ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS
(DS438/444/445)

EXECUTIVE SUMMARY OF

FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA
AND
OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

October 30, 2013

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

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.