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ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

(DS444)

OPENING STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

September 24, 2013

1. Good morning, Madam Chairperson and members of the Panel. On behalf of the United States, we would like to begin by thanking the Panel for agreeing to assist the parties in resolving this dispute and the Secretariat staff for their assistance to you. We look forward to working with you, and with the delegations of Argentina, the European Union and Japan, as you carry out your work.

I. INTRODUCTION

2. We are here today because 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 regarding the advance import affidavit (or "DJAI") Requirement and the Restrictive Trade-Related Requirements (or "RTRRs"), 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 Unjustified delays in, and denials of, approvals to import goods, and the imposition of unpublished requirements that restrict their importation, are squarely prohibited by the WTO Agreement.

3. This dispute involves widespread restrictions on the importation of all types of goods by Argentina in order to protect Argentine domestic industries at a high cost to foreign producers and exporters and the world trading system. As the United States and co-complainants detailed in their submissions, Argentina has also used the DJAI system and other means to require importers to agree to limit imports, increase exports, make investments in Argentina, refrain from repatriating profits, or use Argentine local content in production.

4. As such, Argentina's measures undermine important principles of the multilateral trading system – they unjustifiably restrict and discriminate against imports and provide unfair protection for the domestic industry.

5. The foregoing aspects of Argentina's measures are amply demonstrated in the hundreds of

exhibits submitted by the co-complainants. Argentine officials themselves have confirmed, for example, that its measures "protect Argentine industry" and promote "import substitution."[1] This application of the DJAI system and RTRRs continues to this day.[2]

6. In response to the U.S. submission establishing *prima facie* breaches of Articles XI:1, X:1 and X:3(a) of the GATT 1994, as well as Articles 1.4(a), 1.6, 3.2, 3.3, 3.5(f) and 5 of the Import Licensing Agreement, Argentina does not directly dispute any of the facts. Rather, Argentina attempts to avoid scrutiny of its measures. With respect to the DJAI Requirement, Argentina asserts that no disciplines in the WTO Agreement apply to this measure. Argentina's legal arguments in this respect are deeply flawed; they contain contradictions in logic and are untethered from the text of the relevant provisions. With respect to the RTRRs, Argentina submitted a request

[1] Ministry of Industry Press Release June 19, 2012 (JE-44); Ministry of Economia Press Release March 27, 2012 (JE-284).

[2] DIAGEO PLC, Brunchtime Call with the Presidents - Final, Fair Disclosure Wire, June 10, 2013 (JE-736); VALMONT INDUSTRIES INC., Q2 2013 Earnings Conference Call - Final, Fair Disclosure Wire, July 18, 2013 (JE-737); SCANIA AB, 2013 Q2 Conference Call - Final, Fair Disclosure Wire, July 19, 2013 (JE-738); AGCO, 2013 Q2 Earnings Conference Call - Final, Fair Disclosure Wire, July 31, 2013 (JE-739); ESSILOR INTERNATIONAL SA, 2013 Q2 Earnings and Sales Presentation- Final, Fair Disclosure Wire, August 29, 2013 (JE-740); *Por Nuevo freno importador, ya hay más de 20.000 autos varados en el puerto*, EL CRONISTA (Arg.), May 10, 2013, *available at* http://www.cronista.com/contenidos/2013/05/10/noticia_0038.html (JE-741); *Volvió la 'importación cero' y afecta a las pymes y los programas sociales*, PERFIL (Arg.), June 26, 2013, *available at* www.perfil.com/economia/ Volvio-la-importacion-cero-y-afecta-a-las-pymes-y-los-programas-sociales-20130623-0065.html (JE-742); Tomás Canosa, *El Gobierno frenó importaciones que iban al Hospital Garrahan*, EL CLARÍN (Arg.), July 18, 2013, *available at* http://www.ieco.clarin.com/economia/Gobierno-freno-importaciones-Hospital-Garrahan_0_958104217.html (JE-743); Magdalena Tempranísimo, *Quejas por demoras de hasta seis meses para autorizar importaciones*, CONTINENTAL (Arg.), July 24, 2013, *available at* http://www.continental.com.ar/noticias/actualidad/quejas -por-demoras-de-hasta-seis-meses-para-autorizar-importaciones/20130724/nota/1938158.aspx (JE-744); Dario Gannio, *Empresarios admiten que importan de más para aprovechar el dólar official*, BAE NEGOCIOS (Arg.), August 23, 2013, *available at* http://www.diariobae.com/diario/2013/08/23/32026-empresarios-admiten-que-importan -de-mas-para-aprovechar-el-dolar-oficial.html (JE-745)**;** iProfessional.com, "Centenares de importadores, sin actividad en la Argentina por trabas al comercio exterior," August 29, 2013, *available at* http://www.iprofesional.com/notas/168707-Centenares-de-importadores-sin-actividad-en-la-Argentina-por-trabas-al-comercio-exterior (Arg.) (JE-746); José Hidalgo Pallares, *Cayeron las ventas al exterior de los bienes más usados para compensar importaciones*, LA NACIÓN (Arg.), September 10, 2013, *available at* http://www.lanacion.com.ar/1618477-cayeron-las-ventas-al-exterior-de-los-bienes-mas-usados-para-compensar-importaciones (JE-747); Fernando Bertello, *Sufre el campo la falta de agroquímicos*, LA NACIÓN (Arg.), September 11, 2013, *available at* http://www.lanacion.com.ar/1618764- sufre-el-campo-la-falta-de-agroquimicos (JE-748).

for a preliminary ruling from the Panel arguing that the Panel could not examine this measure. The United States thanks the Panel for its findings in this regard that Argentina's request was unfounded.

7. In this oral statement today, we will focus on responding to certain of the legal and factual issues raised by Argentina in its first written submission to demonstrate the flaws in Argentina's responses to the arguments of the United States and the other co-complainants.

II. ARGENTINA'S DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

8. In its first written submission, Argentina responds to co-complainants' claims with respect to Article XI:1 of the GATT 1994 by abandoning the text of the agreement, as well as the reasoning of multiple past panels, and asserting that Article XI:1 does not apply to measures of a procedural nature.[3] Contrary to these assertions, no such limitation exists on the Article's scope.

9. Article XI:1 applies to a broad set of measures – it provides that Members may not maintain "prohibitions or restrictions [on importation or exportation] other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures." Argentina argues that this language applies only to substantive rules, and not the procedures or means by which the rules are "made effective,"[4] and it alleges that past panels were mistaken in applying Article XI:1 to procedures, such as import licensing requirements.[5]

10. As an initial matter, the DJAI Requirement is not merely procedural but rather is itself a restriction on importation of goods. 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

[3] *See, e.g.*, Argentina's First Written Submission, paras. 147-60.
[4] Argentina's First Written Submission, para. 173.
[5] Argentina's First Written Submission, para. 182.

(other than duties, taxes or other charges) is within the provision's scope. Argentina attempts to separate the "restriction" from the means by which it is "made effective."[6] But this assertion has no basis in the Article's text. Indeed, Argentina's approach would undermine Article XI:1 completely by permitting a Member to restrict as much trade as it likes as long as it can find a means to do so that is "procedural" in nature.

11. For example, a licensing requirement, which Argentina seeks to characterize as "procedural," is itself a "restriction" where it is non-automatic. That was the case with the licensing procedure at issue in *India – Quantitative Restrictions*.[7] 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 that it implements. In that sense, a panel would evaluate whether the licensing measures implementing the underlying measure further restricts imports over and above the restriction that is justified under the WTO Agreement. But that is not the case here; Argentina's DJAI system does not implement any WTO-consistent underlying restriction.

12. The DJAI Requirement is a non-automatic licensing system that operates as an import restriction; it is a system that allows officials to deny a license for discretionary reasons. The analysis may end there as the DJAI Requirement does not implement any other substantive rule. The evidence demonstrates that there is no WTO-consistent restriction that the DJAI makes effective, and Argentina has pointed to none in its first submission, only vaguely referencing the

[6] *See, e.g.*, Argentina's First Written Submission, paras. 173, 178.
[7] *See India – Quantitative Restrictions*, paras. 5.125-31.

general statutes of the participating agencies.[8] Rather, as co-complainants have demonstrated in their submissions, Argentine authorities use the DJAI Requirement to restrict the importation of goods in a discretionary manner, including through the imposition of the RTRRs. As a result, in this dispute, without a separate "substantive" restriction implemented in accordance with a justification under the WTO Agreement, the Panel need only examine the restriction imposed by the DJAI Requirement itself.

13. Further, it is not the case that the RTRRs should be evaluated as the substantive "restriction" imposed by the DJAI Requirement, as suggested by Argentina.[9] First, the RTRRs are not related to a WTO-consistent restriction, and Argentina has not suggested that anything in Article XX of the GATT 1994 or elsewhere in the WTO Agreement justifies the imposition of the RTRRs. As a result, the RTRRs do not provide a WTO-consistent justification for the DJAI Requirement. Second, it is not the case that the RTRRs are necessarily implemented through the DJAIs; they are not a part of the DJAI Requirement. Rather, the discretion afforded agencies participating in the DJAI system enables the Secretariat of Domestic Trade (or "SCI") to implement the RTRRs, as demonstrated by the evidence co-complainants have submitted to the Panel.

14. As the United States explained in its first submission,[10] the DJAI Requirement is itself a "restriction" within the meaning of Article XI:1 of the GATT 1994 because (1) the DJAI Requirement is non-automatic, as approvals for importation are not granted in all cases; (2) Argentine authorities use the discretion in the DJAI Requirement to impose RTRRs; and (3) approvals may be granted only after a delay.

[8] Argentina's First Written Submission, paras. 228, 30-31.
[9] Argentina's First Written Submission, para. 342.
[10] U.S. First Written Submission, Section IV.A.1.

15. Argentina also argues that the scope of Article XI:1 is somehow 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.[11] However, the explicit 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; unless imposed at prohibitive levels, duties, taxes, or other charges raise the cost to importers (or exporters) of trade, and therefore can serve as "restrictions." The phrase "whether made effective through" confirms that the same logic applies to other types of measures that similarly may impose "restrictions." Argentina relies in part on the Appellate Body's observation regarding the title of Article XI in *China – Raw Materials*.[12] However, the Appellate Body's statement differs little from the panel's articulation of that provision in *India – Quantitative Restrictions*. In *China – Raw Materials*, the Appellate Body concluded 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."[13] In *India – Quantitative Restrictions*, the panel considered that the term "restriction" had an ordinary meaning that included "limiting condition."[14] The United States considers that these terms have similar, if not identical, implications for what restrictions are and are not permitted, and that the *India – Quantitative Restrictions* panel and subsequent panels correctly articulated the meaning of "restriction" in Article XI:1.

16. Finally, Argentina's argument that co-complainants must demonstrate the "trade-restricting effects,"[15] of the DJAI Requirement is unfounded. That term is nowhere to be found in Article

[11] Argentina's First Written Submission, para. 333.
[12] Argentina's First Written Submission, paras. 330-34.
[13] *China – Raw Materials (AB)*, para. 320 (emphasis added).
[14] *India – Quantitative Restrictions (Panel)*, para. 5.128.
[15] Argentina's First Written Submission, Section IX.B.2.

XI:1. Argentina relies on the Appellate Body's statement in *China – Raw Materials* to support its position,[16] but as we just explained, 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. In fact, "limiting effect" was adopted by the *India – Autos* panel to describe the term "restriction,"[17] a use which was cited approvingly by three subsequent panels, none of which concluded that Article XI:1 requires a demonstration of trade effects.[18] The DJAI Requirement has a limiting effect because Argentine officials have full discretion to approve or deny applications. Further, notwithstanding the fact that "quantitative" appears in the title of Article XI:1; it is not used in the text of the provision, nor does the provision reference "trade effects" or "trade restrictions." Argentina reads into Article XI:1 a limitation that does not exist.

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

17. In its first submission, Argentina argues that the DJAI Requirement is a "formality" within the meaning of Article VIII and that Articles VIII and XI are mutually exclusive in their spheres of application.[19] Argentina argues that the DJAI Requirement is a "customs formality" and that, for that reason, Article XI:1 does not apply at all. Argentina's argument is untenable. There is nothing in the text of Article VIII or Article XI to support the argument that Article XI:1 excludes "formalities." Further, co-complainants are not challenging a "formality" but rather the restriction.

[16] Argentina's First Written Submission, para. 334.
[17] *India – Autos (Panel)*, para. 7.270.
[18] *China – Raw Materials (Panel)*, para. 7.206; *Colombia – Ports of Entry*, paras. 7.234 & 7.256; *Dominican Republic – Import and Sale of Cigarettes (Panel)*, para. 7.252.
[19] Argentina's First Written Submission, paras. 176-80.

18. Argentina takes an expansive view of the term "restriction" in arguing that "formalities" described in Article VIII would be prohibited under Article XI:1 as a "restriction" if both provisions apply to the same set of measures.[20] It is not the case that all "formalities" are "restrictions." Although Article VIII acknowledges that formalities may burden trade transactions,[21] those burdens are not necessarily "restrictions" under Article XI:1. And, to the extent that they are, Article XI:1 does discipline their imposition by Members.

19. 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 to do so under the DJAI system – permission which Argentine officials have wide discretion to withhold. Even if an importer satisfies the "formalities" associated with the DJAI system, it cannot import if it does not have the required approval.

20. Finally, there is nothing in the text of either Article VIII or Article XI:1 that exempts licensing requirements from the disciplines of Article XI:1. Accordingly, Article VIII is not material to the Panel's consideration of the claims at issue in this dispute.

21. For the foregoing reasons, the co-complainants have satisfied their burden to make 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.

[20] Argentina's First Written Submission, para. 176.
[21] GATT 1994 Article VIII:1(c).

IV. THE DJAI REQUIREMENT IS AN IMPORT LICENSE REQUIREMENT

22. For purposes of the Panel's Article XI:1 analysis, the DJAI Requirement is a licensing procedure. Additionally, it is subject to the disciplines in the Import Licensing Agreement.

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

23. 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')."[22] As we will explain, however, the SAFE Framework has nothing to do with Argentina's discretionary licensing system, nor with the legal issues in this dispute.

24. 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."[23] It is a framework designed to facilitate the application of border security measures. 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. Moreover, the overwhelming evidence in this dispute shows that the DJAI system is used for purposes of economic policies, such as import substitution and balancing trade. For example, Argentine officials have

[22] Argentina's First Written Submission, para. 192.
[23] World Customs Organization, SAFE FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE , p. 2 (June, 2012) ("SAFE Framework") (JE-735).

stated that the DJAI system serves to facilitate "import substitution."[24]

25. Although SAFE is of no relevance to this dispute, the United States will take a few minutes to contrast Argentina's DJAI system with the SAFE framework. And although it is Argentina that asks the Panel to engage in this unnecessary and ultimately irrelevant exercise, the comparison provides no support for Argentina's arguments. To the contrary, it only serves to highlight that the DJAI system represents a major departure from any legitimate system of regulating imports.

26. The SAFE Framework foresees enhanced supply chain security and trade facilitation. Again, the DJAI system is not a system designed to facilitate border security, and thus has no relation to SAFE. And, unlike SAFE, the DJAI system does not facilitate trade. Rather, as a result of the DJAI's non-transparent "observation" process, importers are subject to delays – sometimes up to six months or longer.

27. The DJAI system also differs in other fundamental respects. One subcomponent of SAFE involves a process for businesses to submit supply chain security-related data at the time of cargo loading and/or shipment. Under the DJAI system, only after an importer has fulfilled whatever conditions Argentine authorities may choose to impose can the importer actually commence the importation process, by issuing a purchase order and seeking access to foreign exchange. All of these events are to occur well before – even weeks before –cargo loading and shipment, which are the critical points in time under SAFE.

28. The SAFE Framework is built around four "core elements."[25] The DJAI system departs markedly from each one.

[24] Ministry of Industry Press Release June 19, 2012 (JE-44).
[25] SAFE Framework, p. 3 (JE-735).

29. The first core element is to "harmonize[] the advance electronic cargo information requirements on inbound, outbound and in transit shipments."[26] The DJAI system does not do this. Instead, it imposes onerous requirements not foreseen under the SAFE Framework at all.

30. For example, as previously explained, the SAFE Framework states: "Customs should not require the advance declarations to be submitted more than – for maritime containerized cargo – 24 hours before loading at the port of departure," or shorter periods for other modes of transport.[27] In contrast, the DJAI system requires businesses to submit advance data prior to issuance of a purchase order – a date that is often weeks prior to cargo loading and shipment.[28]

31. Similarly, the SAFE Framework states that: "Customs should not require more than the details listed in the Annex" for the advance electronic import Goods declaration.[29] The Annex to the SAFE Framework lists information relevant to supply chain security threats, including place of loading, stowage location on the vessel, the conveyance reference number, numbers for seals used to secure cargo, among other things.[30] The DJAI system by contrast omits much of the SAFE Framework's security-focused information, and adds information requirements unrelated to supply chain security. Such unrelated information includes information required by SCI to implement the RTRRs in conjunction with the DJAI observation process, such as the "balance of foreign exchange as well as the pace of the company's prices."[31] Thus, in terms of timing and information

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[26] SAFE Framework, p. 3 (JE-735).
[27] SAFE Framework, p. 13 (JE-735).
[28] Resolution 3252, Art. 2 (JE-15); Central Bank Communication A 5274, para 1(c) (JE-40).
[29] SAFE Framework, p. 11 (JE-735).
[30] *See* SAFE Framework, Annex II (JE-735).
[31] See Exhibit *See e.g., DJAI* User Manuel, pp. 13-18 (JE-13); JuguetesyNegocios.com, Cómo Liberar Declaraciones de Importación Centro Despachantes de Aduana [How to Release Declarations of Importation from the Center for Customs Brokers] (March 6, 2012) (JE-2); *Moreno Aclaró que Sus Controles Sobre las Importaciones Se Aplicarán A Cien Empresas que Consumen 80% de las Divisas* [*Moreno Clarified that His Import Controls Will Apply to the One Hundred Companies that Use 80% of Available Foreign Exchange*], BUENOS AIRES ECONÓMICO (Arg.), January 31, 2012 (JE-3);

requirements, the DJAI system is far removed from the SAFE Framework's dual objectives of enhancing supply chain security and facilitating trade.

32. As its second core element, the SAFE Framework provides that each participating country "commits to employing a consistent risk management approach to address security threats."[32] SAFE describes an approach that incorporates security measures, including use of "high-security mechanical seals as prescribed in ISO standard 17712"; the submission of "vessel stow plans" identifying the location of goods on a vessel; the submission of "container status messages" to track movement of shipping containers; and the development of "authorized economic operator" programs to verify companies' supply chain security measures.[33] SAFE also encourages the use of "standardized sets of targeting criteria," including the WCO's General High Risk Indicator document, which helps identify "high-risk countr[ies]," "high-risk commodities used for concealment purposes," and "dangerous goods that may potentially be used in a terrorist attack."[34] The DJAI system appears to contain none of these elements.

33. As its third core element, the SAFE Framework provides that a shipping nation should respond to requests from a receiving nation to perform an "outbound inspection of high-risk cargo or conveyances, preferably using non-intrusive detection equipment such as large-scale X-ray machines and radiation detectors."[35] The DJAI system contains no such features.

34. As its fourth and final core element, "the SAFE Framework suggests benefits that Customs

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Boletin Informativo [Information Bulletin], Union Industrial del Oeste [Industrial Union of the West], Bienes de Capital [Capital Goods Report] (March 21, 2012) (JE-46).

[32] SAFE Framework, p. 3 (JE-735).

[33] SAFE Framework, pp. 10-20 (JE-735).

[34] SAFE Framework, p. 18 (JE-735).

[35] SAFE Framework, p. 3 (JE-735).

will provide to businesses that meet minimal supply chain security standards and best practices."[36] The SAFE Framework states that it "makes it easier for buyers and sellers to move goods across borders," and promises authorized economic operators "benefits, such as faster processing of goods by Customs, *e.g.*, through reduced examination rates," resulting in "savings in time and costs" and greater "uniformity and predictability."[37] The DJAI system does the opposite. It creates an import barrier, resulting in added costs and delay, and reduced uniformity and predictability.

B. The DJAI Requirement Is an Import Licensing Procedure Under the Import Licensing Agreement

35. Argentina bases its argument that the DJAI Requirement is not an import licensing procedure on a misreading of Article 1.1 of the Import Licensing Agreement and a mischaracterization of the purpose of the DJAI Requirement.

36. Argentina employs circular reasoning in support of a narrow definition of "import licensing" under the Import Licensing Agreement. Argentina argues that the phrase "used for the operation of import licensing regimes" in Article 1.1 informs the scope of "import licensing" in that provision.[38] However, 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."

37. Article 1.1 states, in relevant part, that: "[I]mport licensing is defined as administrative procedures 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

[36] SAFE Framework, pp. 3, 6 (JE-735).
[37] SAFE Framework, pp. 6 (JE-735).
[38] Argentina's First Written Submission, para. 283.

administrative body as a prior condition for importation." As the Appellate Body observed in *EC – Bananas III*, if a procedure requires "the submission of an application" for an import license as "a prior condition for importation" of a product, it is a licensing procedure.[39]

38. In addition, the ordinary meaning of the term "license" informs the meaning of the phrase; a "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'."[40] Therefore, an "import license" involves a permission granted by a competent authority to bring merchandise into a Member from another Member.

39. The exclusion in Article 1.1 of applications or documentation submitted for "customs purposes" further demonstrates that import licensing procedures under the Import Licensing Agreement include all procedures other than those that are for "customs purposes." And the footnote to Article 1.1 explains that "administrative procedures" include "[t]hose procedures referred to as 'licensing' as well as other similar administrative procedures."

40. The United States explained in its first written submission why the DJAI Requirement falls within the meaning of the term "import licensing."[41] In short, an importer must submit an electronic application for an import in the DJAI system, and obtain an approval, demonstrated by the "exit" or "*salida*" status, as a prior condition for import. The participating agencies determine whether to lodge an observation, moving the application to the "observed" or "*observada*" status, and thereby withholding approval for the importation to proceed. An importer must then approach the agency making the observation in order to understand what is required to lift the observation. Further, the

[39] *EC – Bananas III (AB)*, para. 193.
[40] *Turkey – Rice*, para. 7.123 (quoting *The New Shorter Oxford English Dictionary* , p. 1578 (1993)).
[41] U.S. First Written Submission, paras. 124-25.

DJAI Requirement is a non-automatic import licensing procedure. A key aspect of this process is the fact that there are – undisclosed – bases for the withholding of approvals, *even if the DJAI is filled out appropriately*.

41. The DJAI is not administered for "customs purposes." Argentina's interpretation of "customs purposes" would completely swallow any procedure that could be considered import licensing. Argentina looks to the definition of "customs," in the sense of a governmental agency, in the Revised Kyoto Convention, which notes that customs services implement customs laws as well as other laws and regulations which are enforced at the border.[42] Argentina uses this definition, which does not relate to "customs purposes," to argue that any application or other 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"*[43] relates to "customs purposes."

42. That is not the case. The definition at Article 1.1 of the Import Licensing Agreement 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 the implementation of a *customs* law or regulation. A customs agency may (or may not) have the authority to enforce aspects of an import licensing procedure or other measure at the border 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, and therefore whether the Import Licensing Agreement applies to that measure.

43. Further, for the reasons already discussed, the DJAI Requirement is not a customs formality

[42] Argentina's First Written Submission, para. 286 & fn. 141.
[43] Argentina's First Written Submission, para. 286 (emphasis added).

implemented in accordance with the SAFE Framework as alleged by Argentina. The functioning of the DJAI system itself, and the participation of agencies which have nothing to do with the identification of security risks, or customs risks, such as SCI, discredits that assertion.

44. Finally, in its first submission, Argentina fails to refute the features of the DJAI system which demonstrate that it is used for purposes other than "customs purposes."[44] That is, Argentina maintains separate customs procedures whereby customs information is collected and duties and other fees are assessed;[45] AFIP, the only agency participating which has explained the reasons an observation may be lodged, has only listed tax reasons,[46] and the other agencies participating in the DJAI system do not have customs administration responsibilities.[47]

45. For these reasons, the DJAI Requirement is an import licensing procedure subject to the disciplines in the Import Licensing Agreement.

46. Further, as explained in the first written submission of the United States, 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. For example, Article 1.4(a) requires Members to publish the rules and all information concerning procedures for the submission of applications, while Article 3.3 requires Members to publish sufficient information for other Members and traders to know the basis for granting and/or allocating licenses. As reflected in the substantial evidence on point, Argentina has failed to meet either of these basic transparency requirements, and has failed to address or refute any of the arguments or evidence submitted by complainants in this regard.

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[44] *See* Argentina's First Written Submission, paras. 288-92.
[45] *See* U.S. First Written Submission, Section III.A.4; Argentina's First Written Submission, para. 291.
[46] *See* U.S. First Written Submission, note 215; *DJAI* User Manuel at 25 (JE-13).
[47] *See* U.S. First Written Submission, para. 125.

V. ORDER OF ANALYSIS

47. 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.[48] However, Argentina is incorrect in its assertion that the Panel is precluded from considering Article XI:1 first under its suggested order of analysis. Not only could the Panel reach the claim under GATT 1994 Article XI even if it were to start its analysis with the Import Licensing Agreement, we consider and respectfully request that the Panel should in any event start its analysis with the GATT 1994. In fact, the logical relationship between Article XI:1 and Article 3.2 indicates that it would be appropriate for the Panel to start its analysis of the DJAI Requirement under Article XI:1.

48. The co-complainants are challenging the DJAI not so much as a set of procedures imposing import licensing than as a restriction on imports imposed through import licensing. As a result, it is not the case that the Import Licensing Agreement is the more specific agreement in relation to the claims advanced by the co-complainants. Rather, it is the GATT 1994, and Article XI in particular, that more specifically and in detail deals with the nature of the matter raised in this dispute.

49. In *Turkey – Rice*, the panel considered that "[i]n contrast to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the provisions of the Import Licensing Agreement invoked by the United States and Article X:1 and X:2 of the GATT 1994 deal with the administration or application of trade measures rather than with the substantive content of the measures *per se.*"[49] That panel decided to "begin its analysis of the substantive content of the

[48] Argentina's First Written Submission, paras. 170-71; 301-06.
[49] *Turkey – Rice*, para. 7.38.

measure,"[50] 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."[51]

50. The United States has presented evidence and legal arguments demonstrating that the DJAI Requirement is a non-automatic licensing procedure. As a result, the provisions of Article 3, as well as Article 1, of the Import Licensing Agreement apply to the DJAI system. Implicit in the Import Licensing Agreement is that WTO-compatible non-automatic import licensing measures are adopted to secure compliance with other measures. As the preamble of the Import Licensing Agreement states:

> *Recognizing* that import licensing **may be employed to administer measures** such as those adopted pursuant to the relevant provision of GATT 1994;
>
> . . .
>
> *Recognizing* that non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary **to administer the relevant measure** . . . .[52]

Along the same line, Article 3.2 prohibits "trade-restrictive or distortive effects on imports **additional to those caused by the imposition of the restriction**."[53] The Import Licensing Agreement concerns licensing procedures, and assumes that there is an underlying measure or restriction, and does not question the WTO compatibility of that measure or restriction.

51. In such a case, it is logical for the Panel to start its inquiry under Article XI:1 to determine

[50] *Turkey – Rice*, para. 7.42.
[51] *Turkey – Rice*, para. 7.41.
[52] Emphasis added.
[53] Emphasis added.

whether (1) there is a restriction and (2) what is its content. Co-complainants have presented ample evidence that the DJAI is *itself* a restriction, and Argentina has provided no evidence or argumentation related to a separate WTO-compatible restriction implemented by the measure. As a result, if the Panel starts with an Article XI:1 analysis, it would find that the entire DJAI Requirement is inconsistent with Argentina's WTO commitments.

52. Further, Argentina's conclusion that there is "no claim under Article XI" if the Import Licensing Agreement is examined first is incorrect.[54] As noted above, the GATT 1994 is the more specific agreement for purposes of the claims in this dispute. In addition, 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. In fact, the Appellate Body in *EC – Bananas* observed that "*both* the *Licensing Agreement* and the relevant provision of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures."[55]

53. 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."[56] In this dispute, the Panel should consider the logical relationship between Article XI:1 of the GATT 1994 and the Import Licensing Agreement, in general and specifically with respect to Article 3.2 of the latter agreement. This assessment will lead to the conclusion that the Panel should start its inquiry under Article XI of the GATT.

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[54] Argentina's First Written Submission, paras. 306, 312.
[55] *EC – Bananas III (AB)*, para. 203.
[56] *Canada – Wheat (AB)*, para. 126.

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

54. Argentina asserts that the U.S. claims under GATT Article X:3(a) do not "refer to administration of rules of general application, but rather to substantive rules . . . ."[57] This is not accurate. The evidence – which we have summarized in Exhibit US-1 – demonstrates that Argentina's administration of the DJAI system fails to meet GATT Article X:3(a) requirements.[58] 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.

55. Argentina's domestic courts have held that the Argentine authorities' implementation of the DJAI system represents "unlawful administrative conduct," and that Argentina has administered the system as "a ban – albeit a temporary one – on imports, without any legal basis."[59] Courts have noted that the authorities have failed to produce "the 'comments' of the authorized agency," as is required under Resolution 3252.[60] Courts have also noted that delays ranging from nearly six to eight months "without any response being given… unreasonably exceeds the [72 hour and 10 day maximum] time frames established in the Resolutions."[61] That is unreasonable administration.

56. Company affidavits and other evidence also reflect the unreasonable and non-uniform administration of the DJAI system. Argentine officials fail to explain the reasons for

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[57] Argentina's First Written Submission, para. 357.
[58] Selected Evidence Supporting GATT Article X:3(a) Claim (US-1).
[59] *See* Yudigar case (JE-59); *See also* Zatel case (JE-57); Wabro case (JE-58); Fity case (JE-302).
[60] *See* Zatel case (JE-57); Wabro case (JE-58); Fity case (JE-302); See also Resolution 3252, Art. 4.
[61] *See* Yudigar case (JE-59); Wabro case (JE-58); Fity case (JE-302); *See also* Zatel case (JE-57).

"observations" or delays;[62] fail to provide effective contact points;[63] and fail to administer the system in a consistent, predictable or reasonable manner – with wide variations in delays and the ultimate disposition of applications.[64] This lack of uniformity occurs with respect to particular importers,[65] and more broadly as well. For example, Argentina claims that it has "observed" only 3% of all medical technology DJAI applications; yet for other product categories (automobiles, consumer goods, foodstuffs, and so forth) there are reports that only 40% of DJAI applications are approved.[66] 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.[67] And even when importers satisfy such demands to alter prices, balance trade or increase local content, Argentine officials may choose not to release all "observed" DJAI applications, notwithstanding prior commitments to do so.[68] This evidence typifies administration that is neither reasonable nor uniform.

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

57. The United States would like to thank the Panel for its prompt resolution of Argentina's request for a preliminary ruling. As Argentina has not yet presented any substantive arguments in

[62] *See VP Company Y Affidavit*, paras. 5-8, 10 (JE-307); Japan Industry Survey, p. 2 (JE-312).
[63] *See VP Company Y Affidavit*, paras. 5-8, 10 (JE-307).
[64] *See, e.g.*, Japan Industry Survey, p. 2 (JE-312); U.S. Chamber of Commerce Report, pp. 1-3 (JE-56); Zatel, Wabro, Yudigar, and Fity cases (JE-57 to JE-59; JE-302); Ian Mount, Argentina's International Trade Disaster, BUSINESSWEEK, November 8, 2012 (JE-281); Magdalena Tempranísimo, *Quejas por demoras de hasta seis meses para autorizar importaciones*, CONTINENTAL (Arg.), July 24, 2013 (JE-744).
[65] *See, e.g.*, Natalia Muscatelli, *Por trabas a importados cierran locales de marcas premium*, IECO (Arg.), April 2, 2012 (JE-260); *VP Company Y Affidavit*, paras. 5-8, 10 (JE-307); Fernando Bertello, *Sufre el campo la falta de agroquímicos (Fields Suffer a Lack of Agrochemicals*, LA NACION (Sept. 11, 2013) (JE-748).
[66] *Compare* Javier Lewkowicz, El abastecimiento tiene remedio, PAGINA12 (Arg.), April 25, 2012 (JE-265) *with* Argentina's International Trade Disaster (JE-281); Presentation, American Chamber of Commerce in Argentina, Declaracion Jurada Anticipada de Importación, Estado de Situación [DJAI Status Report] (March, 2012) (JE-297); and "Maraña de reglas aduaneras, tips para exportadores e importadores", Clement Comercio Exterior, 9 Agosto 2012 (JE-387).
[67] VP of Company X Affidavit (JE-306).
[68] VP of Company X Affidavit (JE-306); U.S. Chamber of Commerce Report, p. 7 (JE-56).

response to co-complainant's presentations on their claims related to the RTRRs, the United States will make only a few points at this time and looks forward to addressing any questions of the Panel.

58. The large volume of 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 – whether through balancing the value of imports with exports, limiting the volume or value of imports, incorporating local content into domestically produced products, or making or increasing investments. For that reason, and as explained in the U.S. first written submission,[69] the RTRRs are inconsistent with Article XI:1 of the GATT 1994.

59. 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.

VIII. CONCLUSION

60. For the reasons we have explained today, Argentina has failed to rebut the *prima facie* case presented by the United States and other co-complainants in their first written submissions. Accordingly, we respectfully request the Panel to find that Argentina's measures at issue breach its WTO commitments. We thank the Panel for its attention and look forward to answering its questions.

[69] U.S. First Written Submission, Section IV.B.

Table of Additional Exhibits

Exhibit No.	Description	Short Title
JE-735	World Customs Organization, SAFE FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE (June, 2012)	*SAFE Framework*
JE-736	DIAGEO PLC, Brunchtime Call with the Presidents - Final, Fair Disclosure Wire, June 10, 2013	
JE-737	VALMONT INDUSTRIES INC., Q2 2013 Earnings Conference Call - Final, Fair Disclosure Wire, July 18, 2013	
JE-738	SCANIA AB, 2013 Q2 Conference Call - Final, Fair Disclosure Wire, July 19, 2013	
JE-739	AGCO, 2013 Q2 Earnings Conference Call - Final, Fair Disclosure Wire, July 31, 2013	
JE-740	ESSILOR INTERNATIONAL SA, 2013 Q2 Earnings and Sales Presentation- Final, Fair Disclosure Wire, August 29, 2013	
JE-741	*Por Nuevo freno importador, ya hay más de 20.000 autos varados en el puerto*, EL CRONISTA (Arg.), May 31, 2013, *available at* http://www.cronista.com/contenidos/2013/05/10/noticia_0038.html	
JE-742	*Volvió la 'importación cero' y afecta a las pymes y los programas sociales*, PERFIL (Arg.), June 26, 2013, *available at* www.perfil.com/economia/Volvio-la-importacion-cero-y-afecta-a-las-pymes-y-los-programas-sociales-20130623-0065.html	
JE-743	Tomás Canosa, *El Gobierno frenó importaciones que iban al Hospital Garrahan*, EL CLARÍN (Arg.), July 18, 2013, *available at* http://www.ieco.clarin.com/economia/Gobierno-freno-importaciones-Hospital-Garrahan_0_958104217.html	
JE-744	Magdalena Tempranísimo, *Quejas por demoras de hasta seis meses para autorizar importaciones*, CONTINENTAL (Arg.), July 24, 2013, *available at* http://www.continental.com.ar/noticias/actualidad/quejas-por-demoras-de-hasta-seis-meses-para-autorizar-importaciones/20130724/nota/1938158.aspx	
JE-745	Dario Gannio, *Empresarios admiten que importan de más para aprovechar el dólar official*, BAE NEGOCIOS (Arg.), August 23, 2013, *available at*	

	http://www.diariobae.com/diario/2013/08/23/32026-empresarios-admiten-que-importan-de-mas-para-aprovechar-el-dolar-oficial.html	
JE-746	iProfessional.com, "Centenares de importadores, sin actividad en la Argentina por trabas al comercio exterior," August 29, 2013, *available at* http://www.iprofesional.com/notas/168707-Centenares-de-importadores-sin-actividad-en-la-Argentina-por-trabas-al-comercio-exterior (Arg.)	
JE-747	José Hidalgo Pallares, *Cayeron las ventas al exterior de los bienes más usados para compensar importaciones*, LA NACIÓN (Arg.), September 10, 2013, *available at* http://www.lanacion.com.ar/1618477-cayeron-las-ventas-al-exterior-de-los-bienes-mas-usados-para-compensar-importaciones	
JE-748	Fernando Bertello, *Sufre el campo la falta de agroquímicos*, LA NACIÓN (Arg.), September 11, 2013, *available at* http://www.lanacion.com.ar/1618764-sufre-el-campo-la-falta-de-agroquimicos	
US-1	Selected Evidence Supporting GATT Article X:3(a) Claim	