself.

17. In that regard, Article 3.2 refers to an underlying restrictive measure that the licensing procedures at issue will be used to administer or implement. Thus, the obligations under Article 3.2 only apply if there is an underlying measure that imposes a trade restriction.

18. Therefore, it is only if the Panel finds that the DJAI regime is exclusively an administrative procedure used for the operation of an import licensing regime, and is not itself an import licensing regime, that the DJAI regime would be examined exclusively under ILA Article 3.2.

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[3] Panel Reports, *India – Quantitative Restrictions*, para. 5.129 and *China – Raw Materials*, para. 7.921 .

[4] Panel Reports, *Colombia – Ports of Entry*, para. 7.240 ; *India – Quantitative Restrictions*, para. 5.128; and GATT Panel Report, *Japan – Semi Conductors*, para. 104.

[5] Australia's third party written submission, para. 30.

[6] Appellate Body Report, *EC – Bananas III*, para. 197.

D. If the DJAI regime contains both substantive rules and administrative procedures for the operation of the licensing regime then it may be analyzed under both GATT Article XI and ILA Article 3.2

19. If the Panel finds that the DJAI regime is both an import licensing regime, subject to GATT Article XI, and also contains administrative procedures for the operation of the licensing regime, then it may be analyzed under both GATT Article XI and ILA Article 3.2.

20. In order for both provisions to apply, the DJAI regime needs to contain both substantive rules with respect to import licenses and administrative procedures used for the operation of those rules. In that case, the substantive elements must be analyzed under GATT Article XI. It is only if the substantive elements are found to be consistent with Article XI, that an analysis under ILA Article 3.2 would be necessary. If the substantive elements are in violation of Article XI, then the question of how the measure has been administered is irrelevant.[7]

II. CONCLUSION

21. In summary, if the DJAI regime is found to restrict the importation of goods into Argentina, it would be inconsistent with Argentina's obligations under GATT Article XI, whether it is found to be an import licensing regime or a customs formality. To the extent that any aspect of the DJAI regime is found to constitute an administrative procedure under the ILA, the DJAI regime would also be inconsistent with ILA Article 3.2 if it has trade-restrictive effects on the importation of goods into Argentina in addition to those of a WTO-consistent underlying restrictive measure.

22. That concludes Canada's statement. Canada thanks the Panel for its attention.

[7] Panel Report, *Turkey – Rice*, para. 7.41.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ISRAEL*

1. Israel would like to take this opportunity to highlight certain points of interest to our delegation albeit we have circulated a written submission informing the Panel of our position as a third party participant in these proceedings.

2. In the case at hand, in Israel's view, Argentina is in violation of several provisions set out under both General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Import Licensing Procedures Agreement (IL Agreement). Argentina has failed to publish promptly the laws, regulations and administrative rulings of general application pertaining to the operation of the RTRRs, thus violating Article X:1 of the GATT 1994. In relation to both the RTRRs and the DJAI, Argentina has failed to publish sufficient information regarding the basis for granting or allocating licenses, as required by Article 3.3 of the IL Agreement. Also, Argentina's DJAI fails to comply with the IL Agreement obligation under Article 1.4(a), since Argentina has not published the rules and all information relating to the DJAI process.

3. These violations raise issues concerning one of the core principles and objectives expressed in the WTO covered agreements, namely that of transparency. In reality, these violations mean that economic operators cannot rely on the legal certainty afforded by a clear and transparent import mechanism and thus create an extremely difficult trading environment.

With this in mind and since Israel views this dispute with particular interest due to its systemic and trade significance, we raise the following three points:

4. Firstly, this dispute involves important interpretive issues under the WTO agreements; specifically Article XI:1 of the GATT 1994, which addresses the general elimination of quantitative restrictions. Argentina has failed to disprove the arguments made by the complainants regarding Argentina's non-compliance with this obligation, and the Panel should find accordingly.

5. Furthermore, in relation to Article 3.2 of the IL Agreement, the complainant's *prima facie* case is clear in that Argentina's DJAI have trade-restrictive or -distortive effects on imports, in addition to those caused by the imposition of the DJAI. The trade-restrictive nature and distortive effects of the DJAI on imports has been carefully detailed by the complainants, and the Panel should find accordingly.

6. Secondly, whether Argentina's DJAI is viewed as a single non automatic import licensing procedure or as part of a broader trade restrictive policy, i.e. the RTRR, Argentina has failed to disprove the complainant's arguments relating to Argentina's non-compliance with its WTO obligations regarding both these measures and thus the Panel should find accordingly.

7. Finally, the Panel should recognize the importance of appropriately applying WTO rules to Members' unpublished measures. The fact that Members do not properly publish their measures and laws, even though they are obligated to do so, should not allow these measures to avoid scrutiny. In this case, Argentina's trade-restrictive measures and policies are widespread and their existence and operation are confirmed through numerous statements, press releases, reports and industry surveys, thus giving the Panel the legal basis for a finding of non-compliance.

8. In light of the systemic importance of this case and the WTO violations mentioned here and through our written submission, we urge the Panel to make the necessary findings in order to preserve the rules-based WTO system. Specifically, Israel respectfully requests that the Panel finds Argentina's RTRRs and the DJAI to be inconsistent with the obligations of Argentina under Article X:1, X:3(a) and XI:1 of GATT 1994 and Articles 1.4(a), 3.2, 3.3, of the Import Licensing Agreement.

We thank the Panel for affording us this opportunity to state our position at this time.

* Israel requested that its oral statement serve as the executive summary.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA*

1. The Republic of Korea ("Korea") appreciates this opportunity to present its view on the matter before the Panel as a third party in the present proceeding. The decision of the Panel in the dispute at hand would provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the rules of the WTO.

2. While the parties and third parties to this dispute raise several important points, Korea would like to comment on one important issue in the interpretation and application of Article XI:1 of GATT 1994.

3. The Kingdom of Saudi Arabia ("Saudi Arabia") argued in its third party submission that a licensing system is not in breach of Article XI of the GATT 1994 unless it imposes a quantitative restriction. Briefly speaking, based on the title and text of the GATT Article XI, and the previous Appellate Body decisions, Saudi Arabia argues that Article XI of GATT 1994 prohibits only quantitative restrictions on imports or exports.

4. In this regard, Saudi Arabia referred to the Appellate Body report on the *China – Raw Materials* case which explained that "the use of the word 'quantitative' in the title of the provision informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1 and XI:2," and that "Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported." Based on this Appellate Body report, Saudi Arabia claimed that "the provisions of the GATT Article XI must be interpreted in light of their stated purpose to eliminate quantitative restrictions, and Article XI disciplines only those measures that have a limiting effect on import or export quantities."[1]

5. Korea appreciates Saudi Arabia's point in interpreting the GATT Article XI. However, Korea has a different view in reading the Appellate Body report. As we understand, the main point of the report in interpreting the GATT Article XI seems to be how to interpret the languages, "temporarily applied" and "critical shortage" of Article XI:2(a).

6. Korea would like to remind the Panel that previous WTO panels have tried to touch upon the interpretation of the terms in the title of the GATT Article XI. The Panel in *China – Raw Materials* expressed its view that "The Appellate Body has indicated that the title of a provision may be useful in defining its objective. The Panel notes the title of Article XI:1 – 'General Elimination of Quantitative Restrictions' suggests that the provision is intended to govern elimination of quantitative restrictions generally. While relevant, the Panel's interpretative task does not of course end with the title. To determine the scope and meaning of Article XI:1, the Panel needs to consider the particular terms of the provision."[2]

7. To Korea's understanding, careful interpretation of the WTO agreements will guide us to interpret the treaty terms with due care that requires more than purely textual interpretation. The Panel in *China – Raw Materials* further added that "Article XI:1 also prohibits restrictions effected through export licenses, as well as an unqualified category of 'other measures.' In the Panel's view, the fact that the title uses the term 'quantitative restrictions' does not change the fact that a broad category of 'other measures' falls within the scope of Article XI:1."[3] Korea believes that the Panel in *China – Raw Materials* clarified that the title in Article XI is not a definite element to define the scope of Article XI:1.

8. There is another panel decision that provides us with useful guidance. The Panel in *India – Autos* case found that "The question of whether the measure can appropriately be described as a restriction on importation turns on the issue of whether Article XI can be considered to cover

* The Republic of Korea requested that its oral statement serve as the executive summary.
[1] Saudi Arabia's third party submission, paras. 5-6.
[2] Panel Report, *China – Raw Materials*, para. 7.912.
[3] Panel Report, *China – Raw Materials*, para. 7.913.

situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import. On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both prohibition and restriction."[4] Again, the Panel in *India – Autos* confirmed that 'restriction' does not necessarily mean a precise numerical limit or express formal quantitative restrictions.

9. Considering these panel decisions, Korea is of the view that the scope of Article XI:1 may be very broad and comprehensive under WTO jurisprudence. That being said, Korea requests the Panel to guide us how to interpret the correct meaning of the term, "quantitative," and its relationship with other terms in the GATT Article XI.

10. Again, Korea appreciates this opportunity before the Panel and would be more than happy to answer any questions you might have.

[4] Panel Report, *India – Autos*, paras. 7.269 -7.270.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. INTRODUCTION

1. A transparent regulatory framework is a prerequisite for international trade in general and the importation of goods in particular. Without the possibility to gain access to relevant information regarding the requirements applicable to the importation of goods, traders are left without predictability and the appropriate due process guaranties. This is recognized both by the interpretation by panels of the GATT 1994 as well as in the preamble of the *ILP Agreement*.[1]

II. TRANSPARENCY OBLIGATIONS IN ARTICLES X:1 AND X:3 OF THE GATT 1994 AND ARTICLES 1.4(A) AND 3.3 OF THE *ILP AGREEMENT*

a) Publication and the manner in which publication must take place

2. Article X:1 of the GATT 1994 and Article 1.4(a) of the *ILP Agreement* contain an obligation on Members, saying that the covered information "shall be published", whereas according to Article 3.3 of the *ILP Agreement*, Members "shall publish" the covered information. Prior panels have examined the meaning of this term in the context of the publication provision of Article X:1 of the GATT 1994. Although no panel has interpreted the meaning of the publication requirement in Articles 1.4(a) and 3.3 of the *ILP Agreement*, the guidance given on the interpretation of Article X:1 of the GATT 1994 must in our view have relevance also for the interpretation on the manner in which publication must take place according to the two provisions on publication in the *ILP Agreement.*

3. The provisions raise questions as to the manner in which publication must take place. In *EC – IT Products*, regarding Article X:1 of the GATT 1994, the panel said that:

> "In our view, if measures are to be published "in such a manner as to enable governments and traders to become acquainted with them", it follows that they must be generally available through an appropriate medium rather than simply making them publicly available."

4. In the footnote to this quote, the panel further elaborates on its view:

> "In other words, if a "medium" makes measures generally available to the public in such a manner as to "enable governments and traders to become acquainted with them", we consider that such medium should be regarded as "appropriate" and that publishing on that medium would fall within "published" a used in Article X:1."[2]

5. We understand this to mean that access to information upon request would not fulfill the publication requirement. Rather, information must be actively provided using an appropriate medium.[3]

b) Requirements as to the content of the publication

6. Article X:1 of the GATT 1994 and Article 1.4(a) of the *ILP Agreement* contain an obligation on Members, saying that the covered information shall be published "in such a manner as to enable governments and traders to become acquainted with them". In accordance with Article 3.3 of the *ILP Agreement*, Members "shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences".

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[1] *EC – IT Products*, para. 7.1085, regarding Article X:1 of the GATT 1994. *ILP Agreement*, preamble ninth indent.

[2] *EC – IT Products*, para. 7.1084.

[3] Article 1.4(a) of the *ILP Agreement* gives further instructions on the media in which publication must take place, stating that information "shall be published, in the sources notified to the Committee on Import Licensing".

7. A common thread in these three Articles is that publication must contain information that provides traders with a *full* picture of the relevant regulations. In Norway's view, the publication requirements must be understood to contain an obligation to make public the process importers must follow in order to import goods, including the different steps in these proceedings and the authorities involved. Furthermore, the conditions for allowing or denying importation of goods must be published, including the method used by the authorities to determine whether the conditions are met. This includes information on any exceptions and changes to the rules. Article 1.4(a) of the *ILP Agreement* states explicitly that "Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above."

8. The requirements in Articles 1.4(a) and 3.3 of the *ILP Agreement* have not been interpreted by panels. However, the guidance given on the interpretation of Article X:1 of the GATT 1994 must in our view also be relevant for the interpretation on the content of the publication requirement in the two provisions on publication in the *ILP Agreement.*

9. The panel in *EC – IT Products* interpreted the phrase, "in such a manner as to enable governments and traders to become acquainted with them," as follows:

> "not any manner of publication that would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is "adequate" so that traders and Governments may become "familiar" with them, or "known" to them in a "more or less complete" way."[4]

10. In this case, the panel concluded that the European Commission's posting of the minutes of the Customs Code Committee on the Comitology website did not fulfill this requirement, and commented, "In particular, we note that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States."[5] (emphasis added)

11. Similarly, in *China – Raw Materials*, China failed to publish the fact that it had not set an export quota for zinc. The panel stated that:

> "Concerning the requirement to publish promptly the relevant measures, in this case, the omission to set a quota for zinc, the Panel observes that China has not denied that it has not published the quota, or lack thereof, for zinc. Additionally the failure to publish the quota has had a practical result as interested exporters did not know that effectively, they were unable to export zinc. The Panel considers that under its Article X:1 obligations, China should have published its decision not to make "effective the quota on zinc by setting a particular quota amount available for exports" in such a manner as to enable governments and traders to become acquainted with that decision"[6] (emphasis added)

12. In *Dominican Republic — Import and Sale of Cigarettes*, the Panel also focused on the type of information the publication must contain:

> "the Dominican Republic should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish its decision to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would use in order to determine the tax base for the Selective Consumption Tax on cigarettes."[7] (emphasis added)

13. In *Thailand — Cigarettes (Philippines)*, the Panel considered a claim regarding failure to publish the methodology for determining MRSPs (which is an element of the tax rate for cigarettes), and held that:

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[4] EC – IT Products , para. 7.1086.
[5] *EC – IT Products,* para. 7.1087.
[6] *China – Raw Materials,* para. 7.806.
[7] *Dominican Republic – Import and Sale of Cigarettes,* para. 7.414.

> "The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted."[8] (emphasis added)

14. These cases illustrate that Members must publish comprehensive and unambiguous information regarding the applicable rules on the importation of goods. This points back to the purpose underlying the publication requirement in all three provision, namely to ensure a transparent regulatory framework for the benefit of all traders.

c) Transparency obligations in Article X:3(a) of the GATT 1994

15. The transparency obligations contained in Article X:1 of the GATT 1994 and Articles 1.4(a) and 3.3 of the refer to as the *ILP Agreement* reflect a fundamental objective of the WTO, namely to ensure predictable conditions for international trade. This fundamental objective is further substantiated, among others, through the provisions of the GATT 1994 Article X:3(a).

16. In *US – Shrimp*, the Appellate Body made it clear that "Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations".[9]

17. Furthermore, Members are obliged to comply with *all* three requirements in letter (a). In *Thailand – Cigarettes (Philippines)*, the Panel stated:

> "The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements. This means that […] a violation of any of the three obligations will lead to a violation of the obligations under Article X:3(a)."[10]

18. Compliance with this provision is important, as transparent rules and a fair and predictable administration of such rules are a prerequisite for international trade.

II. THE RELATIONSHIP BETWEEN THE GATT 1994 AND THE *ILP AGREEMENT*

19. Generally, Norway's view is that all WTO Agreements must be interpreted harmoniously, so that all relevant provisions are given meaning. We find support for this view in WTO jurisprudence. In *Argentina – Footwear (EC)*, the Appellate Body considered the relationship between the GATT 1994 and the *Agreement on Safeguards* and stated amongst other that:

> "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. […] a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements."[11]

20. Moreover, in *US – Softwood Lumber IV*, the Appellate Body further elaborated on the relationship between the GATT 1994 and the *Agreement on Safeguards* and underlined that the

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[8] *Thailand – Cigarettes (Philippines*), para. 7.789.

[9] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, para. 183.

[10] Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes (Philippines)*, WT/DS371/R, para.7.867.

[11] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/AB/R para. 81.

provisions of the *Agreement on Safeguards* and the GATT 1994 apply on a cumulative basis.[12] These statements are clearly relevant also for the interpretation of the GATT 1994 and the *ILP Agreement.*

21. The General interpretative note to Annex 1A sets out the relationship between the GATT 1994 and the other agreements contained in Annex 1A. The *ILP Agreement* is a part of Annex 1A and hence the interpretative note is applicable to the relationship with the GATT 1994. The interpretative note makes it clear that in the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the provision of the other agreement shall prevail to the extent of the conflict.[13]

22. In *European Communities – Bananas (III),* the complainants raised claims in respect of the European Communities' import licensing regime under GATT 1994, the *ILP Agreement* and the TRIMs Agreement. In the interpretation of the concept of "conflict" in the General interpretative note, the Panel emphasized that situations of complementary obligations would not be in "conflict" within the meaning of the General interpretative note."[14]

23. With regard to the relationship between the *ILP Agreement* and the GATT 1994, we note that the preamble to the *ILP Agreement* recognize the provisions of the GATT 1994 as they apply to import licensing procedures and that Members also express a desire to ensure that import licensing procedures are not utilized in a manner contrary to the principles and obligations of the GATT 1994. With this in mind, the Panel must examine closely whether there is a conflict between the relevant provisions of the GATT 1994 and the *ILP Agreement* in this case or whether the provisions are in fact complementing each other.

III. CONCLUSION

24. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[12] Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (US- Softwood Lumber IV),* WT/DS257/AB/R), para. 134.

[13] Annex 1A, Multilateral agreements on trade in goods, "General interpretative note to Annex 1A".

[14] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III),* WT/DS27/R/USA, paras. 7.160-7.161.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you. Madam Chairperson and distinguished Members of the Panel, the Kingdom of Saudi Arabia would like to take this opportunity to affirm the positions set out in its Third Party submission. Today, the Kingdom will summarize its views on several systemic issues relating to the interpretation of the General Agreement on Tariffs and Trade and the Agreement on Import Licensing Procedures: the proper scope of GATT Article XI; its relationship with the Import Licensing Agreement; the permissibility of licensing systems under Article XI; and the appropriate burden of proof for establishing a WTO violation.

II. LICENSING AND GATT ARTICLE XI

2. The first issue concerns the key principles for assessing the consistency of a non-automatic licensing system with GATT Article XI, entitled "General Elimination of Quantitative Restrictions". As it will be highlighted, if an underlying import measure is permissible under GATT Article XI, a licensing system that administers such a measure will be consistent with Article XI, unless it introduces and is designed to introduce an additional quantitative restriction.

3. Article XI and its title establish two fundamental principles. First, Article XI disciplines only *quantitative* restrictions on imports or exports. According to the Appellate Body, "Article XI of the GATT 1994 covers those *prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported*". This interpretation is consistent with previous Appellate Body rulings that have stressed that the title of a provision helps to define its objective, as well as with basic principles of treaty interpretation. Any interpretation of Article XI that expands its coverage to all prohibitions or restrictions, whether or not related to import or export quantities, would contradict the Appellate Body's ruling and render the Article's title meaningless.

4. In assessing whether a measure is an impermissible restriction on imports or exports under GATT Article XI:1, a panel should first determine whether the measure imposes a formal quantitative restriction, such as a set numerical limitation or prohibition on imports or exports. If the measure does not impose such a formal quantitative restriction, a panel then should examine the measure's design, architecture and structure in order to determine whether it has a limiting effect, or whether it is designed to have a limiting effect, on import or export quantities. This analytical approach is consistent with prior Panel rulings, as well as the principle that Article XI only prohibits measures that impose quantitative restrictions on imports or exports. The Kingdom submits that the Panel should apply this principle when assessing the WTO-consistency of the relevant measures in this dispute.

5. Second, GATT Article XI:1 expressly permits, without exception, certain forms of restrictions – "duties, taxes or other charges" – that may be implemented by a licensing system. Article XI explicitly recognizes that such permissible measures are not self-implementing, but may be "made effective through … import or export licences or other measures". This language refers to the obvious fact that in order to enforce a permissible measure, a Member may also establish a system to implement it. A licensing system therefore may be consistent with Article XI where it implements a permissible restriction. Licensing may operate automatically but may also require the fulfilment of criteria necessary to the operation of the underlying measure. The latter instance of so-called "non-automatic" licensing is not inconsistent *per se* with Article XI.

6. It is unchallenged that GATT Article XI permits automatic import licensing systems, which the Import Licensing Agreement defines as "licensing where approval of the application is granted in all cases" where certain pre-established conditions are met. Such systems do not impose any restrictions on imports. In this context, the mere presence of, for example, an application process would not render an import licensing system "non-automatic". The same principles would apply to the permissibility of export licensing.

7. GATT Article XI also allows certain "non-automatic" import or export licensing systems. Based on the Import Licensing Agreement, "non-automatic" licences are a broad residual category of all licences that are not "automatic", which, as highlighted, means "granted in all cases". Licences that administer permitted import or export restrictions are "non-automatic" when they impose requirements that might not be fulfilled in all cases (for example, the payment of a duty). The text of Article XI:1 anticipates that non-automatic requirements may be necessary to implement a permitted restriction: the provision permits duties, taxes or other charges "made effective through… import or export licences". The phrase "made effective" recognizes the imposition of requirements necessary to the operation of the permitted restriction. Non-automatic licensing systems are thus consistent with Article XI to the extent that they merely have "made effective" such restrictions.

8. The permissibility of non-automatic licensing systems under Article XI also is consistent with Article 3 of the Import Licensing Agreement, which establishes specific standards for the imposition of "non-automatic import licensing". There would be no reason to establish such standards if non-automatic licensing were *per se* inconsistent with Article XI. GATT Article XIII, which allows the use of import licences "in connection with" permissible import restrictions, further supports the position that non-automatic licensing may be consistent with Article XI.

9. As Article XI expressly permits "duties, taxes or other charges", non-automatic licensing will be WTO-consistent whenever it implements an otherwise permissible restriction in a form that does not create, and is not designed to create, additional limiting effects on import or export quantities beyond what is necessary to administer the permitted restriction. The Panel in *China – Raw Materials* agreed with this approach and, importantly, many WTO Members use licensing as the means to implement a permissible restriction on imports or exports.

10. For these reasons, Saudi Arabia respectfully requests the Panel to affirm the principle that non-automatic licensing schemes are not *per se* inconsistent with GATT Article XI. Rather, a non-automatic licensing scheme is consistent with GATT Article XI where, for example, it imposes conditions that merely implement an otherwise permissible restriction, such as duties, taxes or other charges, in a manner that does not create an additional quantitative restriction beyond what is necessary to administer the permitted restriction.

11. On the other hand, Article XI prohibits non-automatic licensing systems that independently act as impermissible quantitative restrictions. Such systems include those which implement a permitted import or export restriction but impose an additional trade or administrative restriction; or which are discretionary. Non-automatic licensing is otherwise permitted by Article XI.

12. Where a licensing system implements a permissible import or export measure and is non-automatic, the Panel should examine whether the system is itself an impermissible quantitative restriction. This is essentially a question of whether the licensing requirements do no more than is necessary to administer the underlying measure, and Article 3.2 of the Import Licensing Agreement provides guidance in this regard. It supports the conclusion that a non-automatic licensing scheme that implements a permissible restriction will be consistent with WTO rules unless it, first, has restrictive effects that are additional to those caused by the imposition of the permissible restriction; second, does not correspond in scope and duration to the underlying restriction; or, third, is "more administratively burdensome than absolutely necessary to administer the measure".

13. Finally, it is important to distinguish between non-automatic and "discretionary" licensing systems, as the two terms are not interchangeable. Discretionary licensing systems are a subset of non-automatic licensing systems that are inconsistent *per se* with GATT Article XI. A discretionary licensing system that implements a permissible restriction (such as a duty) would constitute an additional quantitative restriction in violation of Article XI:1. The Kingdom requests that the Panel clarify the distinction between non-automatic and discretionary licensing.

III. BURDEN OF PROOF FOR ESTABLISHING A WTO VIOLATION

14. The Kingdom also wishes to clarify the burden of proof that applies when claims are made against unpublished measures – a key issue in this dispute. It is well established that a complaining party bears the burden to establish a *prima facie* case of a violation for each element

of each claim, based on factual evidence and legal arguments. To demonstrate a violation, a complainant must satisfy both an evidentiary and legal burden of proof, and this must be done for "each of the elements of the claim" and for each independent claim. If a complaining party conflates evidence and legal argument with respect to two distinct claims, one or both of the party's claims will fail.

15. Although a claim's sufficiency will vary by measure, provision and case, the same *prima facie* standard applies to all types of claims, regardless of the nature of the measure at issue. A complaining party challenging an unpublished measure must establish a *prima facie* case that, first, the unpublished measure exists and, second, the measure violates WTO rules.

16. The inherent difficulty of making a *prima facie* case for the existence of an unpublished measure does not excuse the requirement to satisfy the burden of proof. The Appellate Body has underscored the evidentiary burden that must be met to demonstrate the existence of an unpublished measure. Allegations that rest on unproven assumptions or unsupported inferences as to the existence of a measure will fail.

17. Several Panels have endorsed and applied this standard, which allows for indirect proof only as long as it is logical and fact-based. Panels will "carefully and rigorously" examine the evidence put forth by the Member to demonstrate a measure's existence, rather than assuming it. WTO jurisprudence therefore provides that the failure of a complaining Member to demonstrate an unpublished measure's existence will preclude a panel from having a "basis for finding that there are such decisions", and the Member thus will not have met its initial evidentiary burden. Although, as a practical matter, it may be more difficult to challenge an unpublished measure, the same *prima facie* burden of proof applies.

18. If a complaining party establishes the existence of a challenged measure, the party must then make a *prima facie* case that the measure – or combination of measures – is inconsistent with WTO rules. The fact that a measure is unpublished does not change the complaining party's burden of proof for this element. The evidence necessary to demonstrate that a measure violates a WTO provision must be "sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".

19. This requirement applies in all cases and for every measure that is alleged to constitute a violation. The complexity of a measure, or its combination with other measures, does not diminish the complaining party's burden of proof.

20. The Kingdom respectfully requests the Panel to consider these important principles when assessing the claims against unpublished measures in this dispute. As a practical matter, it might be more difficult for a complainant to make a *prima facie* case demonstrating the existence and nature of an alleged measure that is unpublished. The same burden of proof applies, however, whether the complainant's claim involves a measure that is published or unpublished, written or unwritten.

IV. CONCLUSION

21. Madam Chairperson, the Kingdom urges the Panel to consider the Kingdom's views on the interpretive issues set out in its submission. The Panel's decision will serve as an important precedent with respect to key systemic issues under the WTO Agreements.

22. This concludes the Kingdom's statement. Thank you for your attention.

ANNEX C-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, as a third party in this proceeding, addresses two issues in this submission: (1) whether the essence of the challenged Restrictive Trade Related Requirements (RTRRs) measures was conveyed in the complainants' requests for consultations; (2) whether Article XI:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") applies to a broad range of measures not limited to substantive rules of importation.

I. THE ESSENCE OF THE CHALLENGED RTRRS MEASURES WAS CONVEYED IN THE COMPLAINANTS' REQUESTS FOR CONSULTATIONS

2. Regarding the first issue, we are concerned about Argentina's overly narrow interpretation of the scope of the consultation requests because of the important role consultations play during the dispute settlement process. In its first written submission, Argentina argues that because the RTRRs were not identified as "measures" in the request of consultations, they bear "no relationship whatsoever" to the measures, namely the *Declaraciónes Juradas Anticipadas de Importación* (DJAI) and *Certificado de Importacion* ("Import Certificates"), in the requests for consultation.[1]

3. However, comparing the complainants' consultations requests and panel requests, the RTRRs mentioned in the respective panel requests, while not specifically identified as "measure", mirror the trade policies mentioned in the consultation requests. The RTRRs and the policies described, such as limiting import, balancing trade, incorporating local content, increasing investment in Argentina, all bear the same "essence" in terms of their purpose, application, and effect, and thus are distinguishable from the "legally distinct and separate" measures in *US – Certain EC Products*[2], and the "wholly new type of measure" in *US – Anti-Dumping and Countervailing Duties in China*.[3]

4. For the reasons above, we consider that notwithstanding the terminology used, the RTRRs referred to in the terms of reference and complainants' written submissions have not changed the essence of the measures at issue or expanded the scope of the dispute and thus are properly before this Panel.[4]

II. ARTICLE XI:1 OF THE GATT 1994 APPLIES TO A BROAD RANGE OF MEASURES NOT LIMITED TO SUBSTANTIVE RULES OF IMPORTATION

5. Article XI:1 of GATT 1994 prohibits restrictions other than duties, taxes or other charges, made effective through quotas, import or export licenses or other measures, instituted or maintained by any Member on the importation of any product of the territory of any other Member. In this case, the complainants argue that the DJAI procedure constitutes a "restriction" on importation prohibited by Article XI:1.[5]

6. In response, the respondent argues that "the DJAI procedure is a procedure and not a substantive rule of importation" and therefore is not subject to Article XI:1.[6] Accordingly, the respondent seems to argue that Article XI:1 applies only to substantive rules of importation.

7. We disagree. Neither the text of Article XI:1 nor the current jurisprudence supports this reading of the rule. First, Article XI:1 refers only to "measures" and not "substantive laws or regulations"; the former is a broader concept that encompasses the latter. What is prohibited by

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[1] Argentina's first written submission, paras. 122-128, 144.

[2] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para. 5.

[3] Argentina's first written submission, para. 143.

[4] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para. 8.

[5] United States' first written submission, paras. 101 et seq.; Japan's first written submission, paras. 107 et seq.; and European Union's first written submission, paras. 237 et seq.

[6] Argentina's first written submission, paras. 297-299.

Article XI:1 are prohibitions or restrictions made effective through quotas, import or export licenses or other *measures*. Furthermore, the text of the rule does not limit its applicability to only procedural or substantive rules of importation or exportation.

8. Second, the precedents, *Japan – Semi-Conductors*, *EEC – Minimum Import Prices*, *Argentina – Hides and Leather*, and *India – Quantitative Restrictions*, as elaborated in our written submission, reinforce this observation and demonstrate that the interpretation of "measures" referred to in Article XI:1 is very broad and its applicability is not limited only to substantive rules of importation.

9. Finally, the distinction between a "procedural" and "substantive" rule is futile. The main purpose of Article XI:1 of GATT 1994 is the general elimination of quantitative restrictions. Thus, regardless of whether a measure is procedural or substantive in nature, if the application of those measures *results* in a quantitative restriction, Article XI:1 is relevant and should be applied.

10. Thus, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu is of the opinion that the interpretation, which limits the application of Article XI:1 to only substantive rules of importation, is inconsistent with the text and jurisprudence under Article XI:1 and may diminish a Member's obligation under that provision.[7]

[7] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para. 14.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. Whether the DJAI Requirement is an Ordinary Customs Procedure or a Non-Automatic Import Licensing within the Meaning of Import Licensing Agreement and Article XI of the GATT 1994?

1. In their submissions, the complaining parties claim that the Argentinean DJAI Requirement is a non-automatic import licensing within the meaning of Import Licensing Agreement and Article XI of the GATT 1994 and is contrary to the obligations of Argentina stemming from various Articles of the Import Licensing Agreement and Article XI of the GATT 1994. In its submission, Argentina challenges the allegations and asserts that the DJAI Requirement is a customs formality subject to Article VIII of the GATT 1994. In other words, Argentina suggests that as a customs formality, the DJAI Requirement should not be evaluated under the Import Licensing Agreement and Article XI of the GATT 1994. Therefore in Turkey's view, one of the key issues before the Panel is the proper characterization of the DJAI Requirement.

2. In order to determine whether the DJAI requirement is a license, firstly, the texts of the Agreements themselves should be examined. Although Article XI:1 of the GATT makes an explicit reference to "import licenses", it does not define this term. The provisions of the Import Licensing Agreement, however provides a definition of import licensing which could also offer a useful context in defining the term "import licenses" for the purposes of Article XI:1 of the GATT 1994 as well.

3. Article 1(1) of the Import Licensing Agreement states that:

> For the purpose of this Agreement, import licensing is defined as administrative procedures (1) used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

4. Furthermore a footnote to Article 1(1) of the Import Licensing Agreement provides that the term "administrative procedures" which are referred to as "licensing" covers "other similar administrative procedures" as well.

5. Therefore, in order to referred to an import licensing within the meaning of Article 1(1) of the Import Licensing Agreement*:* i) there should be an administrative procedure used for the operation of the import licensing regime, requiring the submission of an application or other documentation as a prior condition for importation and ii) such procedures should not be required for customs purposes.

6. In its submission, Argentina essentially argues that an administrative procedure may constitute a license only if it is used for the operation of import licensing regimes such as the administration of quantitative restrictions or other similar measures[1]. In other words, Argentina suggests that administrative procedures and the import licensing regimes are different and separate elements that needs to be analysed independently

7. In Turkey's view, there could be cases that an administrative procedure encompasses import licensing regime. In this case, the administrative procedure itself may require the submission of an application or other documentation to the relevant administrative body as a prior condition for importation. Where such a situation happens, Turkey considers that there is no need to make a separate analysis on the underlying import licensing regimes such as the administration of quantitative restrictions or other similar measures. Turkey believes that a case by case analysis is needed for a determination of whether a set of administrative procedures constitutes an "import licensing regime". In making such an analysis, the design, structure and operation of the

[1] Argentina first written submission, para. 283.

administrative procedure should carefully be reviewed. Therefore, Turkey asks the Panel to review carefully the design, structure and operation of the DJAI Requirement for making the necessary determination on whether this requirement is a "license" within the meaning of the Import Licensing Agreement.

8. Argentina further argues that application and documentation requirements for the purposes of the customs procedures do not constitute an "import license" under Article 1.1 of the Import Licensing Agreement. Turkey agrees with Argentina that customs procedures do not fall under the definition of import licensing. So, the crucial point before the Panel is whether the DJAI Requirement is required for the customs purposes. Argentina contends that through the DJAI procedure, Argentina collects and processes, in advance of importation, information that is necessary for the adequate performance of its customs control functions[2]. On the other hand, the complainants provide different reasons for explaining why the DJAI Requirement is not needed for the customs purposes[3]. Turkey finds these reasons very important and believes that Panel will carefully examine them all.

9. In addition to complainants arguments, Turkey would like to emphasize that the fact that some of the information requested as part of an administrative procedure, is also requested for the customs clearance process, does not necessarily make the administrative procedure a part of the customs clearance process. In Turkey's view, the important point is whether there is a separate customs clearance procedure in addition to the DJAI Requirement. Furthermore, the design, structure and operation of the administrative procedure should also be taken into account in deciding the matter.

II. Whether the DJAI Requirement Itself is a Measure that Falls within the Scope of Article XI of the GATT 1994.

10. In its submission, Argentina argues that the DJAI is a procedure and asserts on an *arguendo* basis that any claim of inconsistency of the DJAI procedure to Article XI:1 of GATT 1994 should establish that the procedure itself has a limiting effect on the quantity or amount of goods being imported, separate and apart from the limiting effects of any substantive rule of importation that it implements, i.e. restrictive trade related requirements.

11. In order to determine whether a measure falls under the Article XI of the GATT 1994, the text of the Article should carefully be examined. Article XI:1 provides that

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, *import or export licences or other measures*, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. (emphasis added)

12. Panels in *India-Quantitative Restrictions* and *US – Poultry* found that the text of Article XI:1 of the GATT 1994 is "broad" in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges"[4].

13. The Panel in *China-Raw Materials* followed the similar path and provides that

> Article XI:1 by its terms prohibits restrictions or prohibitions that are made effective through a variety of means not solely through a category of measures that may be considered formal quantitative restrictions, such as a quota. Article XI:1 also prohibits restrictions effected through export licenses, as well as an unqualified category of "other measures". In the Panel's view, the fact that the title uses the term

[2] Argentina 's first written submission, para. 287.

[3] European Union's first written submission paras. 281-282; Japan's first written submission para.166; United States of America's first written submission paras. 48 and 125.

[4] Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799, para 5.128; Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, 1909, para 7.450.

> "quantitative restrictions" does not change the fact that *a broad category of "other measures" falls within the scope of Article XI:1*
>
> The Panel's view is consistent with findings of other GATT and WTO panels that types of measures "other" than quotas, import or export licences, duties, taxes or charges that have a "limiting effect" or impose a "limiting condition" are prohibited under Article XI:1. Panels have assessed such measures by examining their design and structure to determine whether they have a "limiting" or "restrictive" effect.
>
> The Panel will adopt a similar analytical approach. The Panel sees no merit in seeking to determine whether or not a measure is permissible under Article XI:1 based solely on its label. In other words, the Panel does not find useful for its analysis here whether a measure is categorized as an "automatic" or "non-automatic" licence. Indeed, the obligation set forth in Article XI:1 does not distinguish between types of import or export licences that would be prohibited, be they automatic, non-automatic or discretionary. Rather, it concerns "prohibitions or restrictions" including those "made effective through ... import or export licenses". Hence, our analysis will examine *the design and structure of the licence to determine if it has a "limiting" or "restrictive" effect.* [5](emphasis added)

14. Turkey finds the mentioned Panels reasoning's persuasive and agrees with the Panels that a broad category of measures, including the administrative procedures either applied as a licence or not, fall within the scope of Article XI:1. Turkey considers that the important thing is whether a measure has a "limiting" or "restrictive" effect on imports. In this regard, the label given or a characterization of a rule by a WTO Member as "substantive" or "procedural" should not change the outcome. Especially where a prohibition or a restriction is implemented through an administrative procedure itself, in Turkey's view, the Panel should examine the design and structure and operation of the measure to determine whether it has a "limiting" or "restrictive" effect on imports.

III. Conclusion

15. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests this Panel to review carefully the comments stated in this submission, in interpreting GATT 1994 and the Import Licensing Agreement.

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[5] Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, para. 7.915.

ANNEX D

PRELIMINARY RULINGS

ANNEX D-1

PRELIMINARY RULING BY THE PANEL

16 September 2013

1 PROCEDURAL BACKGROUND

1.1. In its first written submission on 7 August 2013, Argentina requested that the Panel issue a preliminary ruling that the so-called "Restrictive Trade Related Requirements" (RTRRs) identified in the panel requests submitted by the European Union, the United States and Japan (the complainants)[1] are outside the Panel's terms of reference.[2] Argentina asked the Panel to issue the preliminary ruling "preferably after the First Substantive Meeting of the Panel with the Parties, in a manner that effectively preserves Argentina's due process rights".[3]

1.2. On 9 August 2013, the Panel invited the third parties to comment on Argentina's request for a preliminary ruling in their written submissions, due on 28 August 2013. In the same letter, the Panel invited the complainants to respond in writing to Argentina's request by 10 September 2013. In response to the Panel's invitation, two third parties commented on Argentina's request for a preliminary ruling in their written submissions: Australia and Chinese Taipei. As requested by the Panel, on 10 September 2013 the complainants submitted their respective responses to Argentina's request.

2 MAIN ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES

2.1 Main arguments of the parties

2.1.1 Argentina

2.1. Argentina requests that the Panel issue a preliminary ruling that the so-called "Restrictive Trade Related Requirements" (RTRRs) identified in the complainants' panel requests are outside the Panel's terms of reference.[4] Argentina considers that the RTRRs are not included in the request for consultations and bear no relationship to the measures actually identified by the complainants in their respective requests for consultations.[5] In Argentina's view, because the complainants did not explicitly identify the RTRRs as a separate measure in their requests for consultations, they cannot properly include them in their respective panel requests.[6] Furthermore, Argentina contends that the inclusion of the RTRRs in the panel requests, and the claims that relate to them, impermissibly expands the scope of the dispute and changes its essence from the terms originally identified in the requests for consultations.[7]

2.2. In its first written submission, Argentina also raised two additional arguments against the complainants' claims.

2.3. First, Argentina argues that the three complainants have raised claims in their panel requests against the RTRRs as a broad unwritten measure. Argentina notes that the European Union's panel request refers to the RTRRs "viewed as separate measures", and also "as an overarching measure

[1] Request for the Establishment of a Panel by the European Union, *Argentina – Import Measures*, WT/DS438/11 (7 December 2012); Request for the Establishment of a Panel by the United States, *Argentina – Import Measures*, WT/DS444/10 (7 December 2012); Request for the Establishment of a Panel by Japan, *Argentina – Import Measures*, WT/DS445/10 (7 December 2012). In all successive footnotes, these documents will be referred to as European Union's Panel Request, United States' Panel Request and Japan's Panel Request, respectively.

[2] Argentina's first written submission, paras. 15, 112-146 and 360.

[3] Ibid. para. 146.

[4] Ibid. paras. 15, 112-146 and 360.

[5] Argentina's first written submission, paras. 121, 122-128.

[6] Ibid. paras. 115-121.

[7] Ibid. para. 121.

aiming at eliminating trade balance deficits and/or substituting imports by domestic products".[8] Argentina asserts that this unwritten overarching measure is outside the Panel's mandate because there is no reference to it in any of the complainants' requests for consultations.[9]

2.4. Second, Argentina asserts that, although all three complainants have raised claims against the RTRRs "as applied", only the European Union's panel request identifies the specific RTRRs that are the object of those claims.[10] Argentina argues that the inclusion by the European Union in its panel request of a list of instances of application of RTRRs is an impermissible departure from its request for consultations. In Argentina's view, the European Union should have identified in its request for consultations at least some of the specific instances of application of the RTRRs that are the object of its claims.[11] Argentina argues further that, neither the requests for consultations filed by the United States and by Japan, nor their panel requests, "identify any measures that are the subject of their … claim that 'any application' of 'the requirements' is inconsistent with the listed provisions of the covered agreements".[12] Argentina argues that any claims with respect to measures that have neither been identified in a complainant's request for consultations nor in the panel request are outside the panel's terms of reference.[13]

2.1.2 Complainants

2.5. All three complainants reject Argentina's request and argue that the RTRRs were properly identified in the requests for consultations.[14]

2.6. The European Union adds that Argentina's request is untimely, since Argentina should have raised any concerns related to the request for consultations at an early stage, and the Panel should reject Argentina's request as inadmissible.[15] The European Union also asserts that its challenge against the RTRRs, both as a single overarching measure and as separate measures, falls within the Panel's terms of reference.[16]

2.7. Japan argues that there is no requirement that, for an "as applied" claim, the complainant must identify specific instances of a measure's application.[17] Japan adds that Argentina's decision not to raise its procedural objection at an earlier stage, as well as its decision not to address in its first written submission any of the complainants' arguments related to the RTRRs, should not be allowed to delay the proceedings, or to impair the complainants' ability to respond to any substantive arguments or defences raised by Argentina.[18]

2.8. The European Union and Japan ask the Panel to rule on Argentina's request as soon as possible, and before the date of the first substantive meeting with the parties, so as to allow parties to engage in a debate on the substance of the related claims at the meeting; the European Union adds that, if necessary, the Panel may communicate the reasons for its decision at a later stage in the proceedings.[19]

2.2 Main arguments of the third parties

2.9. The only two third parties that commented in their written submissions on Argentina's request for a preliminary ruling –Australia and Chinese Taipei– consider that the RTRRs challenged

[8] Ibid. para. 135.
[9] Ibid. paras. 135-136.
[10] Ibid. paras. 129-134 and 138.
[11] Ibid. para. 133.
[12] Ibid. para. 134.
[13] Ibid. para. 134.
[14] European Union's response to Argentina's request for a preliminary ruling, paras. 3, 12, and 22-39; United States' response to Argentina's request for a preliminary ruling, paras. 1 and 6-19; Japan's response to Argentina's request for a preliminary ruling, paras. 2 and 6-28.
[15] European Union's response to Argentina's request for a preliminary ruling, paras. 2, 5-11 and 55.
[16] Ibid. paras. 40-45.
[17] Japan's response to Argentina's request for a preliminary ruling, paras. 25-28.
[18] Japan's response to Argentina's request for a preliminary ruling, paras. 3 and 29-32.
[19] European Union's response to Argentina's request for a preliminary ruling, para.56; Japan's response to Argentina's request for a preliminary ruling, paras. 5 and 34.

by the complainants were properly identified in the requests for consultations and are within the Panel's terms of reference.[20]

3 EVALUATION BY THE PANEL

3.1 Introduction

3.1. As will be discussed in more detail below, in their respective panel requests, the complainants assert that Argentina requires economic operators to undertake certain actions with a view to pursuing the country's policy objectives of eliminating trade balance deficits and substituting imports. According to the complainants, those actions include: (i) to export a certain value of goods from Argentina related to the value of imports; (ii) to limit the volume of imports and/or reduce their price; (iii) to refrain from repatriating funds from Argentina to another country; (iv) to make or increase investments in Argentina (including in production facilities); and/or (v) to incorporate local content into domestically produced goods. The complainants refer to these requirements as the "Restrictive Trade Related Requirements" (RTRRs).

3.2. Argentina's preliminary ruling request is based on the contention that the RTRRs were not identified by the complainants in their respective requests for consultations and are therefore outside the Panel's terms of reference.

3.3. In examining this issue, the Panel is guided by the Appellate Body's ruling in *US – Upland Cotton*, where it noted that, for the purpose of examining the sufficiency of the request for consultations, a panel should look at the written request for consultations itself and not consider what may have happened in the consultations.[21]

3.4. Article 4.4 of the DSU, which contains the requirements for requests for consultations, is the relevant starting point for the Panel's analysis. In its relevant section, Article 4.4 of the DSU states that:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

3.5. Previous panels have dealt with objections related to a complainant's request for consultations. Notably, the panel in *Canada – Aircraft* determined that "a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if … the complaining party's request for establishment [of a panel] were found to cover a 'dispute' that had not been the subject of a request for consultations".[22] In the view of that panel,

> [T]his approach seeks to preserve due process while also recognising that the "matter" on which consultations are requested will not necessarily be identical to the "matter" identified in the request for establishment of a panel. The two "matters" may not be identical because, as noted by the Appellate Body in *India – Patents*, "the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings"[23].[24]

3.6. Along the same lines, the Appellate Body in *Brazil – Aircraft* noted that "Articles 4 and 6 of the DSU… [do not] require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the

[20] Australia's third-party written submission, paras. 6-11; Chinese Taipei's third-party written submission, paras. 2-8 and 15.

[21] Appellate Body Report, *US – Upland Cotton*, paras. 286-287. See also Panel Report, *Korea – Alcoholic Beverages*, para. 10.19.

[22] Panel Report, *Canada – Aircraft*, para. 9.12.

[23] (footnote original) *India - Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para. 94.

[24] Panel Report, *Canada – Aircraft*, para. 9.12.

establishment of a panel".[25] The Appellate Body agreed with the panel's statement in that case that:

> One purpose of consultations … is to "clarify the facts of the situation", and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.[26]

3.7. With respect to the identification of the legal basis of the complaint as required in the latter part of Article 4.4 of the DSU quoted above, the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* noted that consultations may lead to the reformulation of a complaint, since a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure:

> A complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.[27]

3.8. Furthermore, as long as the complaining party does not inappropriately expand the scope of the dispute or change its essence, the Appellate Body has cautioned against imposing too rigid a standard for the required identity between the scope of the consultations and the panel request, "as this would substitute the request for consultations for the panel request".[28] As indicated by the Appellate Body, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request, and not by the request for consultations.[29]

3.9. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body noted that, "whether a complaining party has 'expand[ed] the scope of the dispute' or changed the 'essence' of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis".[30] In that case, the Appellate Body agreed with the panel's reliance on the Appellate Body Report in *US – Certain EC Products*, where the Appellate Body "treated the absence of an explicit reference to a measure in the consultations request as *one* factor for excluding a measure from the panel's terms of reference; it thereafter proceeded to consider whether the relevant measures in question were separate and legally distinct".[31] Accordingly, the Appellate Body found that the panel did not err by applying this test and ultimately excluding certain measures from its terms of reference.[32]

3.10. In sum, previous panels and the Appellate Body have clarified that, when considering whether a measure has been included in a request for consultations, a panel should limit itself to the written request for consultations and not consider what may have happened in the consultations. Additionally, a precise and exact identity between the measures that were the subject of the request for consultations and the measures identified in the panel request is not necessary. The critical point is whether a complaining party has expanded the scope of the dispute or changed its essence through the inclusion of a measure in its panel request that was not part of its request for consultations.

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[25] Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).
[26] Ibid.
[27] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[28] Appellate Body Report, *United States – Upland Cotton*, para. 293.
[29] Appellate Body Report, *US – Carbon Steel*, para. 124; Appellate Body Report, *US – Upland Cotton*, para. 293.
[30] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293 (brackets in original).
[31] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 295 (referring to Appellate Body Report, *US – Certain EC Products*, paras. 69-75) (emphasis original).
[32] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 295.

3.11. One approach for conducting this type of analysis it to consider whether there is an explicit reference in the request for consultations to a measure included in the panel request. If no such reference exists, a panel may proceed to consider whether the measure in question is separate and distinct from the measure or measures included in the request for consultations. Finally, a panel should take into account that the consultations may legitimately lead to the reformulation of a complaint, since during consultations a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure. Nevertheless, the right to reformulate a complaint is qualified by the requirement that complainants not expand the scope of the dispute or change its essence.

3.2 Whether the RTRRs were properly identified by the complainants in their requests for consultations

3.12. Argentina argues that, because the RTRRs were not explicitly identified by the complainants as a separate measure in their requests for consultations, the complainants cannot properly include them in their respective panel requests.[33] In Argentina's view, this inclusion expands the scope of the dispute and changes its essence from that originally identified by the complainants in their requests for consultations.[34]

3.13. For the purpose of its preliminary ruling request, Argentina does not dispute that the complainants identified the RTRRs as a measure at issue in their respective panel requests.[35]

3.14. Argentina recognizes that the complainants' requests for consultations: (i) refer to "certain commitments" that Argentina allegedly requires importers to undertake, and describe five types of such commitments; and, (ii) refer also to the alleged relationship between these commitments and the issuance of Import Certificates (*Certificados de Importación*, CIs) and approval of the Advance Sworn Import Declarations (*Declaraciones Juradas Anticipadas de Importación*, DJAIs).[36]

3.15. Argentina nevertheless contends that, in their discussion of such commitments in the requests for consultations, the complainants did not refer to any separate "measures" that might themselves be subject to challenge, or to any legal instruments providing for such measures.[37] In other words, Argentina acknowledges that, in their respective requests for consultations, the complainants referred to the commitments Argentina allegedly requires. However, in Argentina's view, such references are not sufficient to include the RTRRs within the Panel's terms of reference. Instead, Argentina contends that the description of the commitments in the requests for consultations appears to be nothing more than a discussion by the complainants of purported evidence relating to the allegedly "non-transparent" issuance of CIs and the approval of DJAIs.[38]

3.16. Argentina also argues that the reference to "these measures" in the sixth paragraph of each of the requests for consultations can only be understood to refer to the first two measures (the CIs and the DJAIs) and not to the commitments required from importers. In support of its argument, Argentina asserts that the following paragraph of the requests for consultations (the seventh paragraph), states that the "legal instruments through which Argentina maintains *these measures* include, but are not limited to, the *legal instruments listed in the Annexes*, as well as any amendments, replacements, extensions, implementing measures or related measures."[39] Argentina contends that the legal instruments listed in the Annexes to the requests for consultations all relate to the DJAIs and the CIs.[40]

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[33] Argentina's first written submission, paras. 115-121.
[34] Ibid. paras. 15 and 121.
[35] European Union's Panel Request, p. 3; United States' Panel Request, p. 4; Japan's Panel Request, p. 3.
[36] Argentina's first written submission, para. 124.
[37] Ibid. para. 125.
[38] Ibid.
[39] (Footnote original) Emphasis added.
[40] Argentina's first written submission, para. 127 (referring to Request for Consultations by the European Union, *Argentina – Import Measures*, WT/DS438/1 (30 May 2012), p. 2, paras. 6-7; Request for Consultations by the United States, *Argentina – Import Measures*, WT/DS444/1 (23 August 2012), p. 2, paras. 6-7; and Request for Consultations by Japan, *Argentina – Import Measures*, WT/DS445/1 (23 August 2012), pp. 1-2, paras. 6-7). In all successive footnotes, these documents will be referred to as

3.17. The Panel will start by examining whether there is an explicit reference to the RTRRs in the requests for consultations. In doing this, the Panel recalls that the panel in *Canada – Wheat Exports and Grain Imports* compared the language of DSU Articles 4.4 and 6.2 and noted that Article 4.4 refers to "measures at issue", whereas Article 6.2 refers to "specific measures at issue". In that panel's view, the difference in language suggests that the requirements for identifying the measures at issue in a request for consultations are less stringent than those for a panel request.[41] As noted earlier, a precise and exact identity between the measures identified in the requests for consultations and the specific measures identified in the panel requests is not necessary.

3.18. The complainants identified the measures at issue in their respective requests for consultations in almost identical terms.[42] The Panel will reproduce below the relevant part of the request for consultations submitted by the European Union, and note the main differences with the requests for consultations submitted respectively by the United States and Japan.

> Request for Consultations by the European Union
>
> …
>
> Argentina subjects the importation of goods into Argentina to the presentation for approval (*validación*) of a so-called *Declaración Jurada Anticipada de Importación* ("DJAI"). The relevant legal instruments are listed in Annex I.[43]
>
> Argentina subjects the importation of certain goods into Argentina to various types of licences: Licencias No Automáticas de Importación in the form of Certificados de Importación (CIs); Licencias Automáticas Previas de Importación (LAPI); and Certificados de Libre Circulación (CLCs). The legal instruments providing for these measures are listed in Annex II, Annex III and Annex IV, respectively.[44]
>
> Argentina often requires the importers of goods to undertake certain commitments, including, *inter alia*, to limit their imports, to balance them with exports, to make or increase their investments in production facilities in Argentina, to increase the local content of the products they manufacture in Argentina, not to transfer benefits abroad and/or to control their prices.[45]
>
> The issuance of LAPIs, CIs and CLCs and the approval of DJAIs is being systematically delayed or refused by the Argentinean authorities on non-transparent grounds. Often the Argentinean authorities make the issuance of LAPIs, CIs and CLC and the approval of [DJAIs] conditional upon the importers undertaking to comply with the trade restrictive commitments mentioned above.[46]
>
> These measures restrict imports of goods and discriminate between imported and domestic goods. They do not appear to be related to the implementation of any measure justified under the WTO Agreement, but instead appear to be aimed at

European Union's Request for Consultations, United States' Request for Consultations and Japan's Request for Consultations, respectively.

[41] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10.

[42] European Union's Request for Consultations, p. 1, paras. 2-5; United States' Request for Consultations, p. 1, paras. 2-5; Japan's Request for Consultations, p. 1, paras. 2-5.

[43] In their respective requests for consultations, the United States and Japan qualify the DJAIs as a "non-automatic import licence". See United States' Request for Consultations, p. 1, para. 2; Japan's Request for Consultations, p. 1, para. 2.

[44] In their respective requests for consultations, the United States and Japan qualify the licences required by Argentina as "non-automatic licences"; the United States and Japan refer only to the *Certificados de Importación* (CIs), and not to the *Licencias Automáticas Previas de Importación* (LAPI) and *Certificados de Libre Circulación* (CLCs) mentioned by the European Union. See United States' Request for Consultations, p. 1, para. 3; Japan's Request for Consultations, *Argentina – Import Measures*, p. 1, para. 3.

[45] In its request for consultations, the United States uses slightly different language when defining the last two commitments allegedly required by Argentina: "to refrain from transferring revenue or other funds abroad and/or to control the price of imported goods". See United States' Request for Consultations, p. 1, para. 4.

[46] In their respective requests for consultations, the United States and Japan refer only to the issuance of CIs and to the approval of DJAIs. See United States' Request for Consultations, p. 1, para. 5; Japan's Request for Consultations, p. 1, para. 5.

> advancing the Argentinean Government's stated policies of re-industrialization, import substitution and elimination of trade balance deficits.[47]
>
> The legal measures through which Argentina imposes these restrictions include, but are not limited to, the legal instruments listed in the Annexes, as well as any amendments, replacements, extensions, implementing measures or related measures.[48]
>
> …

3.19. In other words, the three requests for consultations identify the same three broad measures:

1. The alleged imposition by Argentina of a requirement to present for approval an Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*, DJAI) for the importation of goods (paragraph 2 in each of the three requests for consultations);

2. The alleged imposition by Argentina of other licences, such as in the form of Import Certficates (*Certificados de Importación*, CIs) (paragraph 3 in each of the three requests for consultations); and,

3. The alleged imposition by Argentina on importers of the requirement to undertake certain commitments including, *inter alia*, to: (i) limit their imports; (ii) balance their imports with exports; (iii) make or increase their investments in production facilities in Argentina; (iv) increase the local content of the products they manufacture in Argentina; (v) refrain from transferring benefits abroad; and/or, (vi) control the prices of imported goods (paragraph 4 in each of the three requests for consultations).

3.20. Accordingly, the scope of the requests for consultations covers "certain commitments" that Argentina allegedly requires importers to undertake. In the Panel's view, the third measure identified in each of the requests for consultations corresponds to the measures identified by the complainants under the heading "Restrictive Trade Related Requirements" in their respective panel requests. All three complainants identify the RTRRs in their respective panel requests as follows:

> Separately and/or in combination with the above measures described in Sections I and II [the DJAI requirement and the CIs requirement, respectively] Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: (1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods ...
>
> To satisfy these requirements, economic operators normally either submit a statement or conclude an agreement with Argentina setting out the actions they will take. Argentina enforces these requirements by withholding permission to import, *inter alia*, by withholding the issuance of DJAI or CI approvals.[49]

3.21. The complainants' panel requests thus enumerate "certain actions" that Argentina allegedly requires economic operators to undertake. Comparing the relevant language used in each document, there is a close identity between the RTRRs identified in the complainants' panel

[47] In its request for consultations, the United States refers to "Argentina's stated policies", instead of "the Argentinean Government's". See United States' Request for Consultations, *Argentina – Import Measures*, p. 2, para. 6.

[48] In its request for consultations, the United States refers to "[t]he legal *instruments* through which Argentina imposes these *measures*" (emphasis added). See United States' Request for Consultations, p. 2, para. 7. In turn, Japan refers to "[t]he legal *instruments* through which Argentina imposes these *restrictions*" (emphasis added). See Japan's Request for Consultations, p. 2, para. 7.

[49] European Union's Panel Request, p. 3; United States' Panel Request, p. 4; Japan's Panel Request, pp. 3-4.

requests and the third measure identified in the complainants' requests for consultations. Both measures are similarly described, both in terms of the nature of the measure and in terms of the scope of the requirements allegedly imposed by Argentina.

3.22. In terms of the nature of the measure, both in their requests for consultations and in their panel requests, the complainants assert that Argentina requires economic operators to undertake certain commitments as a condition to be allowed to import goods into Argentina. In their requests for consultations, the complainants refer to "importers of goods" whereas, in the panel requests, they refer to "economic operators". In both sets of documents, however, the target of the measures seems to be similar, as the panel requests refer to economic operators that are requesting "permission to import". In their panel requests, the complainants add that these commitments may be imposed on economic operators by Argentina either by having them submit a statement or by having them conclude an agreement with the Argentine Government setting forth the actions the economic operators will take.

3.23. In terms of the scope of the requirements, both in their requests for consultations and in their panel requests, the complainants identify similar commitments allegedly imposed by Argentina on economic operators, namely: (i) to balance the value of imports with exports, which may be done by exporting a certain value of goods from Argentina related to the value of imports; (ii) to limit the volume or the price of their imports; (iii) to refrain from repatriating profits from Argentina to another country, described in the requests for consultations as not to transfer benefits abroad; (iv) to make new investments or increase their current investments in Argentina (including in production facilities), described in the requests for consultations as to make or increase their investments in production facilities in Argentina; and (v) to incorporate local content into domestically produced goods, described in the requests for consultations as to increase the local content of the products manufactured in Argentina.

3.24. Accordingly, the RTRRs were identified by the complainants as a measure at issue, both in their respective requests for consultations as well as in their panel requests. The differences in language used by the complainants when describing these measures in their requests for consultations, as compared to their panel requests, are minor and do not expand the scope of the dispute or change its essence. Indeed, as noted by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, consultations may lead to the reformulation of a complaint, since a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure.[50]

3.25. Argentina also argues that the reference to "these measures" in the sixth paragraph of each of the requests for consultations can only be understood to refer to the first two measures (the CIs and the DJAIs) and not to the RTRRs.[51] As noted above, in the requests for consultations filed respectively by the European Union, the United States and Japan, the sixth paragraph reads:

> *These measures* restrict imports of goods and discriminate between imported and domestic goods. They do not appear to be related to the implementation of any measure justified under the WTO Agreement, but instead appear to be aimed at advancing the Argentinean Government's stated policies of re-industrialization, import substitution and elimination of trade balance deficits. (emphasis added)[52]

3.26. The complainants include the sentence "[t]hese measures restrict imports of goods and discriminate between imported and domestic goods" in the sixth paragraph of the requests for consultations, immediately following the description of the three measures at issue. This sentence also follows the complainants' allegation that the issuance of import licences (such as the CIs) and the approval of DJAIs is being delayed or refused by the Argentine authorities on non-transparent grounds and that the Argentine authorities make the issuance of import licences and the approval of DJAIs conditional upon the importers' compliance with the RTRRs. In the Panel's view, it is clear that the reference to "these measures" in the sixth paragraph of the requests for consultations

[50] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

[51] Argentina's first written submission, para. 127 (referring to the United States' Request for Consultations, *Argentina – Import Measures*, p. 2, para. 6; European Union's Request for Consultations, p. 2, para. 6; and Japan's Request for Consultations, p. 1, para. 6).

[52] In its request for consultations, the United States refers to "Argentina's stated policies", instead of "the Argentinean Government's stated policies". See United States' Request for Consultations, p. 2, para. 6.

refers to the three measures at issue previously identified (the requirement to present for approval a DJAI, the imposition of other licences such as in the form of the CIS, and the RTRRs). Argentina's assertion that the reference can only be understood to refer to the CIs and the DJAIs, and not to the RTRRs, is not supported by the text of the requests for consultations.

3.27. The previous conclusion is not affected by Argentina's argument that the expression "these measures" is used again in the seventh paragraph of the requests for consultations. (Paragraph 7 refers to the legal instruments through which Argentina allegedly imposes the challenged measures.) First, the expression "these measures" is used as quoted by Argentina only in the request for consultations by the United States. In contrast, the requests for consultations by the European Union and Japan use instead the expression "these restrictions".[53] Second, even if all complainants had used the expression "these measures" in the seventh paragraph of their respective requests for consultations, this would not change the Panel's conclusion that the expression refers to all three measures at issue, given the structure of the document as described above. Moreover, the language in the seventh paragraph is not exhaustive (the legal instruments *include*, *but are not limited to*, the legal instruments listed in the Annexes) and, as clarified further in the panel requests, the complainants' argument is that the RTRRs "are not stipulated in any published law or regulation".[54]

3.28. In conclusion, the complainants' requests for consultations explicitly identify the requirements that the complainants subsequently described in their panel requests as the RTRRs as a measure at issue in the present dispute. The manner in which the RTRRs were described by the complainants in their respective requests for consultations was sufficient to put the respondent on notice that these alleged requirements were part of the measures at issue for the purpose of the consultations. The small differences in language used in describing the RTRRs in the requests for consultations, as compared with the respective panel requests, are insignificant and do not expand the scope nor change the essence of the dispute.

3.3 Whether consideration of the RTRRs as a single overarching measure is outside the Panel's terms of reference

3.29. As noted, Argentina also argues that the European Union's panel request has raised claims against the RTRRs "viewed as separate measures", and also "as an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products".[55] Argentina asserts that the three complainants raised claims in their panel requests against the RTRRs, both as a single "unwritten global measure", as well as in their application in specific cases.[56] Argentina argues that a single "unwritten overarching measure" is outside the Panel's mandate because there is no reference to it in any of the complainants' requests for consultations.[57] Argentina's argument raises the question of whether the fact that none of the complainants referred to the RTRRs as a single "overarching measure" in their respective requests for consultations entails a conclusion that the consideration of the RTRRs in such a manner would be outside the Panel's terms of reference.

3.30. Argentina's argument does not refer to the description of the RTRRs as measures, but rather to the manner in which the complainants may frame their claims against the RTRRs. The Panel has already concluded that the RTRRs were explicitly identified as a measure at issue in the complainants' requests for consultations. In their panel requests the complainants stated that, in their view, the RTRRs are inconsistent with certain provisions of the WTO agreements, whether analysed separately or together with the DJAI requirement and the CIs requirement. Argentina notes that the complainants also stated in their panel requests that the RTRRs are inconsistent

[53] Argentina quotes the seventh paragraph of the requests for consultations as reading the "legal instruments through which Argentina maintains *these measures* include, but are not limited to, the *legal instruments listed in the Annexes* …" That quotation is correct only for the United States' request for consultations. The request for consultations by the European Union and the request for consultations by Japan read instead the "legal [measures/instruments] through which Argentina imposes *these restrictions* include, but are not limited to, the *legal instruments listed in the Annexes* …"

[54] European Union's Panel Request, p. 3; United States' Panel Request, p. 4; Japan's Panel Request, p. 4.

[55] Argentina's first written submission, para. 135.

[56] Ibid. paras. 135-136.

[57] Ibid.

with provisions of the WTO agreements, whether analysed in their application in specific cases, as well as when considered as a single measure.

3.31. The Panel recalled above the Appellate Body's statement in *Mexico – Anti-Dumping Measures on Rice* that consultations may lead to the reformulation of a complaint, since a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure.[58] As expressed by the Appellate Body in that case, "[t]he claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process".[59]

3.32. In their respective requests for consultations, with respect to the legal basis for their complaints, the complainants stated that "Argentina's measures appear to be inconsistent with Argentina's obligations under [certain] provisions of the covered agreements", including provisions of the GATT 1994, of the TRIMs Agreement, of the Import Licensing Agreement, and of the Agreement on Safeguards. The complainants also referred to the RTRRs in combination with the other requirements, arguing that Argentina often makes the issuance of import licences (such as the CIs) and the approval of DJAIs conditional upon compliance with the RTRRs.

3.33. Accordingly, the characterization of the RTRRs as a single "overarching measure" in the complainants' panel requests seems to be nothing more than an enunciation in different terms of the complainants' same claims as set out in the requests for consultations. There is nothing in this reformulation that *per se* expands the scope or changes the essence of the dispute.

3.4 Whether consideration of the RTRRs "as applied" is outside the Panel's terms of reference

3.34. Finally, Argentina also argues that, although all three complainants raised claims against the RTRRs "as applied", only the European Union's panel request identifies the specific RTRRs that are the object of those claims.[60] In Argentina's view, the panel requests filed by the United States and Japan do not "identify any measures that are the subject of their … claim that 'any application' of 'the requirements' is inconsistent with the listed provisions of the covered agreements".[61] Argentina also asserts that the European Union should have identified in its request for consultations at least some of the specific instances of application of the RTRRs that are the object of its claims.[62] Argentina argues that claims with respect to measures that have neither been identified in a complainant's request for consultations, nor in the panel request, are outside the panel's terms of reference.[63] In other words, Argentina submits that the complainants' "as applied" claims cannot be considered by the Panel because none of the complainants identified in their requests for consultations the specific instances in which the RTRRs were allegedly applied by the Argentine Government, and nor did the United States and Japan in their respective panel requests.

3.35. It should be noted initially that the complainants' claims concerning the RTRRs are directed against an unwritten measure. The Appellate Body has observed that, "[w]hen a challenge is brought against an *unwritten measure*, the very existence and the precise contours of the alleged measure may be uncertain."[64] The Appellate Body has added that, in those cases, complaining parties should be expected "to identify such measures in their panel requests as clearly as possible" and that complaining parties should "state unambiguously the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements". In other words, panel requests "should give respondents and third parties sufficient notice of the specific measures that the complainant intends to challenge in WTO dispute settlement proceedings."[65]

[58] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[59] Ibid.
[60] Argentina's first written submission, paras. 129-134 and 138.
[61] Ibid. para. 134.
[62] Argentina's first written submission, para. 133.
[63] Ibid. para. 134.
[64] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792. (emphasis original)
[65] Ibid.

3.36. It is also worth recalling the difference between "as such" and "as applied" claims. An "as such" claim is aimed at challenging measures "on their face" or as they operate in a general and prospective manner, without regard to their application in a specific instance, or at times even without regard to whether certain measures are yet in effect.[66] As noted by the Appellate Body, in *US – Oil Country Tubular Goods Sunset Reviews*, in an "as such" claim, the complainant asserts "that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations".[67] In contrast, "as applied" claims are aimed at challenging particular acts of application of specific measures.

3.37. Argentina alleges that the "as applied" claims raised by the United States and Japan regarding the RTRRs were not covered by their requests for consultations nor by their panel requests. Argentina also asserts that the European Union did not identify in its request for consultations the specific instances of application of the RTRRs that are the object of its claims. Accordingly, Argentina argues that any claims against the RTRRs "as applied" are outside the Panel's terms of reference. The Panel has already noted that, in their respective requests for consultations, when referring to the requirements that constitute the so-called RTRRs, the complainants identified "certain commitments" allegedly required by Argentina from the importers of goods. The remaining question that arises from Argentina's argument is whether the complainants were additionally required to specify, in their requests for consultations and in their panel requests, the specific instances that constitute their claim against the RTRRs as applied.

3.38. In its response to Argentina's request for a preliminary ruling, the European Union denies that it is advancing separate claims against the RTRRs "as such" and "as applied". The European Union argues that it is challenging the RTRRs as an overarching measure and advancing an alternative claim, in the event the first claim is unsuccessful, against specific cases in which the Argentine government has allegedly imposed RTRR requirements on individual economic operators.[68]

3.39. In its own response to Argentina's request for a preliminary ruling, Japan argues that it: (i) identified the RTRRs in its request for consultations as a measure at issue; and, (ii) subsequently added in its panel request that its challenge against the RTRRs was with respect both to the requirements as well as "any application thereof" (i.e. both "as such" and "as applied"). In Japan's view, there is no requirement under the DSU that a complainant must identify the specific instances of a measure application in its panel request, and until the stage of the parties' submissions and argumentation.[69]

3.40. The United States did not comment on this argument, with respect to claims against the RTRRs "as applied", in its response to Argentina's request for a preliminary ruling.

3.41. The Panel notes that, in the complainants' first submissions, only Japan uses the expression "as applied". Japan argues that the RTRRs are inconsistent with certain WTO obligations "both as such and as applied", but this seems to be part of a broad argument against the RTRRs and not a separate articulation of claims against the RTRRs "as applied".[70] As noted above, the European Union denies that it is advancing separate claims against the RTRRs "as such" and "as applied". Finally, the United States does not use the expression "as applied" in its first submission, nor does it articulate separate claims against the RTRRs "as applied".

3.42. In the light of the above, the Panel does not consider it necessary or appropriate to issue a ruling at this time with respect to this last argument raised by Argentina. The Panel will consider the manner in which the complainants choose to articulate their respective challenges against particular acts of application of the RTRRs during the course of the proceedings. The Panel will consider this matter further in the course of the proceedings as appropriate.

[66] Appellate Body Report, *US – 1916 Act*, para. 88.
[67] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[68] European Union's response to Argentina's request for a preliminary ruling, paras. 46-49.
[69] Japan's response to Argentina's request for a preliminary ruling, paras. 26-28.
[70] See Japan's first written submission, paras. 185, 198 and 218.

3.5 Timing of the preliminary ruling

3.43. As noted above, Argentina asked the Panel to issue the preliminary ruling "preferably after the First Substantive Meeting of the Panel with the Parties".[71] Pending the resolution of its request, Argentina chose not to address in its first written submission the complainants' arguments concerning these measures.[72] In contrast, the European Union and Japan asked the Panel to rule on Argentina's request as soon as possible, and before the date of the first substantive meeting with the parties.[73]

3.44. In the Panel's view, an early preliminary ruling is appropriate in the interest of due process, and especially in order to allow parties and third parties to engage in a substantive discussion of the claims raised by the complainants with respect to the RTRRs.

4 PRELIMINARY RULING OF THE PANEL

4.1. In light of the above considerations, the Panel finds that:

a. The so-called "Restrictive Trade Related Requirements" (RTRRs) were identified by the complainants as a measure at issue in their respective requests for consultations; therefore, the inclusion of the RTRRs in their panel requests is not inappropriate and these measures are within the Panel's terms of reference; and,

b. The characterization of the RTRRs as a single "overarching measure" in the complainants' panel requests does not expand the scope or change the essence of the dispute.

4.2. With respect to Argentina's argument that, in the light of their requests for consultations and panel requests, the complainants' "as applied" claims against the RTRRs are outside the Panel's terms of reference, the Panel declines to provide a preliminary ruling at this time. The Panel will address this issue in its report, as appropriate, in the light of the parties' arguments in the course of the proceedings.

4.3. This preliminary ruling will become an integral part of the Panel's report, subject to any modifications or elaboration of the reasoning, either in a subsequent ruling or in the Panel's report, in the light of comments received from the parties in the course of the proceedings.

[71] Ibid. para. 146.
[72] Argentina's first written submission, paras. 15 and 146.
[73] European Union's first written submission, para.56; Japan's first written submission, paras. 5 and 34.

ANNEX D-2

PRELIMINARY RULING BY THE PANEL

20 November 2013

1 PROCEDURAL BACKGROUND

1.1. In its first written submission dated 7 August 2013, Argentina requested that the Panel issue a preliminary ruling that the so-called "Restrictive Trade Related Requirements" (RTRRs) identified in the panel requests submitted by the European Union, the United States and Japan (the complainants)[1] fall outside the Panel's terms of reference.[2] Argentina asked the Panel to issue the preliminary ruling "preferably after the First Substantive Meeting of the Panel with the Parties, in a manner that effectively preserves Argentina's due process rights".[3]

1.2. Argentina's request raised three main issues with respect to the complainants' claims relating to the alleged RTRRs, namely: (i) whether the RTRRs were identified by the complainants as a measure at issue in their respective requests for consultations; (ii) whether the reference to the RTRRs as a broad unwritten "overarching measure" in the complainants' panel requests "expanded the scope" and "changed the essence" of the dispute; and, (iii) whether the complainants identified, either in their respective requests for consultations or in their panel requests, the measures that are subject to their claims against the RTRRs "as applied".

1.3. Argentina declared that, in light of its request for a preliminary ruling on these issues, it would not address in its first written submission the complainants' arguments with respect to the alleged RTRRs.[4]

1.4. On 9 August 2013, the Panel invited the third parties to comment on Argentina's request for a preliminary ruling in their written submissions, due on 28 August 2013. In the same letter, the Panel invited the complainants to respond in writing to Argentina's request by 10 September 2013. In response to the Panel's invitation, two third parties commented on Argentina's request for a preliminary ruling in their written submissions: Australia and Chinese Taipei. As requested by the Panel, on 10 September 2013 the complainants submitted their respective responses to Argentina's request.

1.5. On 16 September 2013, the Panel issued a preliminary ruling in response to the request filed by Argentina in its first written submission, concluding that:

a. The so-called RTRRs were identified by the complainants as a measure at issue in their respective requests for consultations; therefore, the inclusion of the alleged RTRRs in the complainants' panel requests is not inappropriate and these measures are within the Panel's terms of reference; and,

b. The characterization of the alleged RTRRs as a single "overarching measure" in the complainants' panel requests does not expand the scope or change the essence of the dispute.[5]

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[1] Request for the Establishment of a Panel by the European Union, *Argentina – Import Measures*, WT/DS438/11 (7 December 2012); Request for the Establishment of a Panel by the United States, *Argentina – Import Measures*, WT/DS444/10 (7 December 2012); Request for the Establishment of a Panel by Japan, *Argentina – Import Measures*, WT/DS445/10 (7 December 2012). In all successive footnotes, these documents will be referred to as European Union's Panel Request, United States' Panel Request and Japan's Panel Request, respectively.

[2] Argentina's first written submission, paras. 15, 112-146 and 360.

[3] Ibid. para. 146.

[4] Argentina's first written submission, paras. 146-147.

[5] Preliminary Ruling by the Panel, *Argentina – Import Measures* (16 September 2013).

1.6. In its 16 September preliminary ruling, the Panel indicated that it would not issue a ruling with respect to the third issue raised by Argentina, namely the argument that, in the light of their requests for consultations and panel requests, the complainants' claims against the alleged RTRRs "as applied" are outside the Panel's terms of reference. The Panel observed that it was not necessary or appropriate to issue a ruling at that time. The Panel noted that it would consider the matter further in the course of the proceedings, as appropriate, after having heard the parties' arguments.[6]

1.7. The Panel invited the parties to express their views regarding the circulation of the preliminary ruling to the Members. On 17 September 2013, the complainants submitted a joint communication to the Panel expressing no objection to the circulation of the preliminary ruling, with the understanding that circulation would occur only if none of the parties objected and if parties were given an opportunity to comment on the preliminary ruling at the time of the interim review.[7] On 19 September 2013, Argentina submitted a communication to the Panel expressing its disappointment that the preliminary ruling had not been issued after the first substantive meeting with the parties as requested by Argentina. Argentina also indicated that "there is no reason to justify the circulation of this preliminary ruling among all the Members of the WTO" and therefore it did not agree with such circulation.[8]

1.8. In its oral statement at the Panel's first substantive meeting with the parties on 24 September 2013, Argentina again expressed its disappointment at what it considered to be the Panel's "hasty decision to issue a preliminary ruling without first providing [Argentina] with an opportunity to respond to the complainants' submissions". Argentina noted that it "had a legitimate expectation that it would have more than a single opportunity to express its views with respect to its preliminary objection".[9] Argentina also expressed its concern about the Panel's decision to defer a ruling on some of the jurisdictional objections raised by Argentina; it requested the Panel to promptly resolve the outstanding issues concerning the Panel's terms of reference.[10]

1.9. On the occasion of its first substantive meeting with the parties, the Panel posed questions to the European Union and Japan seeking clarification on their claims regarding the alleged RTRRs "as applied". The European Union and Japan provided written responses to these questions on 11 October 2013.[11]

1.10. The Panel also posed questions to Argentina regarding the possible circulation of the preliminary ruling, as well as the procedures followed by previous panels dealing with requests for preliminary rulings. In its written responses to these questions, provided to the Panel on 11 October 2013, Argentina reiterated its view that it would be premature to circulate the Panel's preliminary ruling to Members in view of the fact that the Panel had not ruled yet on two of the arguments raised by Argentina related to the complainants' claims regarding specific instances of application of the alleged RTRRs.[12]

2 MAIN ARGUMENTS OF THE PARTIES

2.1.1 Argentina's preliminary ruling request

2.1. Argentina asserts that, although all three complainants have raised claims against the alleged RTRRs "as applied", only the European Union's panel request identifies the specific RTRRs that are the object of those claims.[13] Argentina argues moreover that, in its request for consultations, the European Union failed to identify at least some of the specific instances of application of the RTRRs that are the object of its claims. In Argentina's view, the inclusion by the European Union in its

[6] Ibid.
[7] Complainants' joint e-mail communication to the Panel, 17 September 2013.
[8] Argentina's e-mail communication to the Panel, 19 September 2013.
[9] Argentina's opening statement at the first meeting of the Panel, para. 31.
[10] Ibid. para. 32.
[11] European Union's response to Panel question No. 1; Japan's response to Panel question No. 2.
[12] Argentina's response to Panel question No. 4.
[13] Argentina's first written submission, paras. 129-134 and 138.

panel request of a list of instances of application of RTRRs is an impermissible departure from its request for consultations.[14]

2.2. Argentina argues further that the panel requests filed by the United States and by Japan do not "identify any instances that are the subject of their … claims in which 'any application' of 'the requirements' is inconsistent with the listed provisions of the covered agreements".[15] Argentina submits that any claims with respect to measures that have neither been identified in a complainant's request for consultations nor in the panel request are outside the panel's terms of reference.[16]

2.3. On the occasion of the Panel's first substantive meeting with the parties, Argentina requested the Panel to urgently resolve what it considered to be two outstanding issues concerning the Panel's terms of reference.[17]

2.4. First, Argentina requested that the Panel find that, since "neither Japan nor the United States identified any measures subject to any 'as applied' claims in their consultations requests … any such measures and claims are outside of [the Panel's] terms of reference".[18]

2.5. Second, Argentina noted the European Union's statement that it is not challenging separate instances of application of the overarching RTRRs, but rather is challenging as "separate measures" 23 specific instances where the Argentine Government has, according to the European Union, imposed RTRRs on individual economic operators. Argentina requests that, accordingly, the Panel find that the addition of these 23 new measures, which were not identified in the European Union's request for consultations, has "impermissibly expanded the scope of the dispute".[19]

2.1.2 Response of the complainants to Argentina's request for a preliminary ruling

2.6. The European Union explains that it is not advancing separate claims against the alleged RTRRs "as such" and "as applied". The European Union argues that it is challenging the RTRRs as an overarching measure. In the event this claim is unsuccessful, the European Union is challenging in the alternative, as "separate measures" the specific instances listed in Annex III of its panel request where the Argentine Government has, according to the European Union, imposed RTRRs on individual economic operators. The European Union states that, in sum, it is not asking the Panel to issue 23 separate rulings on claims against the alleged RTRRs "as applied", but instead, should the Panel not conclude that the RTRRs constitute an overarching measure that is inconsistent with Argentina's WTO obligations, it is asking the Panel to make findings with respect to each of the 23 measures it identified in its panel request and its first written submission, "where Argentina has imposed [RTRRs] on specific companies at a particular moment in time".[20]

2.7. Japan clarifies that it is asking the Panel to issue separate rulings on claims against the alleged RTRRs "as such" and "as applied". Japan argues that the specific measures that are the object of its "as applied" claims are the same that Japan challenges "as such", i.e. the RTRRs on their face, each of the individual instances of application, as well as broader overall acts of application in a collective sense. In Japan's view, to the extent the RTRRs are inconsistent "as such" with certain provisions of the WTO agreements invoked by Japan, any application of the

[14] Ibid. para. 133.
[15] Ibid. para. 134.
[16] Ibid.
[17] Argentina's opening statement at the first meeting of the Panel, para. 32. See also Argentina's response to Panel question No. 4.
[18] Argentina's opening statement at the first meeting of the Panel, para. 33. See also Argentina's response to Panel question No. 4; Argentina's second written submission, paras. 64-70. In its opening statement at the first meeting of the Panel, its response to Panel question No. 4 and its second written submission, Argentina referred only to the complainants' *requests for consultations*; however, Argentina's request for a preliminary ruling also asserts that the United States and Japan failed to identify the measures subject to their claims against the RTRRs "as applied" in their respective *panel requests*.
[19] Argentina's opening statement at the first meeting of the Panel, paras. 34-35. See also Argentina's response to Panel question No. 4; Argentina's second written submission, paras. 57-63.
[20] European Union's response to Argentina's request for a preliminary ruling, paras. 38-49; European Union's opening statement at the first meeting of the Panel, paras. 35 and 42; European Union's response to Panel question No. 1.

RTRRs ("as applied") would in itself also necessarily be inconsistent with the same provisions. Japan argues that it is important that the Panel's findings not be limited to particular instances of application, and that they "clearly and categorically express the WTO-inconsistency of *any* application of the measure".[21] In this regard, Japan argues that it: (i) identified the alleged RTRRs in its request for consultations as a measure at issue; and, (ii) subsequently added in its panel request that its challenge against the RTRRs "was with respect both to 'these requirements' as well as 'any application thereof' – *i.e.*, both *as such* and *as applied*".[22] In Japan's view, there is no requirement under the DSU that a complainant identify in its panel request the specific instances of application of a measure. Japan submits that it had no obligation to specify in detail the instances of application of the RTRRs until the stage of its submissions and argumentation.[23]

3 PROCEDURAL CONSIDERATIONS

3.1 Is there a need for a preliminary ruling?

3.1. The Panel's preliminary ruling of 16 September 2013 left for later resolution two issues concerning the Panel's terms of reference raised by Argentina in its first written submission. The first is whether the alleged 23 specific instances of application of alleged RTRRs, identified by the European Union in its first written submission, can be considered to be 23 separate measures at issue that fall within the Panel's terms of reference. The second is whether Japan has identified specific measures that would provide the basis for its request for separate findings from the Panel regarding the RTRRs "as applied".

3.2. The issues raised by Argentina concern the Panel's jurisdiction over certain claims advanced by the complainants. A resolution of these issues is essential before the Panel can address the substance of the complainants' allegations. This is not to say that any of these issues would necessarily have to be resolved by the Panel through a preliminary ruling and before the time of the final report.[24] Indeed, the resolution of the issues raised by Argentina may be contingent on how the Panel decides certain of the claims brought by the complainants, which findings would appear only in the final report.

3.3. First, the European Union's request for separate findings concerning the 23 specific instances of alleged application of RTRRs has been advanced only in the alternative, such that it would only be relevant if the Panel were not to find that the RTRRs as a broad "overarching" measure are inconsistent with either Article XI:1 or Article III:4 of the GATT 1994. In other words, if the Panel were to find that the alleged RTRRs, "each on its own or any combination thereof" are inconsistent with either Article XI:1 or Article III:4 of the GATT 1994, it would not be necessary or appropriate for the Panel to examine the European Union's alternative claims.

3.4. Second, Japan asked the Panel to issue separate rulings on claims against the alleged RTRRs "as such" and "as applied". Prior WTO panels and the Appellate Body, however, have noted that, in the event of findings of violation in respect of a measure "as such", additional findings of violation regarding the measure "as applied" may be unnecessary. As noted by the Appellate Body:

> By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations … The implications of ["as such"] challenges are obviously more far-reaching than "as applied" claims.[25]

[21] Japan's response to Panel question No. 2. (emphasis original) See also, Japan's second written submission, paras. 7, 12-20.

[22] Japan's response to Argentina's request for a preliminary ruling, para. 27.

[23] Ibid. paras. 26-28.

[24] Some recent panels have addressed challenges related to whether certain claims raised by the complainants were part of the panels' terms of reference only in their final reports. See, for example, Panel Report, *Colombia – Ports of Entry*, para. 7.18; Panel Report, *US – Orange Juice (Brazil)*, paras. 7.16-7.25 and 7.38-7.49.

[25] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

3.5. In the present case, Argentina has not challenged whether Japan's claims against the alleged RTRRs "as such" are covered by the Panel's terms of reference; Argentina's arguments refer only to the claims against the RTRRs "as applied".

3.6. Similarly to the present dispute, in *Colombia – Ports of Entry* the respondent did not challenge the consistency with Article 6.2 of the DSU of the complainant's claims "as such", but only "as applied". The panel in that case noted that:

> [It] is not obliged, as a threshold matter, to find on whether Panama's "as applied" claims are part of its mandate. In the event of a finding of violation in respect of Panama's "as such" claims … a finding of violation "as applied" would be unnecessary since it stands to reason that each prospective individual application of indicative prices to import transactions would be based on WTO-inconsistent legislation. The fact that a panel makes a finding that a measure "as such" is inconsistent with the covered agreements also covers every instance of application of the same measure.[26, 27]

3.7. Accordingly, the panel in *Colombia – Ports of Entry* decided that it would first address the complainant's "as such" claims and that, only if those claims were rejected, it would then consider whether the "as applied" claims complied with the requirements of Article 6.2 of the DSU.[28] Similarly, in the present case, the Panel could wait until the time of the final report in order to verify whether the necessary conditions are met that would make it necessary to address Argentina's arguments.

3.8. Nevertheless, in the circumstances of the present case there are reasons to decide these two issues through a preliminary ruling and before the time of the final report. First, in the light of the relevant documents (mainly the complainants' panel requests and requests for consultations), as well as the subsequent clarifications made by the parties, the Panel has enough information to rule at this stage on the issues raised by Argentina's request, so that it is unnecessary to wait until the final report. Second, a decision will allow parties to focus, in the remaining stages of the proceedings, on issues that have been determined to be part of the Panel's terms of reference.

3.2 Argentina's arguments regarding the procedure to be followed for the ruling

3.9. As noted above, Argentina has expressed its disappointment at what it considers to be the Panel's "hasty decision to issue a preliminary ruling without first providing [Argentina] with an opportunity to respond to the complainants' submissions". Argentina has also noted that it "had a legitimate expectation that it would have more than a single opportunity to express its views with respect to its preliminary objection". Argentina has asserted that "[m]ost -if not all- recent panels have at … least provided the parties with an opportunity for responsive submissions before issuing a formal ruling" and that "[i]n many instances, panels have adopted separate procedures … for the purposes of adjudicating preliminary ruling requests, with multiple rounds of briefing, questions from the panel, and the opportunity for oral hearing."[29]

3.10. In response to a question from the Panel, Argentina cited seven cases in which panels confronted with a request for a preliminary ruling provided multiple rounds for parties to express their views before the adoption of the ruling.[30] Argentina also cited five cases in which panels provided the opportunity for oral hearings with the parties to address their views before the adoption of the preliminary ruling.[31]

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[26] (footnote original) Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[27] Panel Report, *Colombia – Ports of Entry*, para. 7.44.
[28] Ibid.
[29] Argentina's opening statement at the first meeting of the Panel, para. 31.
[30] Argentina's response to Panel question No. 5. The cases cited by Argentina are the following: (i) *US – Countervailing and Anti-Dumping Measures (China)*, DS449; (ii) *US – Countervailing Measures (China)*, DS437; (iii) *China – Electronic Payment Services*, DS413; (iv) *China – Raw Materials*, DS394, DS395, DS398; (v) *US – Gambling*, DS285; (vi) *EC – Trademarks and Geographical Indications*, DS174, DS290; and, (vii) *India – Autos*, DS146, DS175.
[31] Argentina's response to Panel question No. 5. The cases cited by Argentina are the following: (i) *US – Countervailing and Anti-Dumping Measures (China)*, DS449; (ii) *China – Electronic Payment Services*, DS413; (iii) *China – Raw Materials*, DS394, DS395, DS398; (iv) *Canada – Wheat Exports and Grain Imports*, DS276; and, (v) *Turkey – Textiles*, DS34.

3.11. On this point, the European Union has rejected the assertion that Argentina had "legitimate expectations" that it would have more than a single opportunity to express its views with respect to its preliminary objection. The European Union has noted that, to its best knowledge, "in the vast majority of cases, a party requests a panel to issue preliminary rulings, detailing the motives supporting its request … [Subsequently], panels afford the opportunity to the other party to make comments on the request. Panels may also pose questions on particular issues if need be or seek further clarification as appropriate." In the European Union's view, "there is no established practice of systematically requesting the party submitting a request for a preliminary ruling to further express its views about its preliminary objection. Those views were already expressed in the request for a preliminary ruling." The European Union adds that "the continuous exchange of views on preliminary ruling issues" is not a common practice, but is instead the exception. "And it is an exception that may apply in a completely different set of facts (e.g., where the request is made before the panel starts its work, and not late in the proceedings, such as in the present case, i.e., together with Argentina's first written submission)."[32]

3.12. The United States asserts that it is not aware of the basis for Argentina's "legitimate expectation" for multiple rounds of briefings, questions from the Panel, and an opportunity for an oral hearing. In the United States' view, "[i]n certain cases, particularly where a party requests a preliminary ruling at an early stage in the dispute, the Panel may invite separate comments, ask questions as necessary, and even allow for rebuttals. However, there are many instances where that has not been the case and the panel's ruling was based on the initial request and response." The United States cites eleven such cases. The United States further considers that, because Argentina did not request "separate procedures", there is no basis for it to complain about the lack of such "separate procedures". The United States finally asserts that nothing in the Panel's working procedures prevents Argentina from expressing its views with respect to its preliminary objections later, including through its oral statement at the Panel meeting or through comments on the Panel's interim report.[33]

3.13. Japan notes that, although the DSU does not explicitly regulate preliminary ruling requests nor the procedures to deal with such requests, Paragraph 6 of the Working Procedures for the current dispute explicitly contemplates that preliminary ruling requests will be fully briefed by the time of the first written submissions, except "upon a showing of good cause". Japan notes that Argentina has not objected to this rule, nor has it argued that there is "good cause" to depart from it. In Japan's view, merely having an "expectation", even one that Argentina considers to be "legitimate", is not sufficient to show good cause. Japan adds that, "contrary to what Argentina appears to posit, nothing in the DSU requires this Panel to allow for multiple rounds of briefing before the adoption of the ruling to address specific issues presented in the context of their particular disputes". Japan also asserts that at least five panels since 2008 have allowed "only a single round of briefing before they issued a preliminary ruling".[34]

3.3 Analysis of Argentina's arguments regarding the procedure to be followed

3.14. The DSU does not contain rules on preliminary rulings nor on the procedures that panels should follow when dealing with this type of requests from any of the parties. The Working Procedures for the current dispute, adopted by the Panel on 14 June 2013, after having consulted the parties, state in Paragraph 6 that:

> A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If any of the complainants requests such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their responses to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted by the Panel upon a showing of good cause.

3.15. In other words, the Panel's Working Procedures do not contemplate more than a single opportunity for parties to express their respective views on any request for a preliminary ruling;

[32] European Union's response to Panel question No. 5.
[33] United States' response to Panel question No. 5.
[34] Japan's response to Panel question No. 5.

they do not contemplate multiple rounds of briefings, questions from the panel, nor the opportunity for oral hearings.

3.16. Nothing would have prevented either the Panel or any of the parties to have proposed an exception to the procedures contained in Paragraph 6. Depending on the circumstances of each case, a panel may, in the course of the procedure to decide on a request for a preliminary ruling, accord multiple rounds of briefings, pose questions to the parties, or allow for the opportunity of an oral hearing. Any of those steps is not an acquired right for the parties, but is instead an instrument for a panel to obtain the necessary information that will allow it to rule on the relevant issues.

3.17. Moreover, there is no established practice for panels to grant multiple rounds of briefings (i.e. more than one opportunity) to parties before issuing a preliminary ruling, or to grant the opportunity for separate oral hearings to discuss preliminary ruling requests.

3.18. In at least 13 out of the 22 cases in which a preliminary ruling has been issued related to jurisdictional questions concerning Articles 4.7 or 6.2 of the DSU, WTO panels have issued the ruling after a single round of submissions from the parties.[35] This corresponds to more than half the number of cases. Therefore it cannot be asserted that in most cases panels have offered parties more than one opportunity to make submissions.

3.19. Likewise, panels have only rarely called for a separate hearing in order to hear the parties' views before issuing a preliminary ruling.[36] In two recent cases[37], the respondents proposed that the panel meet with the parties to consider a preliminary ruling request, but in both cases the panel considered that such hearing was unnecessary.[38] In other words, only a few panels have called for separate hearings in order to hear the parties' views before issuing a preliminary ruling.

3.20. In conclusion, there is no legal basis under the DSU, the Panel's Working Procedures, or the practice of previous panels dealing with requests for preliminary rulings, that supports Argentina's assertion that it had "a legitimate expectation that it would have more than a single opportunity to express its views with respect to its preliminary objection" or that the Panel should have called for a separate oral hearing.

3.21. In the present case, with respect to the first two issues raised by Argentina's preliminary ruling request[39], the Panel heard the arguments of Argentina, the views of the third parties and the response by the complainants. After having heard those views, the Panel did not find it necessary or convenient to delay the preliminary ruling by inviting further submissions from the parties.

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[35] The 13 cases are: *India – Agricultural Products*, DS430; *Canada – Feed-In Tariff Program*, DS426; *EU – Footwear (China)*, DS405; *US – Shrimp (Viet Nam)*, DS404; *US – Poultry (China)*, DS392; *US – COOL*, DS384, DS386; *Colombia – Ports of Entry*, DS366; *US – Continued Zeroing*, DS350; *Japan – DRAMs (Korea)*, DS336; *US – Zeroing (Japan)*, DS322; *US – Gambling*, DS285; *EC – Trademarks and Geographical Indications*, DS174, DS290; *Turkey – Textiles*, DS34. In particular, there is no indication in the reports of the panels in either *US – Gambling*, DS285 or *EC – Trademarks and Geographical Indications*, DS174, DS290 (cited by Argentina), that more than one round of submissions was accorded by those panels before issuing a preliminary ruling. See, Panel Reports, *US – Gambling*, para. 1.7; *EC – Trademarks and Geographical Indications*, paras. 2.2-2.5.

[36] Special oral hearings on a request for a preliminary ruling took place in the proceedings on *China – Raw Materials*, DS394, DS395, DS398; *US – Continued Suspension*, DS320; *Canada – Wheat Exports and Grain Imports*, DS276; *Turkey – Textiles*, DS34. See, Preliminary Ruling by the Panel, *China – Raw Materials*, WT/DS394/9, WT/DS395/9, WT/DS398/8, para. 1; Panel Reports, *US – Continued Suspension*, para. 7.1; *Canada – Wheat Exports and Grain Imports*, para. 1.8; *Turkey – Textiles*, para. 1.8. In two of the cases cited by Argentina, no oral hearing took place before the panel issued its preliminary hearing. See, Preliminary Ruling by the Panel, *US – Countervailing and Anti-Dumping Measures (China)*, WT/DS449/4 (7 June 2013), para. 1.3; Panel Report, *China – Electronic Payment Services*, para. 1.6.

[37] *US – Countervailing Measures (China)* and *India – Agricultural Products*.

[38] Preliminary Ruling by the Panel, *US – Countervailing Measures (China)*, WT/DS437/4 (21 February 2013) para. 1.4; Preliminary Ruling by the Panel, *India – Agricultural Products*, WT/DS430/5 (28 June 2013), para. 1.5.

[39] Namely whether the alleged RTRRs were properly identified by the complainants in their respective requests for consultations and whether the characterization of the alleged RTRRs as a single "overarching" measure in the complainants' panel requests improperly expanded the scope or changed the essence of the dispute.

3.22. In contrast, the Panel found it useful to seek further clarification from the parties regarding the issues raised by Argentina's request with respect to the measures that are subject to the complainants' claims against the alleged RTRRs "as applied". In addition to the first round of submissions between the parties addressing Argentina's request for a preliminary ruling (Argentina's submission of 7 August 2013, the third parties' comments submitted by Australia and Chinese Taipei on 28 August and the complainants' responses of 10 September), the Panel has now heard the arguments of the parties at the first substantive meeting of 24 to 26 September as well as the responses to the questions posed by the Panel after the meeting filed by the parties on 11 October.

3.23. The Panel is aware that objections regarding the sufficiency of a panel request or a request for consultations must be decided on the face of those documents and that any defects in these documents cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless the Panel is also aware that, in considering the sufficiency of the documents that lie at the base of a panel's jurisdiction, and in particular the panel request, submissions and statements made by the parties during the course of the panel proceedings may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.[40]

4 PANEL'S ANALYSIS OF THE PENDING ISSUES RAISED BY ARGENTINA'S REQUEST

4.1 Arguments of the parties

4.1.1 Japan's claims against the alleged RTRRs "as applied"

4.1. As noted above, in its first written submission, Argentina alleged that the claims raised by the United States and Japan regarding the alleged RTRRs "as applied" were not covered by their respective panel requests. Argentina added that, although the European Union identified the measures subject to its claims against the RTRRs "as applied" in its panel request, it failed to identify these measures in its request for consultations. Accordingly, Argentina argues that any claims against the RTRRs "as applied" are outside the Panel's terms of reference.[41]

4.2. During the first substantive meeting, and again in response to the questions posed by the Panel after the meeting, Argentina requested that the Panel find that, since neither Japan nor the United States identified any measures subject to claims in their requests for consultations against the alleged RTRRs "as applied", any such measures and claims are outside the Panel's terms of reference.[42]

4.3. In response, Japan argues that the specific measures that are the object of its "as applied" claims are the same that Japan challenges "as such", i.e. the alleged RTRRs on their face, each of the individual instances of application, as well as broader overall acts of application in a collective sense.[43] In this regard, Japan argues that it: (i) identified the RTRRs in its request for consultations as a measure at issue; and, (ii) subsequently added in its panel request that its challenge against the RTRRs "was with respect both to 'these requirements' as well as 'any application thereof' – *i.e.*, both *as such* and *as applied*".[44] In Japan's view, there is no requirement under the DSU that a complainant identify in its panel request the specific instances of application of a measure. Japan submits that it had no obligation to specify in detail the instances of application of the RTRRs until the stage of its submissions and argumentation.[45]

[40] Appellate Body Report, *US – Carbon Steel*, para. 127. See also, Appellate Body Reports, *Korea – Dairy*, para. 127; *Thailand – H Beams*, para. 95.

[41] See paras. 2.1 and 2.2 above.

[42] Argentina's opening statement at the first meeting of the Panel, para. 33; Argentina's response to Panel question No. 4.

[43] Japan's response to Panel question No. 2.

[44] Japan's response to Argentina's request for a preliminary ruling, para. 27.

[45] Ibid. paras. 26-28.

4.1.2 The 23 measures described by the European Union in Section 4.2.4 of its first written submission

4.4. In its first written submission, the European Union noted that it is challenging "as separate measures certain specific instances where the Argentinean Government has applied one or more of the RTR requirements described [in the same submission] to particular entities." The European Union described 23 of those "specific instances" of application in its first submission. In the European Union's view, those measures are inconsistent with Articles XI:1 and/or Article III:4 of the GATT 1994. The European Union noted that its claims against these measures are only advanced in the alternative, in case that the Panel finds that the alleged RTRRs, each on its own or any combination thereof, are not inconsistent with Articles XI:1 and/or III:4 of the GATT 1994 as part of an overarching measure.[46]

4.5. In response to a question posed by the Panel after the first substantive meeting, the European Union clarified that its claims against the 23 specific instances of application do not constitute a challenge against the alleged RTRRs "as applied", based on a distinction between challenges against measures "as such" and challenges against measures "as applied". The European Union noted that it is asking the Panel to issue an individual finding with respect to each of the 23 specific instances of application described in the European Union's first written submission. The European Union added that each of the 23 specific instances of application described in its first written submission correspond to one of the 29 cases listed in Annex III of its panel request, where Argentina has allegedly imposed one or more RTRRs on individual economic operators. In the European Union's view, if the Panel find that the RTRRs constitute an overarching measure that is inconsistent with the GATT, this finding would be sufficient to cover the 23 specific instances of application and the Panel would not need to examine the alternative claims regarding those instances of application.[47]

4.6. In its request for a preliminary ruling, Argentina argues that the European Union failed to identify in its request for consultations the specific instances of application of the alleged RTRRs that are the object of its claims. In Argentina's view, "the European Union's identification of 'separate measures in each of the instances listed in Annex III' is an evident departure from its request from consultations, where no such Annex was included and no such measures were identified." Argentina adds that, based on the dates of the measures identified by the European Union in Annex III of its panel request, "there does not appear to be any discernible reason why the European Union could not have identified at least the majority of these measures in its request for consultations."[48] Argentina concludes that claims with respect to measures that were not identified in a complainant's request for consultations are outside the panel's terms of reference.[49]

4.2 Panel's Analysis

4.2.1 Introductory comments

4.7. In the current case, Argentina is not challenging the manner in which the complainants have defined their claims against the alleged RTRRs, but instead whether the complainants properly identified the specific measures that were the object of those claims. Argentina's allegation relates to the distinction between claims brought against a measure "as such" and claims brought against a measure "as applied".

4.8. In its preliminary ruling of 16 September 2013, the Panel already concluded that:

> [T]he RTRRs were identified by the complainants as a measure at issue, both in their respective requests for consultations as well as in their panel requests. The differences in language used by the complainants when describing these measures in their

[46] European Union's first written submission, paras. 22, 328, 385-490. See also, European Union's opening statement at the first meeting of the Panel, para. 35; European Union's second written submission, fn 102.

[47] European Union's response to Panel question No. 1.

[48] Argentina's first written submission, para. 133.

[49] Ibid. para. 134.

requests for consultations, as compared to their panel requests, are minor and do not expand the scope of the dispute or change its essence.[50]

4.9. The following preliminary comments may be made with respect to Argentina's arguments on the complainants' claims against the alleged RTRRs "as applied":

a. Japan is the only complainant that has used the expression "as applied" and has asked the Panel to issue separate findings regarding the RTRRs "as such" and "as applied".[51]

b. At the first meeting of the Panel, in its response to Panel question No. 4 and in its second written submission, Argentina asserts that Japan and the United States failed to identify the measures subject to their "as applied" claims in their respective *requests for consultations*; however, Argentina's request for a preliminary ruling in its first written submission asserts instead that the United States and Japan failed to identify those measures in their *panel requests*.[52]

c. Argentina does not argue that the European Union failed to identify the 23 specific instances of application of RTRRs in its *panel request*. Argentina's argument is instead that these specific instances of application were not identified in the European Union's *request for consultations*.

d. Argentina has limited its challenge on the sufficiency of the description of the measures at issue in the complainants' panel requests with respect to their challenges against the RTRRs "as applied". In other words, notwithstanding that Japan has specified that it is challenging the RTRRs both "as such" and "as applied",[53] Argentina does not argue that the claims raised by Japan regarding the RTRRs "as such" are not covered by Japan's request for consultations or by its panel request. This is despite the fact that Japan has indicated that "[t]he specific measures that are the object of Japan's 'as applied' claims are the very same as those that Japan also challenges 'as such'".[54]

4.2.2 The requirement to identify the "measures at issue" in the panel request

4.10. The issues raised by Argentina bring into question this Panel's jurisdiction. Accordingly, the Panel must deal with them if necessary on its own motion and "even if the parties to the dispute remain silent on those issues" in order to satisfy itself that it has authority to proceed.[55] As noted by the Appellate Body, "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[56]

4.11. The Panel will begin its analysis by scrutinizing the complainants' panel requests to ensure their compliance with both the letter and the spirit of Article 6.2 of the DSU.[57] If the Panel were to find that the panel requests properly identify the alleged RTRRs as measures at issue, it would then need to additionally consider whether those measures were properly identified in the respective requests for consultations. In this respect, the Appellate Body has noted that, although in considering the sufficiency of a panel request, a panel may consult submissions and statements made in the course of the proceedings, "compliance with the requirements of Article 6.2 must be demonstrated on the face of the [panel request]".[58]

4.12. Article 6.2 of the DSU provides in its relevant part that a panel request:

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[50] Preliminary Ruling by the Panel, *Argentina – Import Measures* (16 September 2013), para. 3.24.
[51] See, Ibid, para. 3.41. See also, Japan's response to Panel question No. 2; Japan's first written submission, paras. 185, 198 and 218; Japan's second written submission, paras. 7 and 20.
[52] See fn 18 above.
[53] Japan's first written submission, paras. 185 and 198; Japan's response to Panel question No. 2.
[54] Japan's response to Panel question No. 2.
[55] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.
[56] Appellate Body Report, *EC - Bananas III*, para. 142.
[57] Appellate Body Report, *US – Carbon Steel*, para. 126.
[58] Ibid. para. 127.

> [S]hall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly…

4.13. Pursuant to Article 6.2 of the DSU, a panel request must thus comply with "two distinct requirements"[59]: (i) it must identify the specific measures at issue; and, (ii) it shall provide a brief summary of the legal basis of the complaint (i.e. its claims)[60] sufficient to present the problem clearly.[61]

4.14. The identification of the specific measures at issue in the complainant's panel request:

> [Must] be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.[62]

4.15. The Appellate Body has also noted that "the identification of the specific measures at issue, pursuant to Article 6.2", which must be done "with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request", is different from a demonstration of the existence of such measures:

> [A]lthough a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.[63]

4.16. In other words, a complainant must identify in its panel request the measure at issue with "sufficient precision". There is no requirement, however, that a complainant must demonstrate the existence and precise content of a measure for a panel request to fulfil the requirement in Article 6.2 of the DSU.[64] Instead, for the demonstration of the existence and the nature of the challenged measures, "a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures … ".[65]

4.2.3 The distinction between claims raised on a measure "as such" and against a measure "as applied"

4.17. The pending issues raised by Argentina's request relate to a distinction between claims brought against a measure "as such" and those brought against a measure "as applied". As noted by the Appellate Body:

> [T]he distinction between "as such" and "as applied" claims … has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm.[66]

4.18. It is established practice in WTO dispute settlement that Members can challenge, not only the application of measures in specific circumstances, but also rules or norms of general and prospective application, irrespective of their actual application and even if they have not been

[59] Appellate Body Report, *EC – Selected Customs Matters*, para. 130. See also, Ibid, para. 131.
[60] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[61] Appellate Body Report, *Korea – Dairy*, para. 120. See also, Appellate Body Report, *US – Carbon Steel*, para. 125.
[62] Appellate Body Report, *EC – Bananas III*, para. 142. See also, Appellate Body Reports, *US – Carbon Steel*, para. 126; *Brazil – Dessicated Coconut*, para. 186; *EC – Bananas III*, para. 142.
[63] Appellate Body Report, *US – Continued Zeroing*, paras. 168-169.
[64] Ibid. para. 168.
[65] Ibid. para. 169.
[66] Ibid. para. 179.

applied in practice. Challenges against a measure "as such" can be brought independently or simultaneously with challenges against a measure "as applied".[67] The Appellate Body has noted that "as such" challenges against a Member's measures in WTO dispute settlement proceedings (which seek to prevent Members *ex ante* from engaging in certain conduct) are especially serious challenges, because they have more far-reaching implications than "as applied" claims.[68]

4.19. Even an unwritten measure can be challenged "as such", as long as it has general and prospective application, but particular rigour must be exercised by a panel to conclude on the existence of an unwritten "rule or norm".[69] The Appellate Body has cautioned, however, that:

> [W]hen bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such.[70]

4.20. In the current case, the complainants are challenging a number of alleged RTRRs, which constitute unwritten measures.[71] The Appellate Body has observed that, "[w]hen a challenge is brought against an *unwritten measure*, the very existence and the precise contours of the alleged measure may be uncertain".[72] Because their challenge is directed against unwritten measures, the complainants are expected to have identified such measures in their panel requests "as clearly as possible" and to have state "unambiguously the legal basis for [their claims]". In other words, through their panel requests, the complainants should have "[given] respondents and third parties sufficient notice of the specific measures that [they intend] to challenge in WTO dispute settlement proceedings."[73]

4.2.4 The description of the alleged RTRRs

4.21. The complainants identify the alleged RTRRs in their respective panel requests in an almost identical manner as follows:

> Separately and/or in combination with the measures described in Sections I and II [the DJAI requirement and the CIs requirement, respectively] Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: (1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods.
>
> These requirements are not stipulated in any published law or regulation. To satisfy these requirements, economic operators normally either submit a statement or conclude an agreement with Argentina setting out the actions they will take. Argentina

[67] Appellate Body Report, *US – 1916 Act*, para. 61.
[68] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173.
[69] Appellate Body Report, *US – Zeroing (EC)*, paras. 193, 198-205. See also, Panel Report, *US – Zeroing (Japan)*, paras. 7.49 and 7.50.
[70] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[71] European Union's Panel Request, p. 3; United States' Panel Request, p. 4; Japan's Panel Request, p. 4.
[72] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792. (emphasis original)
[73] Ibid.

> enforces these requirements by withholding permission to import, *inter alia*, by withholding the issuance of DJAI or CI approvals. …[74]

4.22. The United States' and Japan's panel requests indicate that:

> The United States [Japan] considers that whether analyzed separately or together with the measures described in Sections I and II, these requirements, and any application thereof, are inconsistent with [certain provisions of the GATT 1994].[75]

4.23. In turn, the European Union states that:

> The European Union considers that these requirements, when viewed as an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products, as well as when viewed as separate measures in each of the instances listed in Annex III, and whether analysed separately or together with the measures described in Sections I and II, are inconsistent with [certain provisions of the GATT 1994].[76]

4.24. In other words, the complainants' panel requests enumerate "certain actions" that, according to the complainants, Argentina requires economic operators to undertake as a condition to be granted permission to import goods into Argentina. The complainants have referred to the requirement on economic operators to undertake those actions as the "Restrictive Trade Related Requirements" (RTRRs). The United States and Japan note that their claims refer to the alleged RTRRs, as well as to "any application thereof".

4.25. In the specific case of Japan's claims, the Panel notes that Japan has clarified that the measures that are the object of its "as applied" claims are the same measures that are the object of its claims "as such".[77] Accordingly, in the circumstances of the present case and in light of the unwritten nature of the challenged measures, in their respective panel requests the complainants have identified the alleged RTRRs in a "sufficiently precise" manner so as to "present the problem clearly". The complainants will have the burden, in the course of the proceedings, to present the arguments and evidence necessary to demonstrate the nature and characteristics of the challenged measure. Because the alleged RTRRs are unwritten, much of the evidence to be considered by the Panel may necessarily relate to the application of the measure. This is irrespective of whether the evidence is provided in relation to claims concerning the RTRRs "as such" or "as applied".

4.26. The Panel will deal with the issue of whether the arguments and evidence on the record are sufficient to make a *prima facie* case that the alleged RTRRs are inconsistent with Argentina's WTO obligations either "as such" or "as applied" in its final report. In the meantime, and in terms of the requirements of Article 6.2 of the DSU, the description of the RTRRs provided by the complainants is clear and sufficiently precise as to: (i) allow the Panel to ascertain its terms of reference; (ii) serve the due process objective of notifying Argentina of the nature of the complainants' case with respect to the RTRRs; and, (iii) give sufficient notice to other WTO Members of the specific measures that the complainants have challenged in the current proceedings, so that those other WTO Members may understand the nature of the dispute and determine whether they have any substantial interest in the matter.

4.27. Moreover, in practice, there is no indication that Argentina's ability to defend itself in the course of these proceedings has been prejudiced in any way by the manner in which the complainants have described the alleged RTRRs as a specific measure at issue in their respective panel requests; indeed, Argentina has neither argued this, nor presented any evidence in this regard. There is also no indication that the ability of other WTO Members to understand the nature of the dispute and to determine whether they have any substantial interest in the matter has been impaired by the manner in which the complainants described the specific measure at issue.

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[74] United States' Panel Request, p. 4. See also, European Union's Panel Request, p. 3; Japan's Panel Request, pp. 3-4.

[75] United States' Panel Request, p. 4. See also, Japan's Panel Request, p. 4.

[76] European Union's Panel Request, p. 4.

[77] Japan's response to Panel question No. 2.

4.28. In other words, the alleged RTRRs have been properly identified by the complainants as "measures at issue". Whether Japan presents enough arguments and evidence in the course of the proceedings to sustain its request for findings on those measures "as such" and "as applied" is a matter that the Panel will address in its final report. The latter is an issue that is not related to the identification of the measure, but to the complainants' burden to make a *prima facie* case that the challenged measures are inconsistent with Argentina's WTO obligations.

4.29. Having concluded that the complainants' panel requests properly identify the alleged RTRRs as measures at issue in the present dispute, the Panel should consider whether those measures were properly identified in the respective requests for consultations.

4.30. In this respect, Article 4.4 of the DSU, which contains the requirements for requests for consultations, states that:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

4.31. With respect to the obligation to identify the measures at issue, the panel in *EC and certain member States – Large Civil Aircraft* emphasized the difference in language between Article 4.4 and Article 6.2, observing that "Article 4.4 of the DSU requires only that the request for consultations must identify 'the measures at issue', as opposed to the 'specific measures at issue' as required by Article 6.2 of the DSU".[78]

4.32. In any event, in its preliminary ruling of 16 September 2013, the Panel noted that, both in their requests for consultations and in their panel requests, the complainants used similar language to identify the RTRRs as a measure at issue. As stated by the Panel in its preliminary ruling:

> The manner in which the RTRRs were described by the complainants in their respective requests for consultations was sufficient to put the respondent on notice that these alleged requirements were part of the measures at issue for the purpose of the consultations. The small differences in language used in describing the RTRRs in the requests for consultations, as compared with the respective panel requests, are insignificant and do not expand the scope nor change the essence of the dispute.

4.33. Having concluded that that the alleged RTRRs are properly identified in the complainants' panel requests, the Panel concludes additionally that they were properly identified in the complainants' respective requests for consultations.

4.2.5 The 23 specific instances of application of the alleged RTRRs in Section 4.2.4 of the European Union's first written submission

4.34. Section 4.2.4 of the European Union's first written submission describes 23 measures qualified by the European Union as "specific instances of application of the RTR requirements".[79] The European Union has indicated that the 23 specific instances of application identified in its first written submission correspond to "23 of the 29 cases listed in the EU Panel Request", which the European Union has decided to pursue as "separate measures".[80] According to the European Union, each of the 23 "specific instances of application of the [RTRRs]" described in Section 4.2.4 of its first written submission relates to a bullet point describing an "instance of [RTRRs] affecting products originating in the European Union" in Annex III of the European Union's panel request.[81]

4.35. Annex III of the European Union's panel request (a section that is found neither in the United States' panel request nor in Japan's panel request) lists the title of 29 articles or press releases and includes internet links to the text of each of those articles or press releases. In order

[78] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.126.
[79] European Union's first written submission, paras. 385-490.
[80] European Union's response to Panel question No. 1, paras. 5-6 and 15.
[81] European Union's first written submission, footnotes 446, 453, 461, 465, 473, 480, 484, 491, 497, 504, 509, 516, 520, 526, 530, 535, 541, 548, 562, 568, 574, 577 and 583.

to identify the measures that, according to the European Union, constitute the 23 individual specific measures at issue as "specific instances of application of the RTR requirements", a reader of the European Union's panel request would need to:

a. Visit the websites identified in the list of 29 internet links in Annex III of the European Union's panel request;

b. Read each of the 29 articles or press releases; and,

c. Deduce from each of these articles what may be the specific measures at issue challenged by the European Union.

4.36. Even after having completed these steps, the reader would still need to turn to the European Union's first written submission in order to be able to identify the "specific instances of application of the RTR requirements" that are being challenged as 23 individual measures at issue by the European Union.

4.37. A panel request that requires a reader to access information from a website and deduce from that information what the challenged measures are, cannot be said to be "sufficiently precise"[82] in identifying the specific measures at issue for the purpose of Article 6.2 of the DSU: it is not sufficient for the panel to ascertain its terms of reference; it does not serve the due process objective of notifying the respondent of the nature of the complainant's case with respect to the specific measure; and it may impair the ability of any other WTO Member to understand the nature of the dispute and determine whether it has any substantial interest in the matter. The list provided by the European Union in Annex III of its panel request may contain information that may become relevant in the course of the proceedings in order to demonstrate the nature and existence of the measures described by the European Union. However, on its face[83], the list provided by the European Union in Annex III of its panel request does not identify any "specific measures at issue".

4.38. For the reasons indicated, the 23 measures described by the European Union in its first written submission as "specific instances of application of the RTR requirements" do not constitute "measures at issue" in the terms of Article 6.2 of the DSU. It is therefore unnecessary for the Panel to examine further whether, as argued by Argentina, the European Union failed to identify these "specific instances of application of the RTR requirements" in its request for consultations.

5 CONCLUSION

5.1. In light of the above considerations, the Panel finds that:

a. The complainants' panel requests properly identify the alleged "Restrictive Trade Related Requirements" (RTRRs) as measures at issue in the present dispute and, therefore, these measures are part of the Panel's terms of reference; and,

b. The 23 measures described by the European Union in Section 4.2.4 of its first written submission as "specific instances" of application of alleged RTRRs do not constitute "measures at issue" in the present dispute.

5.2. This preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties during the interim review.

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[82] Appellate Body Report, *EC – Bananas III*, para. 142.
[83] Appellate Body Report, *US – Carbon Steel*, para. 126. See also, Ibid. paras. 126 and 127.