ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

(AB–2014-9 / DS444)

APPELLEE SUBMISSION OF
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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This dispute concerns Argentina's disregard for basic obligations in the WTO agreements. The WTO agreements establish a rule-based trading system for Members disciplining border measures, such as restrictions which harm both individual economies and the world economy as a whole. Argentina has flouted these disciplines and compounded its disregard for its obligations by attempting to avoid scrutiny at the WTO, including under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), by conducting its activities according to unpublished rules.

2. Argentina imposes procedures for the pre-approval of import transactions which it uses to restrict imports of goods with the aim of protecting the domestic economy. Argentina often withholds approval 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. These measures are inconsistent with the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

3. In front of the Panel, Argentina never attempted to confront the evidence – as that evidence clearly revealed what Argentina's measures do. Instead, Argentina advocated legal theories that would open the door widely to a systematic disregard of basic WTO obligations. The Panel properly rejected these arguments, and on the basis of the overwhelming evidence in the record, found that Argentina's regime for the pre-approval of import transactions and the requirements it places on importers restrict imports and are inconsistent with Article XI:1 of the GATT 1994.

4. On appeal, Argentina again avoids the evidence underlying the Panel's findings – including numerous quotes from top Argentine officials to the press extolling their ability to extract concessions from businesses seeking to import goods. Instead, its submission asks the Appellate Body to embrace the baseless legal positions the Panel rejected, and to greenlight persistent non-compliance with the GATT 1994 through unwritten measures. The Appellate Body should reject this invitation. Article XI of the GATT 1994 contains a key WTO discipline: that Parties cannot simply block or restrict the importation of goods into their country in order to advance their economic and industrial policies.

5. Following a summary of the factual background of this dispute, Section III of this submission addresses Argentina's appeal of the Panel's First Preliminary Ruling[1] and demonstrates that the Panel did not err in concluding that the Restrictive Trade-Related Requirements ("TRRs")[2] measure was within its terms of reference.

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[1] Panel Report, Annex D-1, Preliminary Ruling of the Panel (Sept. 16, 2013) ("First Preliminary Ruling"), paras. 3.19-3.21.

[2] The United States, the European Union, and Japan referred to the requirements as the "Restrictive Trade-Related Requirements" (RTRRs). The Panel referred to these requirements as Trade-Related Requirements (TRRs). *See* Panel Report, para. 6.44, fn. 122. For purposes of this submission, the United States will use the terminology employed by the Panel.

6. The Panel correctly found that the U.S. consultations request identifies the TRRs measure as a separate measure and that the description of the TRRs measure in the consultations request is substantially similar to that which is used in the U.S. panel request, which identifies the same measure, only with greater specificity. As a result, the Panel correctly concluded that the U.S. panel request did not impermissibly expand the scope of the dispute.

7. The result of Argentina's arguments that a greater level of detail was required in the consultations request would be that consultations requests must meet essentially the same standard of specificity as panel requests. This position is not supported by either Article 4 of DSU, concerning the requirements of consultations request, or by prior considerations of that provision by panels and the Appellate Body which have concluded that a different, lower standard applies to the identification of a measure in consultations requests, as compared to panel requests. Because the United States identified the TRRs measure in its consultations request, in a description that changed very little in the panel request, Argentina's appeal of the Panel's determination that the TRRs measure was within its terms of reference must fail.

8. Section IV addresses the *Declaraciónes Juradas Anticipadas de Importación* ("advance import affidavit") ("DJAI") Requirement and Argentina's request that the Appellate Body find that a Member may maintain an import restriction that – like the DJAI Requirement – gives its authorities wide discretion to limit imports of all types for unspecified reasons and over indefinite duration. Argentina claims that it should be free to justify such measures and evade scrutiny under Article XI:1 of the GATT 1994 merely by claiming reliance on the hortatory language of Article VIII(1)(c) of the GATT 1994 – suggesting that Article VIII provides an exception to, or is in direct conflict with, Article XI.

9. Argentina's arguments are legally flawed, and nothing in the WTO Agreements gives it the freedom to breach Article XI:1 that it claims. To begin with, nothing in Article XI:1 of the GATT 1994 exempts measures that are characterized as "procedural," or as "formalities" or "requirements." Quite the contrary, any such measures fall within the scope of Article XI:1 if they otherwise meet the conditions of that Article. Indeed, if Argentina were free to justify non-automatic and discretionary import restrictions in this manner, then any Member would be free to do so – not just for breaches of Article XI:1, but also for Article III:4 and other core disciplines of the GATT 1994. Viewed in this light, using the hortatory language of Article VIII to create the possibility that all WTO Members may evade the obligations of GATT 1994 hardly appears – as Argentina claims – to be a "harmonious" interpretation of GATT 1994.

10. Argentina also argues that the Appellate Body should find that Argentina is free to justify the DJAI Requirement because an import requirement need not be "automatic". Argentina is wrong. The Panel found that the DJAI Requirement is a non-automatic trade restriction, as a result of the wide discretion given to unidentified Argentine authorities to withhold approval to import products for unidentified reasons and for indeterminate periods of time.[3] Such a non-automatic trade restriction is an import restriction under Article XI:1 of the GATT 1994 and prohibited under that provision. Not only is this conclusion mandated by the text of Article XI:1

[3] *See* Panel Report, paras. 6.461, 6.474, 6.479, 6.469 ("[T]he fact that a DJAI in exit status is a necessary condition to import goods, coupled with the lack of clarity as to who the participating agencies are and the absence of specific criteria that they can apply to exercise their discretion has a limiting effect on the importation of goods.").

itself, it is also consistent with numerous past panel reports. And for good reason – the non-automatic nature of the DJAI measure not only gives Argentina wide discretion to restrict import transactions for indeterminate (and potentially indefinite) periods of time, but also gives it wide discretion to restrict imports without ever disclosing the reasons for the restriction, the steps that must be undertaken to remedy the restriction, or how long the restriction will remain in effect; or to restrict imports outright or restrict imports by imposing conditions to balance exports or comply with other TRRs.

11. Finally, Argentina seeks to rely on these legally flawed arguments in order to shield the DJAI Requirement from scrutiny under Articles XI and XX of the GATT 1994, despite admissions by Argentine officials that the DJAI Requirement is used to achieve broad national economic policy goals, including "import substitution,"[4] "preventing negative effects on the domestic market, since the qualitative and/or quantitative importance of imports to be made has the effect of impacting domestic trade,"[5] managing the "balance of foreign exchange,"[6] and "protect[ing] Argentine industry and facilitat[ing] the participation of monitoring officials from Argentine chambers of industry – who have been working with sensitive products," to better ensure "productive growth with social inclusion and sustained development."[7] The Appellate Body should decline the invitation extended by Argentina to allow Members to establish such trade restrictions for these purposes with impunity.

12. Section V addresses Argentina's arguments that the Panel erred in finding that the TRRs measure is inconsistent with the GATT 1994. First, the United States responds to Argentina's continued argument that a special standard, drawn from the Appellate Body's report in *US – Zeroing (EC)*, must be met when establishing the existence of an unwritten measure. The Panel properly found no such standard to be applicable to the U.S. claims regarding the TRRs measure. In any event, the Panel explicitly made all of the findings that it needed to make under the standard that Argentina believes to be applicable. Accordingly, there would be no basis on which to reverse the Panel's conclusions about the TRRs measure even if Argentina were correct about the applicable legal standard.

13. Second, Section V addresses Argentina's claims that the Panel acted inconsistently with Article 11 of the DSU when concluding that the TRRs measure as such breaches GATT 1994 Article XI. Argentina challenges the Panel's findings that the evidence established the precise content and the general and prospective effect of the TRRs measure. While Argentina's Article 11 challenge relates on its face to the Japanese "as such" claim, Argentina has argued that such

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[4] Press Release, Ministerio de Industria [Ministry of Industry], Giorgi: "Casi el 100% de los electrodomésticos de línea blanca que se venden en el país son de producción nacional" **[**Giorgi: "Almost all major electrical appliances sold in Argentina are domestically produced"] (June 19, 2012), *available at* http://www.prensa.argentina.ar/2012/06/19/31680-giorgi-casi-el-100-de-los-electrodomesticos-de-linea-blanca-que-se-venden-en-el-pais-son-de-produccion-nacional.php (Arg.) (Exhibit JE-44).

[5] *SCI Resolution* 1, preamble (Exhibit JE-41).

[6] *Roberto Navarro, El Plan 2012* (Exhibit JE-8)

[7] Press Release, Ministerio de Economía, AFIP fijó controles más intensivos en importaciones para lograr un comercio "seguro y transparente" (March 27, 2012), *available at* http://www.prensa.argentina.ar/2012/03/27/29322-afip-fijo-controles-mas-intensivos-en-importaciones-para-lograr-un-comercio-seguro-y-transparente.php# (Arg.) ("*Ministry of Economia Press Release, March 27, 2012*") (Exhibit JE-284) (emphasis added).

findings were also necessary with respect to the claims brought by the United States. Although they were not, even if the Appellate Body were to find that Argentina's proposed standard applies to the U.S. claims, there would be no basis on which to find that the Panel did not properly make the findings relevant to that standard – including that the evidence establishes the measure's precise content and general and prospective effect.

14. Finally, Section V explains that Argentina is improperly recasting as an Article 11 claim its arguments before the Panel with respect to the content of the measure and whether it has general and prospective application. Moreover, Argentina's allegations of error regarding the Panel's evaluation of the evidence on the content and general and prospective nature of its measure are devoid of merit. Over 25 pages and using over 200 footnotes, the Panel elucidated the content of the TRRs measure in exceptional detail. Accepting Argentina's view that it must be clear exactly how an unwritten measure will be applied in all potential circumstances would make challenges to such measures virtually impossible. The Panel also properly understood and applied the concepts of general and prospective effect, rejecting Argentina's view that a measure providing discretion to authorities can never be applicable generally and prospectively. Volumes of evidence in the record support the Panel's conclusions that the TRRs measure is generally and prospectively applicable.

II. FACTUAL BACKGROUND

15. As the Panel explained,[8] in recent years, Argentina has pursued an aggressive policy of what it describes as "managed trade," "with the objectives of substituting imports for domestically-produced goods and reducing or eliminating trade deficits."[9] Argentina's Minister of Industry has explained that her government administers trade "through the carrot and stick,"[10] and that "[w]e believe in carrot and stick managed trade."[11] The measures at issue in this dispute – the DJAI Requirement, and the TRRs – are "stick[s]" that Argentina uses further these goals.

16. The DJAI Requirement is a non-automatic[12] procedure for the pre-approval of the importation of goods that serves to restrict imports[13] and that applies to almost all importations

[8] Panel Report, paras. 6.119, 6.162.

[9] Panel Report, para. 6.119. *See also e.g.*, Press Release, Ministerio de Industria [Ministry of Industry], Giorgi: "Este Gobierno cree y aplica administración del comercio" [Giorgi: "Administration Has Established and Is Implementing Trade Management"] (February 25, 2011), *available at* http://www.industria.gob.ar/?p=6234 ("*Ministry of Industry Press Release February 25, 2011*") (Exhibit JE-9); Press Release, Ministerio de Industria [Ministry of Industry], Amplian el universo de productos importados monitoreados por el sistema de licencias no automáticas [More Imports Subject to Non-Automatic Licensing] (February 15, 2011), *available at* http://www.industria.gob.ar/?p=6053&upm_export=print (Arg.) ("*Ministry of Industry Press Release February 15, 2011*") (Exhibit JE-7).

[10] Press Release, Ministerio de Industria [Ministry of Industry], Giorgi: el que más rápido integre piezas nacionales es el que más va a ganar (March 22, 2012), *available at* http://www.industria.gob.ar/giorgi-el-que-mas-rapido-integre-piezas-nacionales-es-el-que-mas-va-a-ganar/ (Arg.) (Exhibit JE-203).

[11] Exhibit JE-320 ("Creemos en el comercio administrado de zanahoria y garrote").

[12] Panel Report, para. 6.461.

[13] Panel Report, para. 6.364.

of all goods.[14] The Panel found that in order to place a purchase order or initiate a foreign exchange transaction to purchase foreign goods, importers into Argentina must first electronically submit a DJAI, which a variety of Argentine governmental agencies then have an opportunity to review.[15] If any of the governmental agencies registers an "observation" (*observación*) of the DJAI, then the importer may not proceed with the import transaction until the relevant agency (or agencies) decides that it is satisfied with the additional information provided, or actions undertaken by, the importer in response to potential demands that may be discretionally imposed by the agency (or agencies).[16] The Panel found that Argentine government agencies have vast discretion in registering or resolving "observations."[17] The Panel concluded that the DJAI procedure has a limiting effect on imports, and thus constitutes an import restriction, because it: (a) restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic; (b) creates uncertainty as to an applicant's ability to import; (c) does not allow companies to import as much as they desire or need without regard to their export performance; and (d) imposes a significant burden on importers that is unrelated to their normal importing activity.[18]

17. The Panel concluded that pursuant to the TRRs, Argentina withholds permission to import, including approvals of DJAIs, unless an importer agrees to: (1) offset the value of its imports with an equivalent value of exports; (2) reduce the price or volume of imports; (3) incorporate local content into domestically produced goods; (4) make or increase investments in Argentina (including in production facilities); and/or (5) refrain from repatriating funds from Argentina to another country.[19] Agreements by importers to comply with TRRs "are in some cases reflected in agreements signed between specific economic operators and the Argentine Government and in other cases contained in letters addressed by economic operators to the Argentine Government."[20] Argentina has not published legal instruments establishing the TRRs.[21] However, the evidence in the record, including statements of Argentine government officials, official government press releases, numerous press reports, industry surveys and statements by company officials, enabled the Panel to confirm their existence and operation, as well as their application to importers across various industries.[22]

18. The Panel explained that "[a]ccording to the evidence on record, the Argentine Government informs economic operators individually of the specific commitment or commitments it should undertake, depending on the particular circumstances of the respective

[14] *See* Panel Report, note 721 for a discussion of narrow exceptions to the DJAI Requirement.

[15] *See* Panel Report, paras 6.363-6.411, 6.460.

[16] *See* Panel Report, paras 6.380-6.382, 6.407.

[17] *See* Panel Report, paras 6.465-6.466.

[18] *See* Panel Report, para. 6.474.

[19] Panel Report, para. 6.155.

[20] Panel Report, para. 6.156.

[21] Panel Report, para. 6.157.

[22] *See* section V.A. *infra*.

operator."[23] The Panel also explained that "[t]he TRRs cover a broad range of sectors and economic operators."[24] "The evidence shows that such commitments have been required from producers and/or importers of, *inter alia*, foodstuffs, automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing."[25] The Panel also noted that "[t]hese sectors correspond to at least six out of the 11 industrial sectors (value chains) individually addressed in Argentina's Industrial Strategic Plan 2020 (*Plan Estratégico Industrial 2020*, PEI 2020), published in 2011,"[26] and that "[t]he TRRs imposed by the Argentine Government seem in line with three of the five economic objectives or "macroeconomic guidelines" set out in PEI 2020: (a) protection of the domestic market and import substitution; (b) increase of exports; and, (c) promotion of productive investment." As the Panel observed, the "Argentine Government has stated that it monitors the implementation of the commitments undertaken by economic operators."[27]

19. Argentina's government has highlighted that trade restrictions, including the DJAI Requirement and TRRs, are an integral means of forcing companies to adjust their business practices so as to support Argentina's policies. For instance, Argentina's Secretary of Domestic Trade explained that:

> When we study the pre-import affidavit (DJAI), we are going to consider the balance of foreign exchange, as well as the pace of the company's prices. We will do this on a company-by-company basis. And business owners understand what the right road is.[28]

20. He also told the press a story illustrating how Argentina's measures operate:

> Last year [Minister of Industry] Débora Giorgi and I met with the CEOs of Audi, Mercedes-Benz and BMW. We told them that they had to export enough to offset the dollars they spent importing cars. Audi understood it best. BMW did not change its policy. So it went seven months without bringing in one car. The result: Audi cornered the market. There was no shortage of cars. Now they came into line: the vice chairman of the BMW corporate office, in Germany, met with me and started to export semi-fermented grape juice (*must*) and rice. And they started to bring in cars.[29]

21. Even Argentina's President, Cristina Fernandez de Kirchner, boasted of her government's "heavy hand[ed]" methods. As one newspaper reported:

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[23] Panel Report, para. 6.157.

[24] Panel Report, para. 6.158.

[25] Panel Report, para. 6.158.

[26] Panel Report, para. 6.158.

[27] *See* Panel Report, para. 6.160 and exhibits cited therein.

[28] Exhibit JE-249.

[29] Exhibit JE-3.

> Yesterday President Cristina Kirchner defended trade restrictions as a way of encouraging companies to invest in the country and create local jobs. She acknowledged that the Government is often criticized for its "heavy hand" in enforcing complex non-automatic import licensing renewal requirements for hundreds of industrial products. "For Argentina, we will continue to be heavy-handed. If that's what it means to be heavy-handed – to increase employment in Argentina, to increase production in Argentina, to make more parts in Argentina, then it is our duty to do it for 40 million Argentines," said the President . . . .[30]

22. Numerous other quotations in the record from Argentine officials show how they viewed both the DJAI requirement and application of one or more of the TRRs as two key tools for forcing businesses to restructure their operations in accordance with Argentina's industrial and economic policies.[31]

23. The Panel made extensive findings about each of these two measures, which will be discussed in further detail below. Despite Argentina's aversion to memorializing its practices in laws or regulations, the blatant nature with which Argentina applied its two measures and boasted of their application left the Panel with more than enough evidence on which to base its amply supported and well-reasoned findings, and upon which to conclude that by maintaining measures to restrict imports in service of industrial and economic policies, Argentina breached its obligations under Article XI of the GATT 1994.

III. THE PANEL DID NOT ERR IN ITS CONCLUSION THAT THE TRRS MEASURE WAS WITHIN ITS TERMS OF REFERENCE

24. Argentina's appeal of the Panel's finding that the TRRs measure was within its terms of reference is without merit. Argentina argues that the U.S. consultations request[32] does not identify the TRRs measure as an "unwritten 'overarching measure'"[33] and that its inclusion in the U.S panel request[34] impermissibly expands the scope of the dispute. Contrary to Argentina's assertions, the Panel correctly found that the United States identified the TRRs measure in its consultations request in substantially similar terms as the panel request.

25. The obligation under Article 4 of the DSU is to "identify" the measure, and the consultations request clearly did so – not even Argentina is arguing that the U.S. consultations request failed to identify the TRRs. Rather, Argentina creates an artificial distinction between the descriptions in the two documents based on whether the TRRs were explicitly described as

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[30] *Cristina Kirchner Defendió las trabas a las importaciones* [*Cristina Kirchner Defends Import Restrictions*], La Nación (Arg.), September 7, 2011(Exhibit JE-10).

[31] *See* section II *supra* and V.A. *infra*.

[32] *Argentina – Measures Affecting the Importation of Goods*, Request for Consultations by the United States, WT/DS444/1 (Aug. 23, 2012) ("U.S. Consultations Request").

[33] Argentina's Appellant Submission, para. 23.

[34] *Argentina – Measures Affecting the Importation of Goods*, Request for the Establishment of a Panel by the United States, WT/DS444/10 (Dec. 7, 2012) ("U.S. Panel Request").

an "unwritten measure" and whether that measure is "overarching" – a term that was never used by the United States in its consultations request, panel request, or written submissions.

26. This section first addresses the requirement in Article 4 of the DSU that parties identify the measures at issue in requests for consultations. Second, it demonstrates that the TRRs were identified as a "measure" in the consultations request, that this same measure is included in the U.S. panel request, and that the Panel therefore correctly concluded that the panel request did not impermissibly expand the scope of the dispute. For these reasons, the Appellate Body should reject Argentina's arguments that the TRRs measure are outside the terms of reference of this dispute.

A. Article 4 of the DSU Requires Consultations Requests to Identify the Measures at Issue

27. Article 4 of the DSU contains procedures applicable to consultations, while Article 6 sets out the requirements for the establishment of panels. Article 4.7 provides a link between these two stages of a dispute, stating "[i]f the consultations fail to settle a dispute . . . the complaining party may request the establishment of a panel" to consider that dispute. It follows from these provisions, as the Appellate Body has observed, that "Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[35] As a "prerequisite to panel proceedings," consultations play a critical role in the dispute settlement process because they "serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them."[36]

28. Articles 4.4 and 6.2 set out the requirements for a consultations request and a panel request, respectively, and contain different obligations with respect to the identification of the measures and claims at issue. With respect to the measures, Article 4.4 requires "identification of the measures at issue" while Article 6.2 requires that a complainant "identify the specific measures at issue."[37] That is, while each document must identify the "measures at issue," the standard for a panel request requires more precision (the "specific" measures must be identified). The Appellate Body has considered that the differing language in the two provisions suggests that Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified" in the panel request,[38] "provided that the 'essence' of the challenged measures had not changed."[39]

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[35] *Brazil – Aircraft (AB)*, para. 131.

[36] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (quoting *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, paras. 54, 58).

[37] With respect to the claims, Article 4.4 requires "an indication of the legal basis for the complaint," while Article 6.2 requires "a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

[38] *Brazil – Aircraft (AB)*, para. 132 (emphasis in original).

[39] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137 (quoting *Brazil – Aircraft (AB)*, para. 132); *see also US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.

29. As the United States will explain in the sections below, the TRRs are squarely within the terms of reference of this dispute. This is because the consultations request identified the TRRs in substantially similar terms as the panel request. Accordingly, the same measures at issue were identified in both requests, and any minor differences in wording did not expand the scope of the dispute.

B. The Panel Correctly Concluded that the TRRs Measure Is Identified in Both the Consultations Request and the Panel Request

30. The Panel correctly concluded that the TRRs were included in the consultations request as a measure subject to those consultations. Modest changes in the structure of the panel request and in the description of the measure do not support Argentina's argument that the United States added a new measure expanding the scope of the dispute in the panel request.

1. The Panel Correctly Found that the Consultations Request Identifies the TRRs

31. Argentina faults the Panel for failing to provide sufficient analysis of the identification of the TRRs measure in the consultations request.[40] However, as explained below, it is unclear what additional analysis would be needed because, as the Panel found, the face of the U.S. consultations request identifies the TRRs measure in a description substantially similar to that which is contained in the panel request.[41]

32. In paragraphs 2 through 4 of its consultations request, the United States describes three requirements imposed by Argentina on importers:

> [2] Argentina subjects the importation of goods into Argentina to the presentation for approval (*validación*) of a non-automatic import license, the so-called *Declaración Jurada Anticipada de Importación* ("DJAI"). The relevant legal instruments through which Argentina maintains these measures include those listed in Annex I.
>
> [3] Argentina also subjects the importation of certain goods into Argentina to other non-automatic licenses: *Licencias No Automáticas de Importación* in the form of *Certificados de Importación* ("CIs"). The legal instruments through which Argentina maintains these measures include those listed in Annex II.
>
> [4] Argentina often requires the importers of goods to undertake certain commitments, including, *inter alia*, to limit their imports, to balance them with exports, to make or increase their investment in production facilities in Argentina, to increase the local content of products manufactured in Argentina (and thereby

[40] Argentina's Appellant Submission, para. 43.

[41] First Preliminary Ruling, paras. 3.19-3.24.

> discriminate against imported products), to refrain from transferring revenue or other funds abroad and/or to control the price of imported goods.[42]

33. Each paragraph describes one of the three types of requirements imposed by Argentina on importers – the DJAI Requirement, the CI Requirement,[43] and the "require[ment] … to undertake certain commitments," which the United States labeled "Restrictive Trade-Related Requirements" in its panel request for ease of reference.

34. The last paragraph quoted above – paragraph 4 – identifies requirements distinct from those in the other paragraphs. Contrary to Argentina's assertions,[44] there is no basis to assume that this paragraph is limited to describing how the DJAI and CI Requirements are applied. There is no mention of either the DJAI Requirement or the CI Requirement in that paragraph; rather, that paragraph describes the TRRs standing alone. As such, the Panel accurately concluded that these three paragraphs, each setting out different requirements imposed by Argentina, identify three sets of measures related to the DJAI, the CIs and the TRRs.[45]

35. Following this description, the consultations request does provide information as to how the measures are related, stating in the fifth paragraph:

> The issuance of CIs and the approval of DJAIs are being systematically delayed or refused by the Argentinean authorities on non-transparent grounds. The Argentinean authorities often make the issuance of CIs and the approval of DJAIs conditional upon the importers undertaking to comply with the above-mentioned trade-restrictive commitments.[46]

36. However, nothing in this paragraph discussing the application of all three measures indicates that the TRRs measure relates only to the application of the DJAI and CI Requirements. Moreover, there is nothing to indicate that the consultations request somehow excludes any claims related to the TRRs. Rather, the TRRs, and claims related to the TRRs, are within the scope of the consultations request.

37. Further, the TRRs measure does not describe any individual instances of applications of the requirement to undertake commitments, nor does it describe any legal instruments related to

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[42] U.S. Consultations Request, p. 1.

[43] Argentina repealed the resolutions establishing the CIs on the last working day before the meeting of the Dispute Settlement Body where the co-complainants made their second request for the establishment of the panel, and the panel was composed. *Ministerio de Economía y Finanzas Públicas, Procedimientos para el Trámite de las Licencias de Importación. Derogaciones* [Import Licensing Procedures, Repeals], *Resolución* 11 ("*MEFP Resolution 11*"), Jan. 25, 2013, [32.570], B.O. 8. (Arg.) ("*MEFP Resolution* 11") (Exhibit JE-39); Constitution of the Panel Established at the Request of the European Union, the United States and Japan at 1, WT/DS438, WT/DS444/11, WT/DS445/11, circulated May 28, 2013 (noting that the Panel was established Jan. 28, 2013). For that reason, the United States did not pursue its claims with respect to the CIs at the panel stage.

[44] Argentina's Appellate Submission, para. 27.

[45] First Preliminary Ruling, paras. 3.19-3.21.

[46] U.S. Consultations Request, p. 1.

the requirements. As a result, there is no basis in Argentina's arguments that the only possible reading is that the consultations request encompasses *individual written* commitments undertaken by importers.[47] To the contrary, the consultations request, consistent with the panel request, contains no information with respect to individual or written commitments.

38. These essential features of the consultations request remain the same in the U.S. panel request. The panel request described the TRRs measure as follows:

> Separately and/or in combination with the measures described in Sections I and II, Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: (1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods.
>
> These requirements are not stipulated in any published law or regulation. To satisfy these requirements, economic operators normally either submit a statement or conclude an agreement with Argentina setting out the actions they will take. Argentina enforces these commitments by withholding permission to import, *inter alia*, by withholding the issuance of DJAI or CI approvals.[48]

39. A comparison to the consultations request shows that the panel request identifies the same measure, but with greater specificity. The first paragraph in the TRR section of the panel request, describing certain elements of the TRRs, mirrors the relevant paragraph (the fourth paragraph) of the consultations request. The panel request provides further specificity regarding the measure, including confirmation that the requirements are not published and that economic operators must normally submit a statement or conclude an agreement with Argentina to satisfy the requirement. The Panel found that the TRRs measure, as described in the consultations request and panel request, are similar in nature and scope, and was therefore adequately identified in both documents.[49]

40. Finally, in its appellant submission, Argentina relies on the fact that the fourth paragraph of the consultations request contains no reference to "legal instruments" or "measures" as supporting the fact that the TRRs measure was not identified in the consultations request.[50] However, because there are no "legal instruments" through which Argentina maintains the TRRs measure, there was no reason to include a concluding sentence for the fourth paragraph of the request similar to that which concluded the second and third paragraphs. Similarly, the Annexes

[47] Argentina's Appellant Submission, para. 28.

[48] U.S. Panel Request, p. 4.

[49] First Preliminary Ruling, paras. 3.22-3.24.

[50] Argentina's Appellant Submission, paras. 27-31 & note 36.

to the consultations request list legal instruments related to only the DJAIs and CIs, because those were the only measures which were implemented through written instruments.[51] As the Panel found, the structure and context of the consultations request leads to the conclusion that the TRRs measure was identified in the consultations request, notwithstanding the difference in the descriptions of the three measures due to the TRRs unwritten nature.[52]

41. For these reasons, the Panel correctly concluded that the TRRs measure was adequately described in the consultations request. It is important to note that Argentina has not challenged the adequacy of the description of the measure in the U.S. panel request, yet it argues that the similarly worded description in the consultations request is inadequate. The result of Argentina's arguments would be that consultations requests are subject to the same standard of specificity as panel requests, and that there is no room for the refinement of a description of a measure between the two. As the United States demonstrates in the next section, this position is not supported by the DSU and prior applications of Article 4 by panels and the Appellate Body.

2. The Panel Correctly Found that the United States Did Not Impermissibly Expand the Scope of the Dispute in Its Panel Request

42. Argentina argues that the panel request failed to adequately identify a "single unwritten measure" and that the Panel failed to undertake an analysis of this question.[53] Argentina faults the Panel for focusing part of its analysis on the comparison between the language describing the TRRs in the consultations request and the language in the panel request.[54] This is despite the fact that the relevant question before the Panel was whether the panel request impermissibly expanded the scope of the dispute *in the panel request* from what was described in the *consultations request*. Argentina's arguments would require a level of precision in consultations requests that is not based on the obligations in the DSU and does not further the resolution of disputes through the consultations and dispute settlement process.

43. Argentina essentially argues that the United States was required to identify the TRRs measure in the consultations request in the exact same manner in the panel request. Argentina dismisses the fact that the TRRs measure is described in substantially similar terms, and instead rests its arguments on the fact that the word "measure" was not used in the portion of the consultation request identifying the TRRs. Argentina's position is contrary to the requirements of the DSU and would impose new obligations on Members for the exercise of their rights not reflected in the DSU.

44. As the Appellate Body has explained, "one purpose of consultations . . . is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which

[51] U.S. Consultations Request, Annexes 1-2.

[52] First Preliminary Ruling, para. 3.27.

[53] Argentina's Appellant Submission, paras. 43-49.

[54] Argentina's Appellant Submission, paras. 44-45.

it seeks establishment of a panel."[55] In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body observed that "[t]he claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process."[56] Relying on the Appellate Body's discussion in *Mexico – Anti-Dumping Measures on Rice*, the Panel in this dispute observed that "consultations may lead to the reformulation of a complaint, since a complaining party may learn of additional information or get a better understanding of the operation of a challenged measure."[57]

45. The text of the DSU is the basis for the findings of the Panel, and the past explanations of the Appellate Body. With respect to the measures, Article 4.4 requires "identification of the measures at issue" while Article 6.2 requires that a complainant "identify the specific measures at issue." Accordingly, with respect to unwritten measures, the complaining parties should "identify" such measures "as clearly as possible" in their *panel requests*,[58] in order to give sufficient notices of the measures that the complainants intend to challenge, while the level of specificity required in a consultations request's identification of unwritten measures, as with all measures, is lower. Indeed, particularly with respect to unwritten measures, the complaining party may not have complete information as to the content and operation of the measure prior to consultations, and thus may be unable to identify the "*specific* measure," which must be identified in panel requests as required by Article 6.2 (emphasis added).

46. The DSU requires a lower level of specificity in consultations requests, and a panel request will have been "shaped by" or "evolve[ed]" from consultations. Here, as explained above, the United States identified the TRRs measure as a separate measure in the consultations request, and at the very least, the measure is "discernible" from the description in the consultations request. The Appellate Body has previously stated "so long as each measure is discernible in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU."[59] Thus, if in a panel request a complainant is not required to explicitly identify each challenged measure as "separate" or "independent," so long as it is "discernible," then the same would apply for a consultation request, but with greater force as the consultation request is subject to a lower standard of specificity.

47. Finally, Argentina complains that the alleged addition of the TRRs as a separate unwritten measure in the panel request also impermissibly introduced new, as such claims.[60] Contrary to Argentina's assertions, the Panel did consider whether any alleged reformulation of the TRRs measure in the panel request impacted the claims at issue. It found that, whether the TRRs are considered part of the DJAI or CI Requirements in the consultations request or as a

[55] *Brazil – Aircraft (AB)*, para. 132.

[56] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 138.

[57] First Preliminary Ruling, para. 3.31.

[58] *EC and certain member States – Large Civil Aircraft (AB)*, para. 792.

[59] *US – Continued Zeroing (AB)*, para. 170.

[60] Argentina's Appellant Submission, paras. 51-58.

separate measure, the claims with respect to the TRRs would be the same.[61] Accordingly, the Panel found that "the characterization of the RTRRs as a single 'overarching measure' in the complainants' panel requests seems to be nothing more than an enunciation in different terms of the complainants' same claims as set out in the requests for consultations. There is nothing in this reformulation that *per se* expands the scope or changes the essence of the dispute."[62]

48. In other words, under the hypothetical where the consultations request identified the TRRs measure only as part of the DJAI and CI Requirements, and the panel request identifies the TRRs measure as a separate measure, the two "refer to the same subject matter, the same dispute."[63] The United States could bring the same "expansive" claims regardless of how the measure is characterized. This is unlike the facts in *US – Anti-Dumping and Countervailing Duties (China)*, where the consultations request described individual instances of general application and the panel request addressed a "rule or norm of general application".[64] Here, the U.S. consultations request did not list individual instances of application of the TRRs measure, rather the *same measure* is described in both documents, and as a result, the *same claims* can be brought to bear with respect to that measure. Accordingly, also unlike the panel request in *US – Anti-Dumping and Countervailing Duties (China)*, there is no "expansion in the nature of the legal claims in respect of" the TRRs measure.[65]

C. Conclusion

49. Argentina's protestation that the United States did not identify the TRRs measure in its consultations request[66] is unsupported by the text of that request. In fact, the United States identified the measure and provided a description that changed very little between the consultations request and panel request. Further, Argentina's arguments collapse the distinction between the requirements in Articles 4.4 and 6.2 of the DSU and place the same burden on complaints to identify measures at issue with specificity in their consultations request. Such a result would frustrate one object of consultations, which is to provide "the parties an opportunity to 'define and delimit' the scope of the dispute between them."[67] If the description of a measure cannot evolve or be reformulated between consultations and panel requests, consultations cannot serve this function.

50. For these reasons, the United States respectfully submits that the Appellate Body should reject Argentina's arguments that the TRRs measure is outside the scope of this dispute and

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[61] First Preliminary Ruling, para. 3.32.

[62] First Preliminary Ruling, para. 3.33.

[63] *US – Continued Zeroing (AB)*, para. 233 (quoting *US – Continued Zeroing (Panel)*, para. 7.28).

[64] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 14.34.

[65] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 14.34.

[66] Argentina's First Written Panel Submission, paras. 139-40.

[67] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (quoting *Mexico – Corn Syrup (Art. 21.5 – US) (AB)*, paras. 54, 58).

uphold the Panel's findings in its First Preliminary Ruling as reflected in Annex D.1 of the Panel Report.

IV. THE PANEL CORRECTLY FOUND THAT THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

51. The Panel in this dispute found that the DJAI Requirements is, on its face, a non-automatic restriction on the importation of goods, and that Argentina in fact uses it as a tool to restrict imports. In its appeal, Argentina asks the Appellate Body to ignore these findings and carve out an exception to Article XI:1 of the GATT 1994 for restrictions on importation that are "formalities" or "requirements" or that are "procedural" in nature. Argentina focuses on three major arguments that it advanced before the Panel to support its contention that the DJAI Requirement should not be subject to scrutiny under Article XI:1. Specifically, Argentina asks the Appellate Body to accept and adopt novel limitations on the scope of Article XI:1 – limitations which lack basis in the text of that provision. In particular, Argentina asks the Appellate Body to find that:

1. The hortatory language of Article VIII(1)(c) of the GATT 1994 creates an exception to the obligations in Article XI:1 of the GATT 1994 because the two provisions are mutually exclusive in their scope.[68] In addition, any measure that a Member characterizes as a "formality" or as a "requirement… relating to importation" under Article VIII of the GATT 1994 is outside the scope of, and immune from scrutiny under, Article XI:1 of the GATT 1994.[69] As explained below, the view that this hortatory language overrides the obligations of Article XI:1 of the GATT 1994 would render that provision inutile for several categories of measures.

2. Article XI:1 of the GATT 1994 does not apply to trade restrictions that a Member characterizes as procedural – rather than "substantive" – in nature.[70] As explained below, Article XI of the GATT 1994 creates no such distinction between types of restrictions and does not create an exception for "procedural" restrictions.

3. Article XI:1 of the GATT 1994 does not render inconsistent trade restrictions because they are not "automatic."[71] As explained below, the Panel's evaluation was rather that, because the DJAI requirement accords wide discretion to officials not to approve imports and prohibits those imports until authorized, such a non-automatic system is indeed a restriction on imports.

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[68] *See, e.g.*, Argentina's Appellant Submission, para. 205. Argentina also continues to advance the proposition that any measure that a WTO Member characterizes as subject to Article X of the Trade Facilitation Text (which is remains subject to negotiation and is not yet in force) is outside the scope of, and immune from scrutiny under, Article XI:1 of the GATT 1994. Argentina's Appellant Submission, para. 229-232, 235.

[69] *See, e.g.*, Argentina's First Written Panel Submission, paras. 176-80; Argentina's Appellant Submission, paras. 214-218, 220-224, 234-236.

[70] *See, e.g.*, Argentina's First Written Panel Submission, paras. 147-60; Argentina's Appellant Submission, paras. 221-224, 236.

[71] *See* Argentina's Appellant Submission, paras. 5, 206, 218, 237-242.

52. It is important at the outset to appreciate the relatively narrow nature of the Argentine appeal. Argentina has not contested any of the other legal bases upon which the Panel found the DJAI Requirement to breach Article XI:1 of the GATT 1994. Furthermore, Argentina contests few, if any, of the factual findings and other evidence that supports the Panel's finding of a breach of Article XI:1 of the GATT 1994.

53. In particular, Argentina does not contest the Panel's legal conclusions that the DJAI Requirement is a "restriction" with a limiting effect on the importation of goods because:

(a) it creates uncertainty as to an applicant's ability to import, because *inter alia* importers are unable to anticipate the agencies that may intervene in the specific DJAI application, the requirements that should be met, or the complete list of documents that must be provided in the case of an observation to secure a DJAI in exit status and hence the right to import, and because the discretion granted to participating agencies to enter and lift observations thereby potentially blocking imports indefinitely;[72]

(b) it allows – and is used by – the Secretariat of Domestic Trade ("Secretaría de Comercio Interior" or "SCI") to impose TRRs, such as by conditioning importation upon export performance, thereby preventing companies from importing as much as they desire or need without regard to their export performance;[73] and

(c) it imposes a significant burden on importers that is unrelated to their normal importing activity in light of *inter alia* increased transactional costs associated with the TRRs, such as export performance requirements, that are imposed on DJAI applicants.[74]

Accordingly, no party in this appeal contests the foregoing three major findings regarding the DJAI's operation or that the DJAI requirement would be inconsistent with Article XI:1 of the GATT 1994 for the three reasons stated above. Instead, the limited questions raised by Argentina are: (1) whether the DJAI is exempt from scrutiny under Article XI:1 of the GATT 1994 by virtue of Article VIII of the GATT 1994; and (2) whether the Panel was correct to find a breach of Article XI:1 of the GATT 1994 with respect to one of the four independent bases of the Panel's finding – namely, the finding that the DJAI Requirement has a limiting effect on imports because it restricts market access for imported products, as obtaining a DJAI in exit status is not automatic.

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[72] *See* Panel Report, paras. 6.467-6.468, 6.474.

[73] *See* Panel Report, paras. 6.472 ("[T]he export commitment required by the SCI [as a condition of receiving DJAI approvals] has two effects: (a) it makes the declarants' right to import conditional on their commitment to increase their exports…; and, (b) it limits the value of goods that can be imported to the value of their exports. In the Panel's view, these effects place an additional restriction on importation, since importers are not free to import as much as they desire or need without regard to their export performance.").

[74] *See* Panel Report, paras. 6.473 ("[T]he Panel recalls that increases of transaction costs caused by a governmental measure have been found to have a restrictive effect on importation in violation of Article XI:1… [by] discouraging importation by making it 'prohibitively costly'. The Panel considers that the export commitment required by the SCI fulfills this condition, because it imposes a significant burden on importers that is unrelated to their normal importing activity, which results in higher import costs.").

54. In Section A, the United States will demonstrate that the Panel correctly found that Article VIII of the GATT 1994 does not limit the scope of Article XI:1 of the GATT 1994, and that a Member may not exclude a measure from scrutiny under Article XI:1 merely by characterizing it as a "formality" or "requirement" under Article VIII.[75] Section B explains that the Panel correctly found that a Member may not exclude a trade restriction from scrutiny under Article XI:1 of the GATT 1994 merely by characterizing it as a procedural – rather than substantive – measure. Finally, Section C demonstrates that the Panel correctly concluded that the DJAI Requirement is a non-automatic trade restriction, and accordingly, breaches Article XI:1 of the GATT 1994.

A. The Panel Correctly Found that GATT Article VIII of the GATT 1994 Does Not Limit the Scope of Article XI:1 of the GATT 1994, and that a Member May Not Exclude a Trade Restriction from Scrutiny under Article XI:1 Merely by Characterizing it as a "Formality" or "Requirement" under Article VIII

55. Argentina argues that the Panel failed to apply the correct analytical framework with respect to the relationship between Article XI:1 and Article VIII of the GATT 1994, and asks the Appellate Body to reverse the Panel's findings on this basis. As Argentina would have it, "Articles VIII and XI must be interpreted as mutually exclusive in their respective spheres of application in order to ensure that Members are allowed to maintain the types of import formalities and requirements that Article VIII expressly contemplates."[76] Argentina also attempts to resurrect its arguments that Article XI:1 cannot apply to any measure that a Member characterizes as a "formality" or "requirement" under Article VIII.

56. The Panel was correct to reject both of Argentina's arguments because: (1) those arguments ignore the evidence and mischaracterize the U.S. position; (2) the text of relevant GATT 1994 provisions do not support the view that Articles XI:1 and VIII are mutually exclusive, or that Article XI:1 does not apply to "formalities" or "requirements"; (3) well-established rules of treaty interpretation also do not support this view; and (4) Argentina's arguments under Article 10 of the trade facilitation agreement negotiating text fail for the same reasons as its corresponding arguments under Article VIII of the GATT 1994.

1. Argentina Ignores the Evidentiary Record and Mischaracterizes the U.S. Argument as Relating to Mere "Formalities" or "Documentary Requirements"

57. The United States first notes that Argentina's argument on formalities and requirements of importation is entirely misplaced in the context of the DJAI. The Panel concluded that the DJAI Requirement is not a "mere formality."[77] Nor did it describe the DJAI Requirement as a

[75] In this section, the United States also demonstrates that the Panel correctly found that the trade facilitation agreement text does not limit the scope of Article XI:1.

[76] *See, e.g.,* Argentina's Appellant Submission, para. 205.

[77] Panel Report, para. 6.433.

"documentation requirement", within the scope of Article VIII:1(c). Rather, the Panel found that the DJAI Requirement is a "procedure by which Argentina determines *the right* to import."[78] The U.S. claim under Article XI:1 is not focused on "formalities," but rather on the fact that – as demonstrated by the extensive evidentiary record that Argentina has consistently refused to confront – the DJAI Requirement is designed to ensure that import transactions cannot be completed until an importer receives approval through the DJAI system, which may be withheld for nontransparent, discretionary reasons.[79] Thus, it is not "formalities," such as the fact that the DJAI must be submitted electronically or a "documentation requirement" such as the fact that information must be provided in specified fields in particular forms, that are at the heart of the Article XI:1 claim. As a result, the question of whether or not "formalities" or "documentation requirements" are included or excluded from the scope of Article XI:1 is not directly relevant to the U.S. claims in this dispute.

2. The Text of Article XI:1 of the GATT 1994 Does Not Support the Conclusion that Article XI:1 Does Not Apply to "Formalities" or "Requirements"

58. The Panel correctly interpreted the text of Article XI:1 of the GATT 1994 and found that it does not exclude "formalities" or "requirements" from its scope. Thus, the scope of Article XI:1 would not support a conclusion that these provisions are "mutually exclusive" such that Article XI:1 could not reach "formalities" or "requirements".

59. Based on a review of Article XI:1 of the GATT 1994, the Panel found unpersuasive Argentina's argument that a Member could exclude a measure from scrutiny under Article XI:1 simply by characterizing it as "procedural," or "a formality" or a "requirement." Noting that Article XI:1 covered "restrictions … made effective through quotas, import or export licenses or other Measures,"[80] the Panel noted that the category of "or other measures" was a broad category that covered "all measures that constitute import and export prohibitions or restrictions regardless of the means by which they are made effective."[81] The Panel also observed that "the only measures that are excluded from the scope of Article XI:1 of the GATT 1994 are those that take the form of duties, taxes or other charges,"[82] and that "Article XI:1 of the GATT 1994 does not distinguish among categories of import and export prohibitions or restrictions; instead, it refers to import and export prohibitions or restrictions in general. Accordingly, the Panel was unconvinced that customs or import procedures or formalities are *a priori* excluded from examination under Article XI:1 of the GATT 1994."[83]

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[78] Panel Report, para. 6.433.

[79] Article VIII states that it applies to the "fees, charges, formalities and requirements . . . relating to . . . (c) licensing", not licensing *per se*. GATT 1994, art. VIII:4.

[80] GATT Article XI:1.

[81] Panel Report, para. 6.435.

[82] Panel Report, para. 6.435.

[83] Panel Report, para. 6.435.

60. The Panel was correct not to exclude "formalities" or "requirements" from the scope of prohibited restrictions covered by Article XI:1 of the GATT 1994. Argentina does not contest that the DJAI Requirement is a "restriction" based on the ordinary meaning of that term as used within Article XI:1. Further, Argentina does not contest that the plain language of the prohibition of Article XI:1 applies broadly to *any* "restriction", "whether made effective through quotas, import or export licenses or other measures," excluding only "duties, taxes or other charges."[84] As the Appellate Body has emphasized, the principles of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[85] Argentina's proposed reading of an exclusion for "formalities" and "requirements" into GATT XI:1 would contravene this important principle of treaty interpretation.

3. The Texts of Articles VIII and XI:1 of the GATT 1994 Do Not Support the Conclusion that They Are Mutually Exclusive

61. Second, the Panel addressed Argentina's contention that Articles VIII and XI:1 of the GATT 1994 are mutually exclusive provisions, and Argentina's specific claim that the hortatory language of Article VIII:1(c) should override and render inutile, or be treated as an exception to, the obligations of Article XI:1.[86] The Panel correctly found Argentina's arguments to be unpersuasive and at odds with well-established rules of treaty interpretation, as reflected in prior and Appellate Body reports.

62. To begin, the Panel reiterated prior panel findings that "there is a presumption against conflict" in international law, which is "especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum."[87] The Panel then emphasized that:

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[84] *India – Quantitative Restrictions (Panel)*, para. 5.128 (quoting *Japan – Semi-Conductors (GATT)* and *The New Shorter Oxford English Dictionary* at 2569 (1993)). ("[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges". As was noted by the panel in *Japan – Semi-Conductors (GATT)*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.").

[85] *India – Patents (US) (AB)*, para. 45. As the *EC – Selected Customs Matters* panel explained when refusing to impute a limitation from GATT 1994 Article X:3(a) into GATT 1994 Article X:3(b) in the absence of express language directing it to do so, "in practical terms, [the principle of harmonious interpretation] … means that the various provisions of the WTO Agreements should not be interpreted and applied in a manner that would undermine and/or circumvent any other provision of the WTO Agreement." *EC – Selected Customs Matters*, para. 7.535.

[86] *See, e.g.*, Argentina's Appellant Submission, para. 205.

[87] Panel Report, para. 6.436 (citing *Indonesia – Autos*, para. 14.28 and fn. 649 to para. 14.28 for the additional proposition that: " [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. … Not every such divergence constitute a conflict, however. … Incompatibility of contents is an essential condition of conflict.").

> In this context, the Appellate Body has repeatedly stated that all WTO agreements are part of the same treaty (i.e. the Marrakesh Agreement) and thus, in the light of the principle of effective treaty interpretation, all WTO provisions should be interpreted harmoniously and cumulatively whenever possible. Regarding the principle of effective treaty interpretation, in *US – Gasoline* the Appellate Body noted that:
>
> > One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.
>
> Therefore, rather than assuming that Article VIII and Article XI:1 of the GATT 1994 are mutually exclusive, the Panel should presume that the obligations contained therein apply harmoniously and cumulatively. Further, in the light of the principle of effective treaty interpretation, the interpreter should avoid adopting a reading of Articles VIII and XI of the GATT 1994 that would reduce any of these provisions to redundancy or inutility.
>
> Consequently, there is no reason to exclude *a priori* that a measure may be subject to the disciplines of both provisions.[88]

63. Comparing the broad prohibition under Article XI:1 against any import and export prohibitions or restrictions (other than duties, taxes or other charges), with the more narrowly and specifically drawn language of Article VIII,[89] the Panel concluded that:

> [T]here is no indication that Article VIII and Article XI:1 of the GATT 1994 impose mutually exclusive obligations, i.e. obligations that cannot be complied with simultaneously. There is no reason to assume that complying with any of the obligations contained in Article VIII would make it impossible for a Member to comply with the obligation in Article XI:1 to refrain from instituting or maintaining import and export prohibitions or restrictions. Contrary to what Argentina asserts, formalities or requirements that are connected with importation (including customs formalities) can also be subject to Article XI:1 of the GATT 1994. In other words, the consistency of an import or customs formality or requirement could be assessed under either Article VIII or Article XI:1, or under both provisions.[90]

64. The Panel's conclusions here are fully supported by the text of Articles VIII and XI:1 of the GATT 1994.

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[88] Panel Report, para. 6.437 – 6.439 (citing *US – Upland Cotton (AB)*, para. 549; *Korea – Dairy (AB)*, para. 81; *Argentina – Footwear (EC) (AB)*, paras. 81 and 89; *US – Gasoline (AB)*, p. 23; *Japan – Alcoholic Beverages II (AB)*, p. 12; and *India – Patents (US) (AB)*, para. 45.).

[89] Panel Report, para. 6.442.

[90] Panel Report, para. 6.443.

65. The Panel's discussion highlights the extent to which Argentina has distorted the text of Article VIII of the GATT 1994 in an effort to advance a claim that Article VIII can be used by any WTO Member as a permission slip to declare unilaterally that a trade-restrictive measure is a permissible derogation from Article XI:1 by labeling it a "formality" or "requirement".[91] Article VIII does nothing of the sort. The primary subparagraph upon which Argentina claims reliance – Article VIII:1(c) – contains a hortatory "recogni[tion] . . . of the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying *import and export documentation* requirements" to decrease and simplify formalities and documentation requirements.[92]

66. First, while Argentina argues that the Panel should have considered a broader scope of "requirements" in addition to "formalities,"[93] the text of Article VIII:1(c) of the GATT 1994 demonstrates that it does not cover "requirements" broadly. It only covers "import and export documentation requirements." More importantly, nothing in this hortatory language creates an exception to Article XI:1 of the GATT 1994 or permits the maintenance of discretionary trade restrictions that – like the DJAI Requirement – allow unidentified authorities to limit imports for undisclosed reasons and indeterminate periods of time.

67. Additionally, as the Panel observes, "formalities or requirements that are connected with importation (including customs formalities) can also be subject to Article XI:1 of the GATT 1994."[94] Argentina's claim that, "[i]t cannot be the case that measures that are permitted under Article VIII are categorically prohibited three articles later"[95] ignores the fact that Members can and do impose restrictions that are inconsistent with Article XI:1 but that are excepted from that provision under Article XX or another exception specified in the WTO Agreement. In other words, any "formality" or "requirement" that amounts to a restriction is prohibited by Article XI:1, but a Member may maintain such a restriction if it is excepted by another provision.

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[91] Panel Report, para. 6.441. The Panel explained that, "Article VIII provides that (a) all fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by Members on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes; (b) a Member shall, upon request by another Member or by the Members, review the operation of its laws and regulations in the light of the provisions of this Article; (c) no Member shall impose substantial penalties for minor breaches of customs regulations or procedural requirements; in particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning. According to Article VIII, Members also recognize the need to reduce the number and diversity of fees and charges imposed by Members on or in connection with importation or exportation, for minimizing the incidence and complexity of import and export formalities, and for decreasing and simplifying import and export documentation requirements."

[92] GATT 1994, Art. VIII(1)(a).

[93] Argentina's Appellant Submission, paras. 216-217.

[94] Panel Report, para. 6.419.

[95] Argentina's Appellant Submission, para. 221.

68. Argentina does not address this proposition. Indeed, Argentina never – not once – sought to justify the DJAI Requirement under Article XX, the provision of the GATT 1994 which *does* contain exceptions to other GATT 1994 provisions, and imposes criteria for the application of those exceptions. Argentina instead argues that the DJAI Requirement is subject exclusively to the hortatory provisions of Article VIII, which do not even contain an explicit or defined exception to other GATT 1994 provisions. Such an approach would shield the DJAI Requirement from scrutiny under Article XI:1 and further shield the DJAI Requirement from the criteria applicable to the exceptions found in Article XX.[96] The untenable result would be that the DJAI Requirement, through which Argentina establishes the right of an importer to import, would be subject to no WTO discipline.

4. Argentina's Arguments Suggesting that Article XI:1 of the GATT 1994 is Mutually Exclusive with Article 10 of the Negotiating Text of the Trade Facilitation Agreement Fail for the Same Reasons as its Corresponding Arguments Regarding GATT Article VIII of the GATT 1994

69. Finally, Argentina also cites Article 10 of the final negotiating text of the trade facilitation agreement in support of its position that any measures that a Member characterizes as "import formalities or requirements" (such as the DJAI Requirement) are outside the scope of, and immune from scrutiny under, Article XI of the GATT 1994.[97] Argentina's reliance on this negotiating text is misplaced.

70. First, this negotiating text does not constitute a subsequent agreement of the parties on the interpretation of Article XI, and as a result it does not have interpretive value in this dispute under Article 31 of the Vienna Convention for understanding the obligations under Article XI:1. Argentina's arguments in this context are also substantively identical to its arguments under Article VIII:1(c) of the GATT 1994, and therefore fail for the same reasons that its latter arguments do. Among other things, neither the plain language of Article XI:1 nor relevant principles of treaty interpretation allow Argentina to use the language of the trade facilitation negotiating text to assume the presence of a textual conflict or the reading into Article XI:1 of concepts not present therein.

5. Conclusion

71. In sum, the Panel was correct not to imbue the terms "formality" and "documentation requirement" in Article VIII of the GATT 1994 or Article 10 of the trade facilitation agreement negotiating text with special meanings that could be used to undermine and circumvent other

[96] Thus, Argentina has never sought to justify the DJAI Requirement as compliant with the Article XX chapeau, as subject to the requirement that such measures not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination," or as "a disguised restriction on international trade." And Argentina has never sought to justify the DJAI Requirement as "necessary" to achieve any of the listed aims found in paragraphs (a), (b) or (d) of Article XX. Thus, under the reasoning that it has adopted, a Member may take steps that appear on their face to breach Article XI, yet not need to justify that measure as necessary – i.e., the "least restrictive available alternative" – to achieve one of the aims stated in Article XX.

[97] Argentina's Appellant Submission, paras. 229-232, 235.

GATT obligations; such interpretations would be at odds with the principle of effective and harmonious treaty interpretation. The Panel was also correct to decline Argentina's invitation to conjure up limitations on Article XI:1 having no textual basis whatsoever in that provision, in Article VIII:1(c), or in any other provision. The scope and meaning of Article XI:1 is clear and is not limited in any way by the hortatory language in Article VIII:1(c). There is no conflict between these two provisions that would prevent a WTO Member from complying with both provisions, as required by a harmonious reading that gives effect and meaning to both provisions.

B. The Panel Correctly Found that a Member May Not Exclude a Trade Restriction from Scrutiny under Article XI:1 of the GATT 1994 Merely by Characterizing it as a Procedural – Rather than Substantive – Measure

72. Argentina also attempts to resurrect its argument that Article XI:1 of the GATT 1994 does not apply to, or cannot be used to scrutinize, any measure that a Member characterizes as procedural – rather than "substantive" – in nature.[98] And, just as it asserted to the Panel, Argentina asserts that the Appellate Body must distinguish between the trade-restricting effect of the procedural formality or requirement itself and the trade-restricting effect of any substantive rule of importation that the measure implements.[99] As explained in Section B.1 below, neither the evidentiary record, nor the text of Article XI:1 support Argentina's argument that a Member may exclude a trade restriction from scrutiny under Article XI:1 merely by characterizing it, to some extent, as a procedural – rather than "substantive" - measure. Likewise, relevant Appellate Body and panel reports also do not support this argument, as explained in Section B.2.

1. Neither the Evidentiary Record nor the Text of Article XI:1 of the GATT 1994 Support the Conclusion that a Member May Exclude a Trade Restriction from Scrutiny under Article XI:1 Merely by Characterizing it as a Procedural – Rather than Substantive – Measure

73. The Panel carefully considered and rejected Argentina's argument. The Panel noted that Article XI:1 covered "restrictions … made effective through quotas, import or export licenses or other Measures,"[100] and observed that the category of "or other measures" was a broad category that covered "all measures that constitute import and export prohibitions or restrictions regardless of the means by which they are made effective."[101] The Panel also observed that "Article XI:1 of the GATT 1994 does not distinguish among categories of import and export prohibitions or restrictions; instead, it refers to import and export prohibitions or restrictions in general."[102]

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[98] *See, e.g.*, Argentina's First Written Panel Submission, paras. 147-160; Argentina's Appellant Submission, paras. 221-224, 236.

[99] Argentina places these arguments in its discussion of both GATT Article VIII and in its discussion of the non-automatic nature of the DJAI Requirement, so we address this issue here as a standalone issue.

[100] GATT 1994, Art. XI:1.

[101] Panel Report, para. 6.435.

[102] Panel Report, para. 6.435.

74. The Panel's analysis is correct. As a threshold matter, as demonstrated by the uncontested evidence in this case, the DJAI Requirement is not merely "procedural"; it is a restriction because importers cannot import goods into Argentina unless and until they receive approval through the DJAI Requirement, which can be withheld by unidentified Argentine agencies for any number of undisclosed reasons for indeterminate time periods. The DJAI Requirement is a discretionary trade restriction independent from any other measure, and does not specify criteria governing the exercise of discretion relating to other measures that Argentina suggests could potentially be implemented through the DJAI Requirement. As the Panel stated:

> [T]he fact that a DJAI in exit status is a necessary condition to import goods, coupled with the lack of clarity as to who the participating agencies are and the absence of specific criteria that they can apply to exercise their discretion has a limiting effect on the importation of goods."[103]

Thus, the DJAI Requirement constitutes a non-automatic restriction under Article XI:1, regardless of whether one affixes to it a "substantive" or "procedural" moniker.

75. The Panel's construction of Article XI:1 of the GATT 1994 is also correct. As the Panel stated:

> [T]he expression "or other measures" in Article XI:1 of the GATT 1994 implies that this provision covers all measures that constitute import and export prohibitions or restrictions regardless of the means by which they are made effective. The only measures that are excluded from the scope of Article XI:1 of the GATT 1994 are those that take the form of duties, taxes or other charges.[104]

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[103] Panel Report, para. 6.469. The Panel based its conclusions on findings spanning over 100 paragraphs, including the following:

- "[T]he DJAI procedure does not allow importers to know which agencies may review and enter observations on a DJAI…" Panel Report, paras. 6.377, 6.463.
- "As to the conditions that importers must fulfil to have observations *lifted*, [t]he relevant legislation… does not foresee a list of documents or information that an importer must submit to the respective agencies in the case a DJAI is observed." Panel Report, para. 6.465-466.
- "This discretion creates uncertainty for importers of goods, who are unable to anticipate the agencies that may intervene in the specific DJAI procedure, the requirements that should be met, or the complete list of documents that must be provided in the case of an observation, to secure a DJAI in exit status and hence their right to import." Panel Report, para. 6.467.
- "The discretion granted to participating agencies to enter and lift observations combined with the legal consequences of an observation creates uncertainty as to an applicant's ability to import goods into Argentina. This uncertainty in itself affects the opportunities for the importation of goods into Argentina." Panel Report, paras. 6.467.
- "SCI uses its discretion under the DJAI Requirement to require importers to (a) to submit information that is unrelated to the … importation, including "the company's estimates of imports and exports, [and] price lists of goods traded in the domestic market"; and (b) to "require[] prospective importers to commit to increase their exports or to start exporting (if they have not yet done so) as a condition to lift observations on DJAIs." Panel Report, para. 6.471
- "SCI also requires prospective importers to commit to increase their exports or to start exporting (if they have not yet done so) as a condition to lift observations on DJAIs." Panel Report, para. 6.472.

[104] Panel Report, para. 6.435.

In other words, Article XI:1 of the GATT 1994 applies to all restrictions, whether or not they could be characterized as "procedural" or "substantive" in nature. Nothing in the text of Article XI:1 or any other provision requires an artificial distinction between "procedural" and "substantive" measures, nor provides for the exclusion of measures that might be characterized as "procedural."[105] Thus, on both the facts and the law, Argentina's argument relating to "procedural" restrictions fails.

2. Relevant Appellate Body and Panel Decisions Do Not Support the Conclusion that a Member May Exclude a Trade Restriction from Scrutiny under Article XI:1 of the GATT 1994 Merely by Characterizing it as a Procedural – Rather than Substantive – Measure

76. Contrary to Argentina's assertions, the evaluation by prior panels, including *India – Quantitative Restrictions*, *China – Raw Materials*, and *Korea – Various Measures on Beef*, confirms that there is no distinction between "procedural" and "substantive" measures in Article XI:1. In all three disputes, the panels recognized that discretionary trade restrictions that do not implement any other restrictions are, on their face, inconsistent with Article XI:1.

77. The *Korea – Various Measures on Beef* panel noted the distinction between the facts in that dispute and those at issue in *India – Quantitative Restrictions*: Korea's licensing system implemented quotas and related restrictions which were maintained by Korea and authorized by its WTO commitments, while the licensing system in *India – Quantitative Restrictions* had no underlying WTO-consistent justification.[106] The *Korea – Various Measures on Beef* panel pointed out that "the factual context [was] different" than that in *India – Quantitative Restrictions*, where "[t]here was no other quantitative restriction" and where "in the absence of the discretionary licensing system, there would be no restriction on imports."[107] That panel also observed that "*where a quota is in place*, the use of a discretionary licensing system need not necessarily result in any additional restriction."[108] Conversely, the panel implicitly agreed with the *India – Quantitative Restrictions* panel that *where there is no other restriction*, such as a quota, a discretionary licensing system *is* a "restriction" under Article XI:1.

78. The *China – Raw Materials* panel report is also consistent with *India – Quantitative Restrictions*. The *China – Raw Materials* panel considered that, as a general matter, "import and export licenses, including those granted only upon meeting a certain prerequisite, may be, but are not necessarily, permissible under Article XI:1" depending on "whether the licensing system is designed and operates such that by its nature it does not have a restrictive or limiting effect on

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[105] *See, e.g.*, Argentina's First Written Panel Submission, paras. 148-52, 173; Argentina's Opening Statement at the First Panel Meeting, paras. 50-51.

[106] *Korea – Various Measures on Beef (Panel)*, paras. 9-11, 610.

[107] *Korea – Various Measures on Beef (Panel)*, para. 782.

[108] *Korea – Various Measures on Beef (Panel)*, para. 782 (emphasis added). The panel went on to observe that "[w]here a discretionary licensing system is implementation in conjunction with other restrictions, such as in the present dispute, the manner in which the discretionary licensing system is operated may create additional restriction independent of those imposed by the principal restriction." *Id.*

importation or exportation."[109] Building on this principle, the panel observed that discretionary import licensing procedures "would not meet the test . . . to be permissible under Article XI:1 . . . if a licensing system is designed such that a licensing agency has discretion to grant or deny a license based on unspecified criteria."[110] This is consistent with the conclusion of the *India – Quantitative Restrictions* panel, which found that the licensing requirement was a restriction on imports under Article XI:1 based on its conclusion that "India's licensing system . . . is a discretionary import licensing system, in that licenses are not granted in all cases, but rather on unspecified 'merits'."[111]

79. In the present dispute, as in *India – Quantitative Restrictions*, the DJAI Requirement is a discretionary trade restriction independent from any other measure, and does not specify criteria governing the exercise of discretion relating to other measures that Argentina suggests could potentially be implemented through the DJAI Requirement. As a result, there is no separate restriction justified by an exception to the WTO Agreements that should be considered in evaluating the restrictive nature of the DJAI Requirement. Further, decisions to grant or deny approvals are based on unspecified criteria or merits. For these reasons, the DJAI system is a non-automatic trade restriction that qualifies as a restriction under Article XI:1 of the GATT 1994 – a measure that cannot be saved by Argentina's unsubstantiated avowals that the DJAI Requirement is not "substantive" – but "procedural" – in nature.

80. For the same reasons, Argentina's attempted defense of the DJAI Requirement based on a new analytical framework for excluding certain trade restrictive measures from scrutiny under Article XI:1 also fails. Argentina argues that Article XI:1 should apply to import formalities or other import procedures only to the extent that (1) they "limit the quantity or amount of imports to a material degree that is separate and independent of the trade-restrictive effect of any substantive rule of importation that the formality or requirement implements, and (2) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of this nature."[112]

81. Argentina's formulation, however, is aimed at different factual situation than the one present in this dispute because the DJAI Requirement is a discretionary trade restriction that on its face does not implement a separate WTO-consistent requirement. Indeed, Argentina has indicated that there is no WTO-consistent restriction being implemented through the DJAI Requirement.[113] Accordingly, Argentina's argument is irrelevant for the resolution of this dispute and may be dismissed on this basis.

82. Argentina's arguments would distract from the straightforward questions faced by the Panel and now the Appellate Body: Does the DJAI requirement – based on the extensive factual record at issue – serve as a restriction on importation within the meaning of Article XI:1? As the

[109] *China – Raw Materials (Panel)*, para. 7.918.

[110] *China – Raw Materials (Panel)*, para. 7.921.

[111] *India – Quantitative Restrictions (Panel)*, para. 5.130.

[112] Argentina's Appellant Submission, paras 223, 236; Argentina's First Written Panel Submission, para. 183.

[113] Argentina's Response to Panel Question No. 21.

Panel correctly found, the answer to this question is yes. If so, of course, an import restriction that is otherwise inconsistent with Article XI:1 may be justified by an exception, such as under Article XX. But, this second question was not presented in this dispute because Argentina has not raised any defense for the DJAI Requirement.

C. The Panel Correctly Concluded that the DJAI Requirement is a Non-Automatic Trade Restriction, and Accordingly, Is Inconsistent with Article XI:1 of the GATT 1994

83. Argentina argues that the Panel erred in concluding that the non-automatic nature of the DJAI Requirement supported a finding that it is inconsistent with Article XI:1 of the GATT 1994. Argentina seems to suggest that the implication of the Panel's ruling is that any measure that is not approved instantaneously would breach Article XI:1.

84. Argentina's argumentation again ignores the factual record, and is legally incorrect. Non-automatic trade restrictions like the DJAI Requirement are not, as Argentina inaccurately suggests, defined simply in temporal terms, and thus it is not because approvals are not instantaneous that the DJAI Requirement breaches Article XI:1. As the following sections explain: (1) a non-automatic trade restriction – such as the DJAI Requirement – is an import restriction under Article XI:1 and prohibited under that provision because of *inter alia* the wide *discretion* afforded to governmental authorities to disapprove importation; (2) record evidence demonstrates that Argentine authorities exercise their wide discretion to disapprove importation; (3) extended delays in the approval of importation are relevant to determining that a measure such as the DJAI Requirement is non-automatic in nature and serves as an import restriction; and (4) Argentina's attempted reliance on the *Agreement on Import Licensing Procedures* ("Import Licensing Agreement") is misplaced.

85. Before addressing Argentina's legal arguments, it is useful to review several of the Panel's core factual findings that supported its conclusion that the DJAI Requirement was a non-automatic trade restriction with a limiting effect on imports.

86. First, with regard to the Argentine agencies that were authorized to participate in the DJAI system, the Panel found that, "the DJAI procedure does not allow importers to know which agencies may review and enter observations on a DJAI . . . ."[114]

87. Second, the Panel found that resolving any Argentine government observations and thereby securing an "exit" (salida) status, is a prerequisite that must be completed before issuing any purchase order, and securing foreign financing,[115] and that goods that are still covered by a DJAI in observed status cannot be imported into Argentina.[116]

88. Third, as regards the overall observation process, the Panel found that "[i]f a DJAI is in observed status, prospective importers are required to (a) identify the entity that entered the

[114] Panel Report, paras. 6.377, 6.463.

[115] Panel Report, paras. 6.407-6.408.

[116] Panel Report, para. 6.382.

observation; (b) contact such agency in order to be informed of the supplementary documents or information that must be provided; and (c) provide the information required."[117]

89. Fourth, as regards the criteria on the basis of which Argentine authorities may enter observations, the Panel found that "the relevant [DJAI] legislation does not identify … the complete list of information that must be provided to complete the DJAI procedure; or… the specific criteria on which the agencies may enter and lift observations."[118]

90. Fifth, as regards the information or actions that Argentine authorities may in their discretion demand from an importer, the Panel found *inter alia* that, "there is no indication which supplementary documents or information may be required by a participating agency that enters an observation on a DJAI."[119]

91. Sixth, as regards the conditions that importers must fulfil to have observations lifted, the Panel found that, "Argentina has indicated that, in the event of an observation, the importer should contact the agency concerned 'to regularize the situation'; to this end the importer might be required to submit additional information. … Argentina has also stated that the specific information required to lift an observation depends on 'the reasons [that led to] the observation.'" [120]

92. Thus, the Panel noted that, "the information or documents to be provided to secure a DJAI in exit status depend on shortcomings detected by the relevant agency in a particular case which may be unrelated to the information requested from the declarant when filing a DJAI application; and … the discretion granted to participating agencies to lift observations is as broad as that accorded on them to enter observations."[121] In conclusion, the Panel stated that, "the fact that a DJAI in exit status is a necessary condition to import goods, coupled with the lack of clarity as to who the participating agencies are and the absence of specific criteria that they can apply to exercise their discretion has a limiting effect on the importation of goods."[122]

1. A Non-automatic Trade Restriction Like the DJAI Requirement is an Import Restriction under Article XI:1 of the GATT 1994 Because of the Discretion Afforded to Governmental Authorities to Disapprove Importation

93. As is apparent from the face of the legal instruments and the implementation of the DJAI system, and as found by the Panel, the DJAI Requirement is a non-automatic trade restriction

[117] Panel Report, para. 6.382.

[118] Panel Report, para. 6.462.

[119] Panel Report, paras. 6.382, 6.465.

[120] Panel Report, para. 6.466.

[121] Panel Report, para. 6.466. The Panel separately observed that Argentine authorities conditioned DJAI approvals on the submission of information, and export balancing requirements, that are unrelated to the prospected importation. Panel Report, paras. 6.471-6.472.

[122] Panel Report, para. 6.469.

because it is a highly discretionary and non-transparent restriction. Such a restriction enables unidentified Argentine officials to withhold DJAI approvals for undisclosed reasons and indeterminate periods of time. They may withhold such approvals outright and/or to condition such approvals on compliance with TRRs. These factors support a finding that the non-automatic DJAI Requirement has a limiting effect on importation and is inconsistent with Article XI:1 of the GATT 1994.

94. The Panel's factual findings and other evidence of record provide a solid evidentiary basis for the Panel's finding of a breach under Article XI:1. First, the DJAI Requirement "restricts market access to Argentina as obtaining a DJAI in exit status is not automatic," in light of *inter alia* the wide discretion given to Argentine authorities withhold DJAI approvals – which are a legal prerequisite for importation.[123] As the Panel found:

> Under the relevant Argentine law, a DJAI in exit status is necessary for obtaining authorization from the Central Bank of Argentina to make payments in foreign currency and for clearing customs. The immediate effect of a DJAI in exit status is that it grants importers the right to import goods into Argentina. A DJAI will attain exit status if either: (a) no agency of the Argentine Government enters an observation within the prescribed time period; or, (b) when an agency has entered an observation on a DJAI, the observation is lifted by the agency concerned following information provided by and/or action taken by the declarant or prospective importer.[124]

95. As regards the aforementioned observation process, however, Argentina has built into the DJAI Requirement extremely wide discretion not to approve import transactions – discretion that is at the very heart of a "non-automatic" trade restriction. The Panel stated:

> [T]he fact that a DJAI in exit status is a necessary condition to import goods, coupled with the lack of clarity as to who the participating agencies are and the absence of specific criteria that they can apply to exercise their discretion has a limiting effect on the importation of goods. [125]

96. More specifically, the Panel found that Argentine authorities may withhold approval for importations on grounds that are unrelated to the information in the DJAI submission itself – indicating that Argentine authorities have wide discretion to refuse importation even where all formal information submission requirements specified in the DJAI instruments have been fully and accurately completed. The Panel concluded in this regard that:

> [T]he information or documents to be provided to secure a DJAI in exit status depend on shortcomings detected by the relevant agency in a particular case which may be unrelated to the information requested from the declarant when filing a

[123] Panel Report, paras. 6.461, 6.474.

[124] Panel Report, para. 6.460.

[125] Panel Report, para. 6.469.

> DJAI application; and… the discretion granted to participating agencies to lift observations is as broad as that accorded on them to enter observations.[126]

In short, the Panel correctly found the DJAI Requirement to qualify as a non-automatic trade restriction in light of *inter alia* the wide discretion it affords to Argentine authorities to grant or deny DJAI applications for undisclosed reasons that are much broader than the information submission requirements imposed by the DJAI – such that, *even if an importer complies with all formal DJAI requirements*, the Argentine authorities are free to deny the application on unspecified grounds.

97. The DJAI Requirement suffers from the defects described by both the *India – Quantitative Restrictions* and *China Raw Materials* panels. In particular, the panel in *India – Quantitative Restrictions* based its conclusion that India's licensing requirement constituted a non-automatic licensing system and a restriction within the meaning of Article XI:1 on the fact that, for goods on a "Negative List of Imports" maintained by India, the system was discretionary because licenses were "not granted in all cases, but rather on unspecified 'merits'."[127] Likewise, 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 would not be consistent with GATT 1994 Article XI:1.[128] Similarly here, Argentina maintains the discretion to deny a DJAI application and accordingly restricts or prohibits importation.

2. Record Evidence Demonstrates that Argentine Authorities Exercise Their Wide Discretion to Disapprove Importation

98. Record evidence indicates that Argentine authorities frequently exercise this broad discretion to withhold automatic approval to import. In exercising this discretion to restrict imports, Argentine officials often fail to explain the reasons for "observations,"[129] and sometimes fail to provide effective contact points for relevant authorities.[130] 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.[131] And even when importers satisfy such demands to alter prices, balance trade or increase local content, Argentine officials may choose not to release

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[126] Panel Report, para. 6.466.

[127] *India – Quantitative Restrictions (Panel)*, para. 5.130. The panel in *India – Quantitative Restrictions*, relying on the findings of GATT panels and the ordinary meaning of the term "restriction," concluded that "discretionary or non-automatic licensing systems by their very nature operate as limitations on actions *since certain imports may not be permitted*," and therefore are prohibited by Article XI:1. *Id.* para. 5.129 (emphasis added) (discussing *EEC – Quantitative Restrictions Against Imports from Hong Kong (GATT)*; *EEC – Minimum Import Prices (GATT)*; *Japan – Semi-Conductors (GATT)*).

[128] *China – Raw Materials (Panel)*, para. 7.921. These findings were vacated by the Appellate Body on procedural grounds.

[129] *See* VP of Company Y Affidavit, paras. 5-8, 10 (Exhibit JE-307); Japan Industry Survey, p. 2 (Exhibit JE-312).

[130] *See* VP of Company Y Affidavit, paras. 5-8, 10 (Exhibit JE-307).

[131] VP of Company X Affidavit (Exhibit JE-306).

all "observed" DJAI applications, notwithstanding prior commitments to do so.[132] Such evidence reflects the lack of accountability and transparency resulting from the nearly unlimited discretion that Argentine authorities have to restrict imports.

3. Extended Delays in the Approval of Importation are Relevant to Determining that a Trade Restriction, such as the DJAI Requirement, is Non-Automatic

99. While Argentina is incorrect that the Panel or any Party in this case understands "non-automatic" to mean "not instantaneous," the extended delays in the approval of DJAI applications that have been observed are a relevant factor in concluding that the DJAI Requirement is indeed a non-automatic trade restriction.

100. 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. The *Japan – Semi-Conductors* GATT panel determined that, where approval of applications took three months, the licensing system was "non-automatic" (even if all licenses were ultimately approved), and therefore constituted a restriction on the exportation of products inconsistent with Article XI:1.[133] In contrast, the *EEC – Minimum Import Prices* GATT panel found that approvals granted within five working days were *automatic*, and therefore did not restrict imports under Article XI:1.[134] Finally, in a case concerning quantitative import restrictions maintained by France (called the *régime sans limitation de quantité* or "SLQ regime"), the panel observed that "the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the *automatic issuance* of licenses."[135]

101. Evidence of the extended delays that commonly arise in connection with DJAI Requirement includes: (a) a U.S. Chamber of Commerce survey reporting that for nearly one in three respondents it took over 60 days to receive a denial or approval of 75 percent or more of respondents' DJAI applications; (b) month-long delays experienced by Company X and the Company Y, as detailed at Exhibits JE-303 through 307;[136] (c) delays of up to six months or

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[132] VP of Company X Affidavit (Exhibit JE-306); U.S. Chamber of Commerce Report, p. 7 (Exhibit JE-56).

[133] *Japan – Trade in Semi-Conductors (GATT)*, para.118.

[134] *EEC – Minimum Import Prices (GATT)*, para. 4.1.

[135] *EEC – Quantitative Restrictions Against Imports from Hong Kong (GATT)*, para. 31 (emphasis added).

[136] For example, the Vice President of Company Y stated as follows: "During the first few months after passage of the Resolution, the percentage of our Argentine Company's numerous DJAIs (amounting to XXX million dollars in inventory) that were "observed" steadily increased, until nearly half of our shipments had been "observed" without explanation. Nor was our Argentine Company able to find anyone within the government to provide guidance regarding how to obtain approvals of the "observed" applications… Representatives from our Argentine Company tried visiting the Secretary of Commerce's office on numerous occasions to obtain an explanation, but were never received and had no alternative means of contacting a government representative who could answer their questions."

more experienced by litigants in domestic court cases;[137] and (d) lengthy delays described in other sources.[138]

4. Argentina's Reliance on the Import Licensing Procedures Agreement is Misplaced

102. Argentina cites to the Import Licensing Agreement in support of its argument that WTO Members may freely delay importation approvals for unspecified periods and on unidentified grounds without facing any scrutiny under Article XI:1 of the GATT 1994 for those actions. Argentina promotes the argument that provisions of the Import Licensing Agreement that impose certain obligations on non-automatic licensing regimes may be used freely to override and render inutile the obligations of Article XI:1 of the GATT 1994.

103. In any event, as discussed above, Argentina's arguments on appeal depend upon assuming that conflicts exist where they do not, and upon imputing concepts and terms into treaty provisions when there is no basis – textual or other – to do so.[139] There is no conflict between Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. In particular, Article XI:1 provides that Members cannot make effective a restriction on the importation of goods though import licensing, or any other measure. Article 3.2 of the Import Licensing Agreement anticipates that there is a separate WTO-consistent "restriction" "impos[ed]" through non-automatic licensing procedures.[140] If a Member imposes non-automatic import licensing and another provision of WTO Agreement provides an exception to Article XI:1, the Import Licensing Agreement, including Article 3.2, applies to ensure that the exempted procedure is not overly restrictive and burdensome in relation to the underlying WTO-consistent reason for its imposition.

104. Argentina's reliance on the Import Licensing Agreement does not help Argentina for other reasons. Even putting to the side that the Panel expressly chose not to make a finding regarding the applicability of the Import Licensing Agreement in this dispute, it should be observed that the DJAI Requirement is a trade restriction with limiting effects on imports that fails to qualify as an automatic licensing measure, because DJAI applications are not approved

[137] Argentina's Federal Court of Appeals ("Cámara Nacional de Apelaciones") has rendered at least four judgments in cases brought by different importers relating to stalled DJAI applications and seeking relief in the form of an approval of the importation in the DJAI system to enable the completion of the transaction. The courts have found that the DJAI applications at issue in all four cases (six DJAI applications in total) had been delayed for up to six months or more and that the applicants are unable to complete the processing of the application because the reasons for the "observations" made by SCI were not provided to applicants. *See* Panel Report, para. 6.384; Zatel case (Exhibit JE-57); Wabro S.A. case (Exhibit JE-58); Yudigar S.A. case (Exhibit JE-59); Fity SA case (Exhibit JE-302).

[138] *See, e.g.*, Japan Industry Survey, p. 2 (Exhibit JE-312) (two thirds of respondents indicate that Argentina did not provide an explanation for delays in approvals of DJAI applications); Exhibits JE-723, JE-724, JE-725, JE-741 (describing delays in importation of tens of thousands of automotive vehicles at various points in time, including May 2012, August 2012, and May 2013).

[139] *See infra* discussion at paras. 62-63, 71.

[140] Import Licensing Agreement, Art. 3.2. *See also* Import Licensing Agreement, preamble ("*Recognizing* that import licensing may be employed to administer measures such as those adopted pursuant to the relevant provision of GATT 1994 . . . .").

"within a maximum of 10 working days," as required by Article 2.2(a)(iii).[141] And the chapeau of Article 2.2(a) itself indicates that a measure shall be "deemed to have trade *restricting* effects" if the 10-day processing time period is not met.

105. As discussed in the Panel Report, the time period for the SCI to even *consider* whether to place an observation on a DJAI application is 15 days,[142] exceeding the maximum of ten days set out in Article 2.2(a)(iii). An approval is not possible until after that time elapses. Further, after an observation is made by any one of the six participating agencies, there is no timeline for a decision to be made on whether to grant the application. For those DJAI submissions that do receive observations, the process does not end there. The importer must then approach the agency or agencies to resolve the concern(s).[143] Because the importer must reach out to the agency, provide further information, and the agency must then consider whether to remove the observation (without any time limit on that consideration), the total time elapsed would far exceed the "immediate" approval (or in some instances maximum of ten working days) described in the definition of "automatic" import licensing. After a comment is lodged, no time limits apply to the agencies' final determination, although after 180 days from when the application is "registered" (which starts the clock running for the comment period), the application is voided and effectively denied.[144]

106. Argentina also reiterates arguments made in other sections of its appellant submission. First, Argentina seeks to rely on Article 3.2 of the Import Licensing Agreement. Its reliance is misplaced, because that provision is inapplicable. The DJAI itself is a trade restriction and it does not specify criteria governing the exercise of discretion relating to other measures that Argentina suggests could potentially be implemented through the DJAI Requirement, as explained in Section B above. Second, Argentina reiterates its arguments relating to the not-yet-in-force trade facilitation agreement, which are unpersuasive here for the same reasons that they were unpersuasive in Section A.4 above. For these reasons, Argentina's reliance on the Import Licensing Agreement and the negotiating text of the trade facilitation agreement must fail here too.

D. Conclusion

107. For the reasons stated above, the Panel correctly found that: (1) GATT Article VIII of the GATT 1994 does not limit the scope of Article XI:1 of the GATT 1994, and that a Member may not exclude a measure from scrutiny under Article XI:1 merely by characterizing it as a "formality" or "requirement" under GATT Article VIII; (2) a Member may not exclude a trade restriction from scrutiny under Article XI:1 merely by characterizing it as a procedural – rather than substantive – measure; and the DJAI Requirement is a non-automatic trade restriction, and accordingly, breaches Article XI:1.

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[141] Import Licensing Procedures Agreement, Art. 2.2(a).

[142] *DJAI* User Manuel at 7 (Exhibit JE-13).

[143] *AFIP Resolution* 3252, art. 4 (Exhibit JE-15).

[144] *AFIP Resolution* 3255, Updated Annex, Section D(h) (Exhibit JE-16) (explaining that a DJAI application is voided automatically at its expiration, if there has been no extension).

V. THERE IS NO BASIS FOR THE APPELLATE BODY TO REVERSE THE PANEL'S CONCLUSION THAT ARGENTINA BREACHES ARTICLE XI OF THE GATT 1994 BY MAINTAINING THE TRRs MEASURE

A. Argentina's TRRs Measure is a Tool by Which Argentina Extorts Businesses to Take Actions That Advance the Government's Economic and Industrial Policies in Disregard of Argentina's WTO Obligations

108. Argentina's appellant submission contains 42 pages of argument about the Panel's conclusion that its TRRs measure exists and breaches Article XI of the GATT 1994. Yet almost entirely absent from these 42 pages is a discussion of the voluminous evidence that the complaining Members offered to show what Argentina's measure is and how it functions – in breach of the GATT 1994. In so doing, Argentina continues the strategy it employed before the Panel of ignoring and attempting to distract from the actual evidence.

109. Argentina's unwillingness to confront and discuss the actual content of the complaining Members' evidence on the TRRs is telling. There is no good explanation of the evidence except as demonstrating Argentina's flouting of its obligation to not impose import restrictions. And, it shows Argentina attempting to pursue its blatant import restriction though an unwritten measure, in an apparent attempt to avoid scrutiny that would result if it had committed its measure to writing.

110. For this reason, when considering Argentina's arguments on appeal, it is important to keep in mind both the volume and content of the evidence that the complaining parties presented before the Panel and that supports the Panel's well-reasoned conclusions. That evidence shows systematic and sustained efforts by Argentina to use TRRs to force businesses to act in accordance with Argentina's trade policy objectives, including import substitution and reducing or eliminating trade deficits.[145] And it shows that, as the Panel concluded,[146] imposition of TRRs on businesses was not just a series of one-off decisions but was the result of a measure that Argentine officials maintained but never committed to paper.

111. The Panel found that Argentina's TRRs measure implements Argentina's "managed trade" policy[147] – which Minister of Industry Débora Giorgi described as the government's "strategy of using managed trade" for purposes of "import substitution" and "to keep domestic products on the internal market."[148] Argentina's President Cristina Fernandez de Kirchner has acknowledged Argentina's managed trade policy, and the use of import restrictions to enforce that policy. One 2011 press report in the record noted:

> Yesterday President Cristina Kirchner defended trade restrictions as a way of encouraging companies to invest in the country and create local jobs. She acknowledged that the Government is often criticized for its "heavy hand" in

[145] *See* Panel Report, para. 6.228.

[146] Panel Report, para. 6.231.

[147] Panel Report, paras. 6.119, 6.228.

[148] See Panel Report, para. 6.162 and exhibits cited therein.

> enforcing complex non-automatic import licensing renewal requirements for hundreds of industrial products. "For Argentina, we will continue to be heavy-handed. If that's what it means to be heavy-handed – to increase employment in Argentina, to increase production in Argentina, to make more parts in Argentina, then it is our duty to do it for 40 million Argentines," said the President . . . .[149]

As the Panel observed, moreover,[150] in late 2013, the Secretary of Domestic Trade explained in an official press release that this policy of "managed trade" would continue to be applied as per instructions from the President of Argentina.[151]

112. Statements from Argentine officials amply bear out the Panel's conclusion that, as part of its trade-management effort, Argentina has implemented a TRRs measure, and not a slew of "one-off" company- or industry-specific actions or a series of isolated TRRs, through which it compels economic operators to take actions that advance the objectives of its managed trade policy.[152] Minister Georgi has explained that "[w]e believe in carrot and stick managed trade,"[153] and her Ministry has similarly issued a press release explaining that: "Giorgi ratified 'the State policy of administering trade through the carrot and the stick, because the companies that take advantage of internal demand have to create Argentine employment.'"[154]

113. Minister Georgi, Secretary Moreno, and government press releases have also offered more specifics. For example, Secretary Moreno noted in an interview that:

> Businesses that meet government requirements are going to have all the raw materials they need. What they have to understand is that every industry has to prepare to be self sufficient when it comes to foreign exchange: for every dollar's worth they import, they must export one.[155]

Minister Georgi also explained in 2012 that: "[W]e will keep demanding investments from those who want to sell here."[156]

114. With respect to the auto industry, a government press release noted:

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[149] Exhibit JE-10.

[150] Panel Report, para. 6.162.

[151] Exhibit JE-759.

[152] Panel Report, paras. 6.228, 6.231.

[153] Exhibit JE-320 ("Creemos en el comercio administrado de zanahoria y garrote").

[154] Exhibit JE-203.

[155] Exhibit JE-3. The Argentine Presidency also issued a press release highlighting commitments by appliance manufacturer Electrolux to achieve a trade balance, and quoting an Electrolux official as stating that" "Electrolux committed to comply with the requirements that the government imposes on companies, so that for every dollar imported there is another that is exported." JE-145.

[156] Exhibit JE-320 ("vamos a seguir exigiendo inversiones a los que quieran vender aquí:").

> The automotive sector will be able to import in dollars for the same price they export. The rule is that one export dollar enables one import dollar. This was announced by the Minister of Industry, Débora Giorgi, and the Secretary of Domestic Trade, Guillermo Moreno.
>
> The Minister of Industry, Débora Giorgi, informed yesterday that "the automotive companies will be able to import in dollars the same amount that they export; in other words, a rule applies by which one export dollar enables one import dollar."
>
> …
>
> The imports made from now on can be compensated with exports made up to 31 March 2012, or with the alternative of an irrevocable capital payment during 2011 to the importing company itself, for the imported amount, as informed by the Ministry of Industry in a press release.
>
> …
>
> The automotive companies must submit their export plans by means of an affidavit.
>
> The import and export plans can be submitted as of tomorrow and the Ministry of Industry will approve them within a maximum period of three working days.[157]

[157] Exhibit JE-396 ("El sector automotriz podrá importar en dólares por el mismo valor que exporte. La regla es que un dólar de exportación habilita a un dólar de importación. Lo anunciaron la ministra de Industria, Débora Giorgi y el secretario de Comercio Interior, Guillermo Moreno. ¶ La ministra de Industria, Débora Giorgi informó ayer que "las automotrices podrán importar en dólares la misma cantidad que lo que exporten; es decir que se aplica una regla por la cual un dólar de exportación habilita a un dólar de importación ¶… ¶ Las automotrices deberán comprometer sus planes de exportación mediante una declaración jurada. ¶ Los planes de importación y exportación pueden presentarse a partir de mañana y el Ministerio de Industria aprobará los mismos en un plazo máximo de tres días hábiles."). Similarly, *see* JE102 ("From the government we demand an increase in national integration in the automotive industry, substituting imports, increasing investments, developing local providers, and in this manner generating new jobs." ("Desde el Gobierno exigimos incrementar la integración nacional de la industria automotriz, sustituyendo importaciones, aumentando las inversiones, desarrollando proveedores locales y generando, de este modo, nuevos puestos de trabajo[.]"). *See also Ministry of Industry Press Release, March 25, 2011* (Exhibit JE-1) ("From now on, imports must be compensated for by exports, which have one year to be fulfilled, thereby taking 2012 exports into consideration; or alternatively, an irrevocable capital contribution can be made throughout 2011 in the amount of the net total of imports. ¶ Compensation must be made with exports from the importing firm or a company belonging to the same group. ¶ Automakers must commit to their export plans by means of an affidavit.") Argentina's President herself announced the imposition of export demands on the audiovisual industry: "[W]e proposed holding this business rally, where we tell importers that they are going to have to export Argentine [audiovisual] contents because this is what the political objective which we advancing as a country and that, for us, it is important to export grains, it is important to export agricultural machinery, value added, industrial goods, software, but it is also very important to export our identity, our culture, our knowledge, as expressed in movies and television. . . . thus, we will foster the balance between those who import and those who export."); Press Release, Presidencia de la Nación Argentina, Palabras de la Presidenta de la Nación Cristina Fernández en el acto de cierre de ronda de negocios "Argentina Exporta Audiovisual" (December 6, 2011), (Exhibit JE-137).

115. Companies complied, and that the Argentine government touted the results. A government press release announcing a trade balancing agreement with General Motors explained:

> The agreement signed today with GM is the sixth one, and it is added to those with Mercedes Benz, Volkswagen, Alfa Romeo, Porsche and Peugeot Citroen.
>
> In every case, the companies committed themselves to increasing investments and exports in response to the "One-for-one" trade balance program (one import dollar for one export dollar) that Giorgi and Moreno required of them at the beginning of the year.[158]

116. Secretary Moreno also made clear what happens when companies fail to comply with TRR demands:

> Last year Débora Giorgi and I met with the CEOs of Audi, Mercedes-Benz and BMW. We told them that they had to export enough to offset the dollars they spent importing cars. Audi understood it best. BMW did not change its policy. So it went seven months without bringing in one car. The result: Audi cornered the market. There was no shortage of cars. Now they came into line: the vice chairman of the BMW corporate office, in Germany, met with me and started to export semi-fermented grape juice (*must*) and rice. And they started to bring in cars.[159]

117. Statements by top Argentina officials were not all of the evidence that the Panel could rely upon in ascertaining how the TRRs measure works. Before concluding that "the Argentine authorities' imposition on economic operators of one or more of the five requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina,"[160] the Panel painstakingly examined and discussed the evidence concerning each of the five TRRs.[161] And having completed that analysis, the Panel concluded that "the requirements constitute different elements that contribute in different combinations and degrees … towards the realization of the common policy objectives that guide Argentina's managed trade policy."[162]

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[158] Exhibit JE-400 ("El acuerdo firmado hoy con GM es el sexto, y se suma a los de Mercedez Benz, Volkswagen, Alfa Romeo, Porsche y Peugeot Citroën. ¶ En todos los casos las firmas se comprometieron a aumentar inversiones y exportaciones en respuesta al programa de equilibrio de balanza comercial "Uno a uno" (un dólar importado por uno exportado) que Giorgi y Moreno les exigieron a principio de año.").

[159] Exhibit JE-3. An earlier mail in the record from BMW Argentina executive Christian Menges to a media outlet confirmed Secretary Moreno's account: "Due to the current situation of import restrictions, we temporarily do not deliver vehicles to Argentina as they would remain blocked at customs . . . . New quotas will be reallocated to Argentina as soon as the situation is solved." Menges said BMW is in talks with the government "various options are being evaluated with the goal to restart importing vehicles as quickly as possible." *See* Exhibit JE-98; *see also* Exhibit JE-8.

[160] Panel Report, para. 231.

[161] Panel Report, paras 6.155-6.231.

[162] Panel Report, para. 6.228.

118. As the Panel explained, "[t]he TRRs imposed by the Argentine Government seem in line with three of the five economic objectives or 'macroeconomic guidelines' set out in" Argentina's Industrial Strategic Plan 2020 (Plan Estratégico Industrial 2020, PEI 2020): "(a) protection of the domestic market and import substitution; (b) increase of exports; and, (c) promotion of productive investment."[163] Further, as the Panel noted, sectors targeted for application of TRRs "correspond to at least six out of the 11 industrial sectors (value chains) individually addressed in" the PEI 2020.[164] According to a news report of an interview given by Secretary Moreno, the Secretary explained that import controls would be applied to 100 companies that use 80 percent of available foreign exchange.[165]

119. The Panel also highlighted that:

> With respect to the operation of the measure, in many cases for which there is evidence, Argentina has imposed a combination of TRRs on economic operators. It appears that the TRRs operate in combination such that more than one TRR has been imposed at a given time on a specific economic operator. … The Panel notes that the one-to-one requirement, the import reduction requirement and the local content requirement have been imposed separately and not necessarily in combination with other TRRs. In any event, the resulting combination of requirements imposed on individual economic operators at a given time seems to depend on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits.[166]

120. The evidence amply supported this conclusion as well. For instance, exhibits cited by the Panel showed that to reverse its trade deficit, Renault trucks committed to several TRRs, including making a $4 million investment, not distributing $18 million in profits, and increasing its exports by $47 million.[167] Exhibits cited by the Panel also showed that Scania trucks committed to increase its exports, make an investment, and to reinvest profits in Argentina instead of repatriating them.[168] Minister Giorgi personally explained that Scania had acted pursuant to "the national government's demand that auto manufacturers equalize their commercial balances."[169] Similarly, Agricultural equipment manufacturer Claas committed to a

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[163] Panel Report, para. 6.161 (citing Exhibit JE-749).

[164] Panel Report, para. 6.158.

[165] Exhibit JE-3. Secretary Moreno was quoted as saying "About 19 companies account for 50% of all foreign exchange demand; another 106 [companies], [account] for 80% [of that demand]. That is what our strategy is targeted at. We are going to focus on them; we are not going to be controlling thousands of small and medium-sized businesses."

[166] Panel Report, para. 6.225.

[167] Panel Report, paras. 6.173, 6.211, 6.214 (*citing* Exhibits JE-103 and JE-590).

[168] Panel Report, paras 6.211, 6.214 (*citing* Exhibits JE-101 and JE-411).

[169] Exhibit JE-101 ("la exigencia del gobierno nacional para que las automotrices equilibren sus balanzas comerciales").

mixture of new investments and increased exports in order to balance its import and export flows.[170]

121. Evidence in the record also showed how Argentina used a variety of TRRs in tandem as a means of achieving its industrial and trade policy goals with respect to the pharmaceutical sector. At a 2011 meeting Secretary Moreno explained that pharmaceutical companies would be required to submit plans for achieving a balance of trade in their raw materials and medicines, including through increasing exports, reducing imports, making capital investments, or reinvesting profits.[171] Shortly thereafter, Minister Giorgi explicitly clarified, in a Ministry of Industry Press release, the stick behind this demand: "we encourage production by multinational laboratories in Argentina as a condition of market access."[172] Moreover, in making its findings with respect to the investment requirement and the requirement to refrain from repatriating profits, the Panel highlighted that these TRRs had been imposed "in combination with the one-to-one requirement or the local content requirement."[173]

122. As will be discussed further below, moreover, the evidence not only fully supports the Panel's conclusion that Argentina maintains the TRRs measure, but it strongly undermines Argentina's contentions that there could be any question about the validity of the Panel's findings that the measure was attributable to Argentina, well-defined, and of general and prospective effect – even though the complaining Members did not need to establish these facts in order to prevail on their claims. Using over 75 paragraphs and over 200 footnotes, the Panel was able to carefully detail the five TRRs imposed as part of the measure and how the Argentine authorities imposition of those TRRs operates as a single measure,[174] leaving no doubt about its content.

123. Additionally, the Panel pointed out that Argentina did not dispute the question of attribution, and that in any event "the evidence shows that [the measure] implements a policy that has been announced in public statements and speeches and on government websites by high ranking Argentine officials," and that "[h]igh-ranking Argentine officials have also referred to the imposition of TRRs on specific companies and sectors."[175] Finally, the Panel correctly observed that "the evidence suggests that these TRRs will continue to be imposed until and unless the policy is repealed or modified."[176] Indeed, statements by Argentine officials that economic operators in different industries will continue to face rules or demands into the future left no doubt that the Panel was correct in this conclusion – one that necessarily indicates general and prospective effect.

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[170] *See* Panel Report, paras. 6.176, 6.214 (*citing* Exhibit JE-128).

[171] *See* Exhibits JE-169, JE-170.

[172] Exhibit JE-168.

[173] Panel Report, paras 6.212, 6.216.

[174] Panel Report, para. 231.

[175] Panel Report, para. 230.

[176] Panel Report, para. 230.

124. In sum, the evidence overwhelmingly supports the Panel's conclusion that Argentina maintains the TRRs measure, as identified in the complaining Members' request. The decision to pursue industrial and economic policy goals through imposition of these requirements is precisely the kind of conduct that Article XI of the GATT 1994 prohibits. The Panel properly declined to let Argentina hide its non-compliance with its obligations behind the unwritten nature of its measure.

B. Argentina's Arguments About the Applicable Legal Standard are Without Merit

125. Argentina contends on appeal that the Panel applied an incorrect legal standard in assessing whether the United States and the other complaining Members adequately established the existence of the TRRs measure for purposes of their claims under Article XI of the GATT 1994. Argentina's arguments are without merit. Not only did the Panel properly reject the notion that there is a special legal standard applicable to the claims against this unwritten measure, but the Panel in any event did make all of the findings that Argentina claims it needed to make under Argentina's proposed legal standard.

1. There is no Special Burden of Proof or Standard Applicable to the U.S. Challenge to Argentina's TRRs Measure

126. Contrary to what Argentina argued before the Panel and has argued in this appeal, there is no special and higher burden that the Panel should have applied when assessing the U.S. challenge to Argentina's unwritten measure. Before the Panel, the burden was on complainants to provide sufficient evidence for the Panel to determine that the TRRs measure exists. The United States and co-complainants provided evidence that was more than sufficient to enable the Panel to reach this conclusion.

127. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. With respect to the allocation of the burden of proof, the Appellate Body has explained:

> [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.[177]

[177] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Sardines (AB)*, para. 270.

128. What evidence is sufficient in any instance will depend on the fact to be proven and the context.[178] In most cases, it is likely that a greater *volume* of evidence is necessary to demonstrate the existence of an unwritten measure than a written measure, which in many cases may be demonstrated by a statute or regulation alone. But, that does not mean that there is a *higher standard of proof* or that a party must do more than present sufficient evidence to raise a presumption of the existence of that measure. Contrary to what Argentina argues, moreover, there is no need for greater specification of how the measure applies, or when in the future it will apply, just because the measure is unwritten.

129. Argentina also argues that the Panel erred by failing to require a special showing that the TRRs measure has general and prospective application.[179] There is no basis for requiring such a showing. The TRRs measure consists of the decision of high-level Argentine officials to impose TRRs on imports of goods into Argentina. Like any current measure, it applies until it is withdrawn.

130. Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC and certain member States – Large Civil Aircraft* to support the existence of a higher standard of proof for unwritten measures is misplaced. The evidence required to establish a *prima facie* case is that which is necessary to "raise a presumption that what is claimed is true" and will depend on the facts and circumstances of the claim or defense.[180]

131. Accordingly, the Appellate Body's discussion of the evidence required in *US – Zeroing (EC)* must be considered in the context of that dispute, which differed in key respects from the claims at issue in this dispute. The Appellate Body in *US – Zeroing (EC)* considered whether the "zeroing methodology" could be challenged, as such, in dispute settlement.[181] That case concerned the methodology as a "rule or norm" relating to how a particular law or regulation is applied by a Member.[182] It did not merely concern the existence of an unwritten measure, the different question at issue here.

132. Likewise, in *Thailand – Cigarettes (Philippines)*, the Philippines challenged a "general rule or norm of systematically rejecting transaction values for certain imported goods and using the deductive valuation method for customs valuation inconsistently with" the Customs Valuation Agreement.[183] Thus, the *Thailand – Cigarettes (Philippines)* dispute also concerned the administration and application of other measures – Thailand's customs laws and regulations.

133. In this dispute, the measure being challenged is not a "norm or rule" as that term was used by the Appellate Body in *US – Zeroing (EC)* – the TRRs measure does not provide "administrative guidance" on application of a law or regulation. What the United States has

[178] *See US – Wool Shirts and Blouses (AB)*, p. 14.

[179] Argentina's Appellant Submission, paras. 118-119.

[180] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Sardines (AB)*, para. 270.

[181] *US – Zeroing (EC) (AB)*, para. 185.

[182] *See, e.g., US – Zeroing (EC) (AB)*, paras. 199-200.

[183] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.112

challenged in this dispute is instead a measure in the form of a decision by Argentina to impose the TRRs, as evidenced by statements by Argentine officials, various private sources that reported instructions related to the TRRs, and the many other sources cited by complainants. As the Appellate Body pointed out in *EC and certain member States – Large Civil Aircraft*, when it rendered moot the panel's findings on the LA/MSF Programme, it is not the case that "a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order show that . . . a measure exists."[184]

134. The facts in this dispute and the analysis that should be followed is quite similar to what confronted the panel in *EC – Approval and Marketing of Biotech Products*.[185] In that dispute, the complaining parties alleged that the EC had imposed a moratorium on the approval of biotech products.[186] The EC contested the moratorium existed, and the panel observed that "[i]t is therefore necessary to examine in detail whether the evidence supports the Complaining Parties' assertion."[187]

135. In other words, the panel in that dispute concluded that the question with respect to the existence of an unwritten measure is the same as that related to any fact asserted by a Member in the course of dispute settlement procedures: "whether the evidence supports the Complaining Parties' assertion."[188] The panel then went on to methodically consider the evidence of the moratorium submitted by the complaining parties to determine whether the moratorium existed.[189]

136. The evidence presented in *EC – Approval and Marketing of Biotech Products* was very similar to that presented to the Panel here; it included press releases, fact sheets and other statements of the European Commission; speeches and news reports concerning statements of Commissioners; and statements by member State officials.[190] The panel concluded that this evidence supported the complaining parties' assertion that the EC applied a moratorium during the relevant time period and that such evidence, together with other evidence submitted in the dispute, was sufficient to establish the existence of the moratorium.[191]

137. Similarly here, the evidence in this dispute includes statements by Argentine officials in governmental press releases, speeches, interviews, and other news reports; statements by company officials in earnings calls and reports, news reports, press releases, and in affidavits; other news reporting; trade publications; and surveys of companies doing business in Argentina. Like the evidence in *EC – Approval and Marketing of Biotech Products*, the evidence here more

[184] *EC and certain member States – Large Civil Aircraft (AB)*, para. 794.

[185] *See also* U.S. Second Written Panel Submission, paras. 106-107.

[186] *EC – Approval and Marketing of Biotech Products*, para. 7.456.

[187] *EC – Approval and Marketing of Biotech Products*, para. 7.459.

[188] *EC – Approval and Marketing of Biotech Products*, para. 7.459.

[189] *EC – Approval and Marketing of Biotech Products*, paras. 7.522-7.531.

[190] *EC – Approval and Marketing of Biotech Products*, paras. 7.524-7.531.

[191] *EC – Approval and Marketing of Biotech Products*, para. 7.1272.

than sufficed to support the Panel's finding that the measure at issue – the TRRs measure – exists and is susceptible to challenge in the WTO dispute settlement process.[192]

2. The Panel Here Properly Relied On Factors Highlighted By The *US – COOL* Panel To Assess Whether Instruments Should Be Examined As One Measure or Multiple Measures

1. Argentina argues that the Panel here improperly substituted a standard articulated by the panel in *US – COOL* for a standard applicable to the identification of an unwritten measure.[193] As discussed above, however, there is no separate legal standard applicable to the identification of an unwritten measure. The Panel here properly pointed out that "the panel in *US – COOL* summarized the main factors considered by previous panels and the Appellate Body" when considering "whether to examine certain instruments as one single measure or individual separate measures"[194] Those factors considered by the panel in *US – COOL* were:

> (i) the manner in which the complainant presented its claim(s) in respect of the concerned instruments; (ii) the respondent's position; and (iii) the legal status of the requirements or instrument(s), including the operation of, and the relationship between, the requirements or instruments, namely whether a certain requirement or instrument has autonomous status.[195]

138. The Panel explained, moreover, that in conducting its analysis of "whether the five TRRs operate in a manner such that they constitute a single measure," it would take the three factors highlighted by the *US – COOL* panel into account.[196] The Panel not only considered those factors,[197] it concluded, based on careful examination, that the evidence proved the existence of each of the individual TRRs,[198] and then found that the requirements were imposed according to the single measure identified in the complaining Members' requests for establishment of a panel.[199] As discussed above,[200] the evidence, including the manner in which TRRs were applied, the relationship of TRR requirements to Argentina's policy objectives, and the statements of Argentine officials, overwhelmingly supports the Panel's conclusion.

3. Even Though It Did Not Need To, The Panel Made The Findings That Argentina Claims It Needed To Make

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[192] *See* section V.A. *supra*.

[193] Argentina's Appellant Submission, paras. 121-126.

[194] Panel Report, para. 6.144.

[195] Panel Report, para. 6.144 (quoting *US – COOL (Panel)*, para. 7.50) (footnotes omitted).

[196] Panel Report, para. 6.222.

[197] Panel Report, paras. 6.221-6.231.

[198] Panel Report, paras, 6.166 -6.216

[199] Panel Report, paras. 6.223-6.231.

[200] *See* section V.A. *supra*.

139. Even though it did not need to, the Panel *did* make the factual findings that Argentina thinks the Panel needed to make in order to permit a challenge to its unwritten measure. Accordingly, there would be no basis on which to reverse the Panel's findings even if it did need to apply the standard proposed by Argentina.

a. The Panel Did Examine the Evidence Concerning Argentina's Measure Under the Standard That Argentina Criticizes the Panel for Failing to Apply

140. Argentina acknowledges[201] that, when evaluating Japan's request for a separate finding that the TRRs measure breaches Article XI of the GATT 1994 as such, the Panel considered the TRRs measure under the standard that Argentina believes is applicable to claims against unwritten measures. In particular, the Panel explicitly considered whether the measure's precise content had been established with sufficient precision, and whether the measure has general and prospective effect.[202] Argentina claims that the Panel erred when considering the existence of the measure for purposes of the claims by the United States and the EU when it failed to consider these questions.

141. As Argentina acknowledges, however, the measure at issue is the same: the TRRs measure identified in the panel requests of the three complaining Members and found by the Panel to have been established by the evidence in the record. The Panel found that this measure met the standard articulated by Argentina for the purposes of Japan's claim. Because the complaining parties presented their evidence jointly, and all explained the content of the measure and that the measure has general and prospective effect, to the extent discussion and findings on these questions were necessary to evaluate *any* of the complaining Members' claims, those findings were made by the Panel. Accordingly, regardless of whether or not Argentina's proposed standard applies to the TRRs claims brought by the United States and the European Union, Argentina's challenge to the Panel's conclusion with respect to those claims should be rejected.

b. The Panel's Finding That the TRRs Measure Exists as a Single Measure Necessarily Meant That the Measure is General and Prospective, Precisely Defined, and Attributable To Argentina

142. Not only does the Panel make explicit findings applying the standard pursued by Argentina with respect to Japan's "as such" claims, but the Panel's general findings regarding the measure's existence and operation necessarily meant that the measure was adequately defined, attributable to Argentina, and of general and prospective effect. The Panel found that Argentina had adopted a single TRRs measure pursuant to which Argentine authorities "impos[e] on economic operators of one or more of the five requirements identified by the complainants as

[201] Argentina's Appellant Submission, para. 137.

[202] Panel Report, paras. 6.322-6.342.

a condition to import or to obtain certain benefits."[203] The Panel further rejected Argentina's contention[204] that the evidence at most demonstrates a series of unrelated 'one-off' actions.[205]

143. The Panel's findings with respect to the existence of the measures support each element of the standard advanced by Argentina. First, the Panel's finding that the measure involves "Argentine authorities' imposition"[206] of TRRs necessarily means that the measure is attributable to Argentina. Second, the Panel's explanation that the TRRs measure consists of "Argentine authorities' imposition on economic operators of one or more of the five requirements identified by the complainants as a condition to import or to obtain certain benefits,"[207] necessarily means that the evidence in the record permitted the definition of the measure with sufficient precision. Third, the Panel's identification of a single TRRs measure,[208] pursuant to which one or more TRRs may be imposed on different economic operators, means that the measure at issue is one of general application. Finally, the Panel's identification of a presently existing measure through which Argentine officials seek to fulfill their policy goals means that the measure has prospective effect, as it is applicable until it is withdrawn. In fact, when identifying the measure, the Panel was clear that the evidence established a measure that would apply into the future. It explained that:

> [T]he evidence shows that it implements a policy that has been announced in public statements and speeches and on government websites by high-ranking Argentine Government officials, including the President, the Minister of Industry and the Secretary of Trade. … The evidence suggests *that these TRRs will continue to be imposed, until and unless the policy is repealed or modified*.[209]

144. Crucially, Argentina has not challenged the Panel's conclusion that there is a single TRRs measure on grounds of alleged failure to make an objective assessment of the facts. Rather, it argues against the Panel's conclusion solely on the basis of the Panel's having allegedly applied an incorrect legal standard when making its determination. Argentina's arguments fail because (1) the Panel did not use an improper legal standard when making its finding of the existence of the TRRs measure; (2) in applying the legal standard with respect to Japan's claims, relying on the same evidence presented by the United States, it found the measure to satisfy the standard; and (3) the Panel's findings with respect to the measure as described the United States satisfies the standard. For these reasons, the Appellate Body should uphold the Panel's findings, even if it were to find that the legal standard suggested by Argentina applies.

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[203] Panel Report, para. 6.231.

[204] *See, e.g.,* Argentina's Second Written Panel Submission, para. 106; U.S. Closing Statement at the Second Panel Meeting, para. 5.

[205] Panel Report, para. 6.229.

[206] Panel Report, para. 6.231.

[207] Panel Report, para. 6.231.

[208] Panel Report, para. 6.231.

[209] Panel Report, para. 6.230 (emphasis added).

4. Argentina's Assertion That Legal Error Led the Panel to Presume the Existence of the TRRs Measure is Absurd and Illogical

145. Argentina contends that as a result of an alleged failure to apply a standard that it has read into *US – Zeroing (EC)*, the Panel improperly "presumed … that a single [TRRs] measure exists."[210] This position is both illogical and untenable.

146. As the Panel's evaluation of the evidence in the dispute demonstrates, it did not presume the existence of the TRRs measure, but rather undertook a lengthy evaluation of whether Argentina was imposing each of the TRRs, and whether those requirements were imposed according to a single measure. Moreover, as already discussed, the Panel's findings indicate that the TRRs measure is attributable to Argentina, has defined content and is general and prospective.[211]

147. The passages cited by Argentina supposedly demonstrating the Panel's circular reasoning in fact relate to the Panel's consideration of the fact that individual TRRs may be imposed in combination or individually, and what impact this had on the evaluation of the single TRRs measure.[212] Argentina's mischaracterizes these passages and omits any discussion of the lengthy analysis of the evidence undertaken by the Panel. . Moreover, Argentina has not directly challenged the Panel's finding that a TRR measure exists on the basis of alleged "circular reasoning." Rather, Argentina challenged the Panel's conclusion with respect to the U.S. and EU claims under XI:1 and III:4 of the GATT 1994 solely on the ground that the Panel failed "to apply the correct legal standard" when assessing the existence of the measure.[213] Tellingly, Argentina does not suggest that the Panel's alleged circular reasoning with respect to the existence of the TRRs measure would provide independent grounds for reversal of the finding that Argentina maintains the TRRs measure. In any event, Argentina's arguments are frivolous.

148. Argentina complains[214] that the Panel stated that: "The fact that the TRRs can be imposed separately does not mean that a single global measure does not exist."[215] This statement, and the remainder of the paragraph that it introduces, however, by no means constitutes an assumption of the existence of a single measure, as Argentina argues.[216] Rather, Argentina's argument rests on its selective quotation of the Panel's Report. The Panel also explained that "If the Argentine Government imposed five requirements at once on a specific economic operator, this would not make the TRRs measure in that particular case any more

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[210] Argentina's Appellant Submission, para. 129.

[211] *See* subsection V.B.3 *supra*.

[212] Argentina's Appellant Submission, paras. 131-133 (*citing* Panel Report, paras. 6.224-6.228).

[213] *See* Argentina's Notice of Appeal, para. 9 (challenging the Panel's conclusion with respect to the U.S. and EU claims under GATT XI:1 and III:4 solely on the ground that the Panel failed "to apply the correct legal standard" when assessing the existence of the measure).

[214] Argentina's Appellant Submission, para. 131.

[215] Panel Report, para. 6.227.

[216] Argentina's Appellant Submission, para. 132.

'global' as compared to a TRRs measure that consisted of a single requirement."[217] Thus, the Panel was simply (and correctly) observing that the fact that TRRs can be imposed separately does not preclude a determination that a single TRRs measure exists.

149. Similarly, the Panel was not "simply asserting the single TRRs measure into existence,[218] when it explained that "it appears that the requirements constitute different elements that contribute in different combinations and degrees – as part of a single measure – towards the realization of common policy objectives that guide Argentina's "managed trade" policy, i.e. substituting imports and reducing or eliminating trade deficits."[219] Rather, the Panel was simply highlighting the obvious: the fact that the TRRs contribute in different combinations and degrees to the objectives of Argentina's managed trade policy constitutes a powerful reason to consider them components of a single measure.

150. The Panel relatedly noted that TRRs were imposed according to the particular situation of individual companies – so as to ensure that the particular company's economic activities advance Argentina's managed trade policies.[220] The Panel explained that the "combination of requirements imposed on individual economic operators at a given time seems to depend on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits,"[221] and that decisions about the extent to which TRRs should be applied to individual operators were likewise being made in order to achieve policy objectives.[222]

151. The evidence was fully consistent with these findings, demonstrating overwhelmingly that the TRRs did function together to advance common policy objectives, and often were employed in tandem with respect to particular companies or industries[223] – functioning as the "stick" of Argentina's "carrot and stick"[224] approach to managed trade. The Panel's conclusion reflected this voluminous record evidence – evidence that the Panel spent over 25 pages of the report and over 200 footnotes reviewing[225] – and thus hardly qualifies as a "simple assert[ion]."

C. Argentina's Article 11 Claim is Without Merit

152. Argentina claims that the P**a**nel acted inconsistently with Article 11 of the DSU when concluding that the TRRs measure as such breaches GATT 1994 Article XI. In particular, Argentina challenges the Panel's findings that the evidence established the precise content and

[217] Panel Report, para. 6.227.

[218] Argentina's Appellant Submission, para. 133.

[219] Panel Report, para. 6.228.

[220] Panel Report, para. 6.226.

[221] Panel Report, para. 6.225.

[222] Panel Report, para. 6.226.

[223] *See* section V.A *supra*.

[224] Exhibit JE-320 ("Creemos en el comercio administrado de zanahoria y garrote").

[225] *See* Panel Report, paras. 6.155-6.231, 6.323-6.343.

the general and prospective effect of the TRRs measure. While Argentina's Article 11 challenge relates on its face to the Japanese "as such" claim, Argentina has argued that such findings were also necessary with respect to the claims brought by the United States and the EU.

153. As the United States has explained above, they were not. However, if the Appellate Body were to find that Argentina's proposed standard applies to the U.S. and EU claims, there would be no basis on which to find that the Panel did not properly make the findings relevant to that standard – including that the evidence establishes the measure's precise content and general and prospective effect. The Panel's findings with respect to the Japanese claim were made on the basis of the same evidence that applies to the U.S. and EU claims, and the United States explained to the Panel that, in the event the U.S. needed to establish precise content and general and prospective application, this evidence easily did so.[226] And as the United States explains in this section, the Panel did not err in making these findings.

154. The Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation," one that "goes to the very core of the integrity of the WTO dispute settlement process itself."[227] For Argentina's Article 11 claim to succeed, Argentina must demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[228]

155. The Appellate Body has also emphasized that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."[229] Moreover, it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[230] The Appellate Body has further explained that the weighing of evidence is within the discretion of the panel,[231] and that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[232]

156. As the United States demonstrates below, Argentina has failed to meet the high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU. Indeed, Argentina attempts to recast its argument before the panel under the guise of an Article 11 claim. Moreover, in making its Article 11 claim, Argentina fails to confront the substantial evidence in the record upon which the Panel relied – just as Argentina failed to confront this evidence in its arguments before the Panel. Argentina claims that the Panel breached its obligations under Article 11 are belied by the Panel's report and the volumes of evidence in the record.

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[226] U.S. Opening Statement at the Second Panel Meeting, paras. 69-88.

[227] *EC – Poultry (AB)*, para. 133.

[228] *EC – Hormones (AB)*, para. 133.

[229] *EC – Fasteners (China) (AB)*, para. 442.

[230] *EC – Fasteners (China) (AB)*, para. 442.

[231] *Korea – Dairy (AB)*, para. 137.

[232] *Korea – Alcoholic Beverages (AB)*, para. 164.

1. Argentina is Recasting its Arguments Before the Panel Under the Guise of an Article 11 Claim, Which is "Unacceptable"

157. Argentina presents to the Appellate Body, as a claim under Article 11 of the DSU, the same arguments that it presented to the Panel. Before the Panel, Argentina argued that "The Complainants Have Failed to Establish the Precise Content and the General and Prospective Application of the Alleged Unwritten 'Overarching RTRR Measure.'"[233] The Panel considered and rejected Argentina's arguments – on the basis of the volumes of record evidence that disprove them.[234] On appeal, Argentina asks the Appellate Body to find that, in doing so, the Panel acted inconsistently with Article 11 of the DSU. Argentina's request should be denied.

158. As noted above, the Appellate Body has admonished that it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[235] That is all that Argentina is doing here. Argentina disagrees with the Panel's conclusion that the evidence does establish the existence of an adequately defined measure with general and prospective application, so Argentina has presented to the Appellate Body the same arguments that it presented to the Panel and asks the Appellate Body to reach a different conclusion. However, the Appellate Body has explained that it will not "interfere lightly" with a panel's fact-finding authority, and, therefore, for a party to prevail on an Article 11 claim, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts."[236] The Appellate Body "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached."[237] Rather, a failure to make an objective assessment would entail "deliberate disregard of, or refusal to consider, the evidence" or "willful distortion of" it.[238] Argentina has not demonstrated how the Panel "disregarded or distorted the evidence"[239] in its evaluation of how that evidence satisfied each of the elements Argentina believes is required (an adequately defined measure with general and prospective application).

159. Argentina attempts to circumvent the fact-finding authority of the Panel by citing to the "particular rigour" that is necessary to find the existence of an unwritten norm or rule.[240] To the extent that such a standard applies to the Panel's evaluation of the TRRs measure, it was amply met. The Panel undertook an extensive review of the evidence presented to it, including the substantial evidence of both the content and the general and prospective effect of the TRRs measure,[241] and found that the evidence amply demonstrated that the measure fulfilled all the

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[233] Argentina's Second Written Panel Submission, Section III(C).

[234] Panel Report, paras. 6.315-6.342.

[235] *EC – Fasteners (China) (AB)*, para. 442.

[236] *US – Wheat Gluten (AB)*, para. 151.

[237] *US – Wheat Gluten (AB)*, para. 151.

[238] *EC – Hormones (AB)*, para. 133.

[239] *EC – Hormones (AB)*, para. 133.

[240] Argentina's Appellant Submission, para. 141.

[241] Panel Report, paras 6.155-6.231, 6.323-6.343.

requirements that Argentina itself claimed to be necessary for an as such challenge to an unwritten measure. While Argentina may disagree with the Panel's conclusion, that is not enough to demonstrate a breach of Article 11.[242] Accordingly, Argentina's Article 11 claim with respect to the findings of precise content and general and prospective application must fail.

2. The Panel Undertook an In-Depth Examination of the Evidence, Which Fully Supports the Panel's Conclusions that the TRRs Measure Has Precise Content, as Well as General and Prospective Effect

160. Argentina's allegations of error regarding the Panel's evaluation of the evidence on the content and general and prospective nature of its measure are entirely devoid of merit. They certainly fall far short of the standard required to establish that a Panel breached its obligations under Article 11 of the DSU.

a. To Establish that the Panel Breached Article 11, Argentina Must Show That The Panel Committed An Egregious Error That Calls Its Good Faith Into Question

161. "[I]t is insufficient for an appellant to simply disagree with a statement or to assert that it is not supported by the evidence."[243] Rather, the appellant "bears the onus of explaining why the alleged error meets the standard of review under Article 11."[244]

162. That standard of review is far from *de novo*. The Appellate Body stated in *EC – Hormones* that:

> Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. … The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party

[242] *Korea – Alcoholic Beverages (AB)*, para. 164.

[243] *EC – Seal Products (AB)*, para. 5.150.

[244] *EC – Seal Products (AB)*, para. 5.150 (citing *EC – Fasteners (China) (AB)*, para. 442).

> submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[245]

163. Further, a panel "is not required to discuss, in its report, each and every piece of evidence."[246] Accordingly, a panel's findings about what the evidence shows are not rendered unsupported by virtue of the fact that the panel did not specifically discuss each piece of evidence in the record that supports the findings.

b. The Panel More Than Adequately Fulfilled its Obligations in Evaluating the Evidence

164. The Panel in this dispute fulfilled its obligation to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[247] Indeed, the Panel performed such an extensive consideration of the evidence that Argentina's assertions to the contrary border on the absurd.

i. The Panel Correctly Concluded That the Precise Content of The TRRs Measure has Been Adequately Established

(a) The Panel Elucidated The Content Of The TRRs Measure In Exceptional Detail

165. The Panel's report contains approximately 25 pages of painstaking analysis of the evidence demonstrating the existence and characteristics of the TRRs measure.[248] The Panel's analysis employs over 200 footnotes, many of which individually cite numerous exhibits in the record.

166. Using this voluminous evidence, the Panel explored in detail whether the Complaining Members had established the existence of the TRRs measure, and its contours. First, the Panel highlighted the evidence showing the existence of each of the five TRRs identified by the Complaining Members in their Panel requests. Then, the Panel proceeded to determine "whether the five TRRs imposed by Argentina and described above apply and operate in a combined manner as part of a single measure."[249]

167. Finding that they do, the Panel observed that "[i]t appears that the TRRs operate in combination such that more than one TRR has been imposed at a given time on a specific economic operator."[250] The Panel further explained that "the requirements constitute different

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[245] *EC – Hormones (AB)*, para. 133.

[246] *Brazil – Retreaded Tyres (AB)*, para. 202.

[247] *Brazil – Retreaded Tyres (AB)*, para. 185 (citing *EC – Hormones (AB)*, paras. 132 and 133). *See also, e.g.*, *EC – Seal Products (AB)*, para. 5.150; *Korea – Alcoholic Beverages (AB)*, paras. 161- 162; *Korea – Dairy (AB)*, para. 138.

[248] *See* Panel Report, paras. 6.155-6.231, 6.323-6.343.

[249] Panel Report, para. 6.219.

[250] Panel Report, para. 6.225.

elements that contribute in different combinations and degrees – as part of a single measure – towards the realization of common policy objectives that guide Argentina's "managed trade" policy, i.e. substituting imports and reducing or eliminating trade deficits."[251] Further, the Panel noted that the "combination of requirements imposed on individual economic operators at a given time seems to depend on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits,"[252] and that decisions about the extent to which TRRs should be applied to individual operators were likewise being made in order to achieve policy objectives.[253]

168. Having already elucidated the content of the TRRs measure in exceptional detail, the Panel returned to that content in its separate consideration the Japanese claim.[254] The Panel noted that the complainants "had identified the same five requirements as the constituent elements of the TRRs measure" and that those had been "demonstrated through the evidence."[255]

169. In evaluating whether the content of the measure had been established, the Panel noted that "what is crucial" is that "available evidence" provide "a clear understanding of the components and the operation of the challenged measure."[256] Understandably, after 25 pages and over 200 footnotes discussing the evidence the complaining parties had presented about the TRRs measure, the Panel felt that it had "sufficient elements to establish the existence and the precise content of the challenged measure, notwithstanding the fact that the measure is unwritten."[257] Moreover, on the basis of the characteristics of the measure as identified by the Panel, the Panel had no trouble considering the legal claims that the complaining parties brought against the TRRs measure under Articles XI:1 and III:4 of the GATT 1994.

170. The Panel's conclusions are overwhelmingly supported by the record evidence. As discussed above,[258] the evidence shows in detail the five different types of TRRs that Argentina has imposed on economic operators:

> (a) offsetting the value of their imports with, at least, an equivalent value of exports (one-to-one requirement); (b) limiting their imports, either in volume or in value (import reduction requirement); (c) reaching a certain level of local content in their domestic production (local content requirement); (d) making investments in Argentina (investment requirement); and, (e) refraining from repatriating profits from Argentina (non-repatriation requirement).[259]

[251] Panel Report, para. 6.228.

[252] Panel Report, para. 6.225.

[253] Panel Report, para. 6.226.

[254] Panel Report, para. 6.323-6.327.

[255] Panel Report, para. 6.326.

[256] Panel Report, para. 6.325.

[257] Panel Report, para. 6.327.

[258] *See* section V.A. *supra*.

[259] Panel Report, para. 6.155. *Compare* U.S. Panel Request, Japan Panel Request, and EU Panel Request (identifying requirements to: "(1) export a certain value of goods from Argentina related to the value of imports; (2)

The evidence also shows in detail the manner in which the TRRs work together as a single measure for effectuating Argentina's policy goals, with TRRs imposed in tandem with respect to particular companies or industries.[260] The Panel did not need to discuss individually all of the pieces of evidence showing the content of the TRRs measure[261] although it did discuss many of them The Panel certainly did not need to repeat its earlier discussion of them when separately addressing the Japanese claim. Rather, in light of the overwhelming evidence and the Panel's ample discussion of it in the report, Argentina has no basis on which to claim that the conclusion that the measure's content was established with adequate precision amounts to a failure by the Panel to make an objective assessment.

(b) Accepting Argentina's Position On The Level Of Precision Required In Identifying The Content Of An Unwritten Measure Would Make Challenges To Unwritten Measures Virtually Impossible, Enabling Members To Flout WTO Commitments Through Unwritten Rules and Policies – Just As Argentina Has Done.

171. Argentina complains that the Panel did not demand evidence establishing with certainty what the full universe of potential TRRs is, when each will be applied, to which economic operators, and to what extent.[262] As a threshold matter, the TRRs measure as described by the United States had precise content, and was not amorphous or ill-defined as Argentina argues.[263] As the United States explained to the Panel, pursuant to the TRRs measure, "Argentine officials require, as a prior condition for importation, commitments to export a certain dollar value of goods; reduce the volume or value of imports; incorporate local content into products; make or increase investments in Argentina; and/or refrain from repatriating profits."[264] Further the Panel properly understood that requiring the level of detail Argentina thinks necessary "could make it almost impossible in practice to challenge [unwritten] measures."[265] "This is more so," the Panel correctly observed, "in cases where one of the purported characteristics of the challenged measure is precisely its lack of transparency and the broad discretion that the authorities have in its implementation."[266] That is precisely the nature of the TRRs measure at issue here. Argentina, in sum, thinks that the discretionary and non-transparent nature of the TRRs measure immunizes it from challenge in the WTO dispute settlement process. The Panel properly recognized that this cannot be the case.

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limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods.").

[260] *See* section V.A. *supra*.

[261] *Brazil – Retreaded Tyres (AB)*, para. 202.

[262] Argentina's Appellant Submission, paras. 168-172.

[263] Argentina's Appellant Submission, para. 172.

[264] U.S. Opening Statement at the Second Panel Meeting, para. 73.

[265] Panel Report, para. 6.325.

[266] Panel Report, para. 6.325.

172. Indeed, Argentina asserts that the measure was not established with sufficient precision because it is "unclear in any given instance which of the 'certain' economic operators in Argentina the alleged measure potentially will apply to, how their 'contribution to achieving' the objectives of trade balancing and import substitution will be measured and evaluated, or what precisely will be required of those economic operators when the evidently subjective determination is made that the alleged measure should be applied to them."[267] These are points that by definition cannot be established perfectly with respect to a measure that provides discretion to the officials who carry the measure out. And they are not relevant to the crucial question in WTO dispute settlement: whether the measure exists and is consistent with the WTO obligations the responding Member is alleged to have breached.

173. For this reason, the Panel in *EC and certain member States – Large Civil Aircraft* made clear that there is no requirement for the kind of perfect precision that Argentina believes the Panel should have required:

> [W]e see no reason why the precise content of an unwritten measure alleged to have 'normative value' has to arrive at a certain level of specificity in order to be susceptible to challenge in WTO dispute settlement under the SCM Agreement. If a WTO Member considers in good faith that a measure exists that nullifies or impairs benefits that accrue to it under the SCM Agreement, then regardless of how generic its content may be, the WTO Member is entitled to seek redress through WTO dispute settlement. Of course, it may be more difficult to establish that a measure which possesses a generic content breaches a WTO obligation compared with a measure that is more specific. However, we see no reason to exclude the possibility that even measures with generic content might be WTO-inconsistent.[268]

174. In sum, there was no reason for the Panel to have demanded more precision than it did in the identification of the measure at issue. Demanding more would lead to the absurd consequence of insulating from challenge measures that Members attempt to hide by not committing them to writing.

(c) Argentina's Complaints About The Panel's Analysis of the Measure's Content Are Frivolous

175. Argentina asserts that the evidence does not adequately establish the content of the TRRs measure because individual TRRs, such as local content requirements, were not invariably imposed as a condition of importation.[269] The complaining Members established, and the Panel found,[270] that the nature of the TRRs measure is that it gives Argentine officials the ability to impose one or more TRRs as they deem appropriate to advance certain policy objectives, not that Argentina invariably imposes local content requirements or any other TRR as a condition for an

[267] Argentina's Appellant Submission, para. 154.

[268] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.524 (footnotes omitted).

[269] Argentina's Appellant Submission, paras. 174-175.

[270] Panel Report, paras. 6.224-6.231.

economic operator to import. Similarly, contrary to what Argentina argues,[271] there is nothing contradictory about the idea that application of the TRRs measure necessarily implies imposition of a TRR and the Panel's finding that the evidence did not show that two of the five TRRs had ever been imposed "as stand-alone" conditions to import."[272] This simply means that, as the Panel explained, those two TRRs had "been imposed on economic operators in combination with other requirements."[273]

176. Argentina further complains that there was "confusion in the complainants' identification of the constituent elements" of the TRRs measure.[274] Yet to support its assertion of confusion, Argentina points only to the fact that in the EU's first written submission, it described one TRR and the relationship between two others in a manner slightly different from the way they were described by the United States and Japan.[275] In fact, the Panel found the TRRs and their relationship to be as they have been identified by the United States.

177. In any event, the question is not whether the complaining parties described the measure in precisely the same way at all times in their submissions. Rather, it is whether the *evidence* permitted the Panel to identify adequately the content of the measure at issue. The Panel concluded that the evidence established the existence of the five TRRs as identified in the panel requests of all three complaining parties:

> (a) offsetting the value of their imports with, at least, an equivalent value of exports (one-to-one requirement); (b) limiting their imports, either in volume or in value (import reduction requirement); (c) reaching a certain level of local content in their domestic production (local content requirement); (d) making investments in Argentina (investment requirement); and, (e) refraining from repatriating profits from Argentina (non-repatriation requirement).[276]

178. Argentina also appears to claim that the Appellate Body's report in *US – Zeroing (EC)* set out a standard for identifying the precise content of an unwritten measure, and that the Panel failed to apply this standard.[277] Tellingly, Argentina never indicates what it thinks this standard is. Indeed, the Appellate Body did not set forth any separate standard for establishing the content of unwritten measures for purposes of an as such challenge. Rather, the Appellate Body simply

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[271] Argentina's Appellant Submission, para. 175.

[272] Panel Report, para. 6.259.

[273] Panel Report, para. 6.259.

[274] Argentina's Appellant Submission, paras. 176-179.

[275] Argentina's Appellant Submission, paras. 176-179.

[276] Panel Report, para. 6.155. *Compare* U.S. Panel Request, Japan Panel Request, and EU Panel Request (identifying requirements to: "(1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods.").

[277] Argentina's Appellant Submission, para. 179.

considered a variety of pieces of evidence[278] that were indicative of the content of the measure before concluding that the evidence in the record was sufficient to identify its precise content.[279] That is precisely what the Panel did here, painstakingly establishing not just the content of each individual TRR, but also the way that they operate together as a single measure to support Argentina's import substitution policies.

179. In these circumstances, Argentina has no basis on which to claim that the content of the measure was not established.

ii. Argentina Fails to Show Distortion or Disregard in the Panel's Evaluation of General And Prospective Effect, and The Panel Correctly Concluded That The TRRs Measure Has That Effect

180. Argentina's allegations of error in the Panel's findings that the TRRs measure has general and prospective effect are likewise without merit.

181. The Panel properly rejected Argentina's argument that, just because the zeroing methodology at issue in *US – Zeroing (EC)* had been applied to all AD determinations and because *EC – Approval and Marketing of Biotech Products* involved a blanket moratorium on approvals of genetically modified crops, the panel should consider only measures applicable to all cases to be measures of general application.[280] Panels interpreting the term "general application" in the context of Article X of the GATT 1994 had given this same term a much broader interpretation. Indeed, the Panel here explained that panels in Article X disputes had interpreted the term to refer to measures applicable to "an unidentified number of economic operators"[281] or "a range of situations or cases,"[282] as opposed to measures addressed to a single company or applied to a single shipment. The Panel here also correctly observed that the panel in *China – Raw Materials* "considered that 'a measure that has the potential to affect trade and traders' was of general application."[283]

182. Argentina's logic would suggest that a measure providing options to officials to take certain actions in a range of future circumstances could never be considered "generally applicable," and therefore, under Argentina's view, could never be subject to an as such challenge. In other words, Argentina thinks that by merely building options into a measure, a Member can require other Members to wait for individual applications of the measure and challenge only those individual applications. The Panel properly did not adopt this view, which would open the door to massive and persistent evasion of WTO commitments.

183. In fact, hundreds of exhibits provided by complainants demonstrate that the TRRs

[278] *US – Zeroing (AB)*, paras. 201-202.

[279] *US – Zeroing (AB)*, para. 204.

[280] Panel Report, paras. 6.328-6.332.

[281] Panel Report, para. 6.329 (quoting *US – Underwear (Panel)*, para. 7.65).

[282] Panel Report, para. 6.331 (quoting *EC – Selected Customs Matters (Panel)*, para. 7.116).

[283] Panel Report, para. 6.331 (quoting *China – Raw Materials (Panel)*, para. 7.1098).

measure applies generally across products and sectors. These include autos and auto parts, trucks, motorcycles, agricultural machinery, books and other publions, audiovisual products, tires, agricultural products, white goods, electronic products, clothing, retail, toys, pharmaceuticals, auto software and services, pork, mining related imports, liquor, and consumer goods.[284] The Panel clearly did not fail to make an objective assessment of the facts when finding the TRRs measure to have general effect.

184. Argentina's argument that the Panel failed to make an objective assessment when finding that the measure has prospective effect is equally absurd. Citing *US – Shrimp (Viet Nam)*, Argentina appears to suggest that the Panel should not have found prospective effect because the TRRs measure is not applied in all cases.[285] But nothing about the Panel's decision in *US – Shrimp (Viet Nam)* suggests such a requirement. Rather, that Panel was clear that a variety of types of evidence were relevant to whether a measure is prospective.[286] Argentina's suggestion that a measure giving discretion to officials cannot be found to be prospective not only flies in the face of an ordinary understanding of the term "prospective" – "[c]haracterized by looking forward into the future. … [c]oncerned with or applying to the future; operative at a future date"[287] – but would lead to the same absurd result as its suggestion that only measures applied without discretion in all cases can be found to be general: that Members could insulate their measures from challenge by making them discretionary.

185. Argentina also seems to argue that the Panel found that the measure has prospective effect because it had been applied repeatedly.[288] However, the Panel did not find the measure to be prospective solely on the basis of mere repeated application. Rather, the Panel cited its repeated application as just one part of a picture from which it was logical to infer that the TRRs measure would be applied into the future.

186. Indeed, contrary to what Argentina suggests, the findings showing the prospective nature of the TRRs measure were robust. As discussed above, when finding the existence of, and elucidating the content of, the TRRs measure, the Panel made findings that left no doubt of its prospective effect.[289] And when explicitly concluding that the TRRs measure has prospective effect, the Panel highlighted features of it that demonstrate its prospective effect.

187. The Panel observed that the TRRs measure had been applied for several years, and that the measure could be applied to any sector or economic operator.[290] It also explained that:

[284] *See* Panel Report, paras. 6.155-6.216 and exhibits cited therein.

[285] Argentina's Appellant Submission, paras 195-197.

[286] *US – Shrimp (Viet Nam) (Panel)*, para. 7.112.

[287] New Shorter Oxford English Dictionary, p.2385.

[288] Argentina's Appellant Submission, para. 193.

[289] *See* section V.B.3.b *supra*.

[290] Panel Report, para. 6.342.

> Argentina's imposition of the TRRs measure reflects a deliberate policy, as it constitutes repeated actions, coordinated by the highest authorities, including the President, the Minister of Industry and the Secretary of Trade.[291]

The Panel further highlighted the fact that the policy of "managed trade"[292] or "trade administration,"[293] which the TRRs measure is part of and implements, is publically announced, and, crucially, that Argentina's Secretary of Domestic Trade had been explicit that this policy would continue.[294]

188. The Panel explained that "[e]vidence on the record suggests that these commitments will continue to be required unless and until the policy is repealed or modified."[295] Indeed, there was ample evidence in the record to support the Panel's findings, and the Panel referred back to prior portions of its report when discussing the prospective nature of the TRRs measure.[296] The Panel explained earlier in its report that the TRRs are in line with the macroeconomic objectives laid out in Argentina's Industrial Strategic Plan 2020 (*Plan Estratégico Industrial 2020*), which called for protection of the domestic market and import substitution, an increase in exports, and the promotion of productive investment.[297] The Panel further noted that TRRs had been imposed on "a broad range of economic sectors and economic operators," – a fact amply demonstrated in the Panel's discussion of the TRRs[298] – including at least 6 of the 11 industrial sectors addressed in the Industrial Strategic Plan 2020.[299] Because the TRRs measure is of general effect and implements policies that the evidence shows Argentina plans to continue, the Panel's conclusion that the measure would continue to be applied in the absence of a future policy change is not just supported, but the only logical conclusion that could be drawn from the evidence.

189. Statements in the record from Argentine officials also made completely clear that the TRRs measure is prospective. Examples of such statements include the following:

- According to Secretary Moreno: "When we study the pre-import affidavit (DJAI), we are going to consider the balance of foreign exchange, as well as the pace of the company's prices. We will do this on a company-by-company basis. And business owners understand what the right road is."[300]

- Secretary Moreno also stated: "For each dollar used to acquire goods abroad, you

[291] Panel Report, para. 6.340.

[292] Panel Report, para. 6.341.

[293] Panel Report, para. 6.341, fn. 702.

[294] Panel Report, para. 6.341.

[295] Panel Report, para. 6.341.

[296] Panel Report, para. 6.340-6.341 (citing earlier paragraphs).

[297] Panel Report, para. 6.161.

[298] *See* Panel Report, paras. 6.155-6.216 and exhibits cited therein.

[299] Panel Report, para. 6.158.

[300] Exhibit JE-8.

> will have to generate another in this country. If that's not convenient for you, bring me the keys to your company . . ."[301] and "for every dollar's worth [that companies] import, they must export one"[302]
>
> - A Ministry of Industry press release explained that "[f]rom now on, imports must be compensated for by exports, which have one year to be fulfilled . . . or alternatively, an irrevocable capital contribution can be made . . . in the amount of the net total of imports."[303]
>
> - Another Ministry of Industry Press Release stated: "Giorgi ratified 'the State policy of administering trade through the carrot and the stick, because the companies that take advantage of internal demand have to create Argentine employment.'"[304]
>
> - Argentina's Secretary of Commerce noted in a news interview that: "What they have to understand is that every industry has to prepare to be self sufficient when it comes to foreign exchange: for every dollar's worth they import, they must export one.[305]
>
> - Argentina's Minister of Commerce explained that: "[W]e will keep demanding investments from those who want to sell here."[306]

190. Even Argentina's President herself discussed the fact that the TRRs measure would be applied into the future:

> President Cristina Kirchner … acknowledged that the Government is often criticized for its "heavy hand" in enforcing complex non-automatic import licensing renewal requirements for hundreds of industrial products. "For Argentina, we will continue to be heavy-handed. If that's what it means to be heavy-handed – to increase employment in Argentina, to increase production in Argentina, to make more parts in Argentina, then it is our duty to do it for 40 million Argentines".[307]

The evidence gave no reason to doubt that the Argentine government would act consistently with President Kirchner's statement. Application of the TRRs measure would continue.

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[301] Exhibit JE-249.

[302] Exhibit JE-3.

[303] Exhibit JE-1.

[304] Exhibit JE-203.

[305] Exhibit JE-3. The Argentine Presidency also issued a press release highlighting commitments by appliance manufacturer Electrolux to achieve a trade balance, and quoting an Electrolux official as stating that" "Electrolux committed to comply with the requirements that the government imposes on companies, so that for every dollar imported there is another that is exported." Exhibit JE-145.

[306] Exhibit JE-320 ("vamos a seguir exigiendo inversiones a los que quieran vender aquí:").

[307] Exhibit JE-10.

D. Conclusion

191. Argentina provides no reason for the Appellate Body to reverse the Panel's well-reasoned and overwhelmingly supported findings that Argentina maintains a TRRs measure through which it pressures economic operators to comply with its economic policy goals, on pains of being unable to make importations. Tellingly, Argentina has not even appealed the Panel's conclusion that the measure the complaining parties identified breaches Article XI of the GATT 1994. Argentina's measure restricts trade in precisely the manner that GATT Article XI sought to prohibit. The Panel properly declined to let Argentina hide its non-compliance with the GATT 1994 behind the unwritten nature of its measure.

VI. CONCLUSION

192. Based on the foregoing, the United States respectfully requests the Appellate Body to reject all of Argentina's claims on appeal, and uphold the Panel's findings.