ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

(AB-2014-9 / DS438, DS444, DS445)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

November 3, 2014

Good morning, Presiding Member and members of the Division:

1. On behalf of the United States, I would like to thank you, as well as the Secretariat assisting you, for your work on this appeal.

2. The relevant issues have been well traversed in the written submissions of the co-complainants as well as the oral statements this morning. Therefore, we would like to focus these remarks on a few over-arching points.

3. *First*, there is a voluminous record of evidence in this dispute showing that Argentina breaches its obligations under Article XI of the GATT 1994, using the DJAI and the TRRs measure to restrict the importation of goods into Argentina. The evidence that the complaining parties put on the record has revealed Argentina's operation of an import licensing scheme, the DJAI, in which its officials have and exercise discretion to grant or deny permission to import, and it has showed that pursuant to an unwritten measure, the TRRs measure, Argentine officials extract commitments from economic operators that will bolster the Argentine government's economic and industrial strategies in exchange for permission to import. The Panel thoroughly reviewed this evidence and found that it shows just what the complaining parties in this dispute alleged. Both in front of the Panel and now on appeal, Argentina has refused to confront this evidence.

4. *Second*, instead of confronting the evidence, Argentina has sought throughout this dispute to invent artificial technicalities and false, formalistic distinctions in an attempt to insulate its conduct from scrutiny. Those technicalities and distinctions, however, are either not based on any text in the covered agreements or are based on a plainly erroneous reading, disregarding pertinent text.

5. For instance, Argentina's challenge to the Panel's jurisdiction in essence asks the Appellate Body to find that a request for consultations must set forth the exact contours of a challenged measure with the same precision required in a request for the establishment of a panel, and use exactly the same terms. Argentina's argument disregards the clear textual difference in the DSU on the precision required in identifying a measure at issue in a request for consultations and a panel request. Argentina's argument also ignores that the requests at issue in this dispute identify the TRRs measure in almost identical terms.

6. From a broader standpoint, Argentina's argument ignores the fact that one object of consultations is to provide "the parties an opportunity to 'define and delimit' the scope of the dispute.[1] If a consultations request really needed to specify the measures at issue with the exactitude that Argentina suggests, and needed to match the framing of the panel request word for word, there would be no room for parties to refine their understanding of the measures at issue during consultations. And if that understanding did become sharper as a result of consultations, a complaining party could not reflect that greater precision in the panel request for fear of inviting a successful jurisdictional challenge.

7. This would serve neither the interests of the panel, in considering the nature and scope of the matter referred to the DSB on which it should make findings,[2] nor of WTO Members who may wish to consider whether they have interest in becoming a third party to a dispute,[3] nor, indeed, of a responding party, which would be deprived of the enhanced precision in the identification of the measure of concern. On Argentina's view, to the extent that a complaining

[1] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras 54, 58).
[2] DSU, Articles 7.1, 11.
[3] DSU, Article 10.2.

party learned something during one consultation that affected its understanding of a measure, it would need to file a new consultations request and consult a second time before requesting establishment of a panel to consider the same measure, wasting time and resources and undermining the "prompt settlement" of disputes which is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[4]

8. With respect to the DJAI, Argentina simply does not appropriately read the text of the GATT 1994 according to its ordinary meaning in its context, as previous WTO reports have done. The hortatory language in Article VIII:1(c) of the GATT 1994 does not create any exception to the obligations in Article XI. Thus, Argentina's argument that any measure that a Member characterizes as a "formality" or a "requirement" under Article VIII is exempt from the disciplines of GATT Article XI is simply misplaced.

9. Similarly, nothing in the text of either Article VIII or Article XI supports any limitation on the scope of Article XI solely to trade restrictions that are "substantive" and not to trade restrictions that a Member characterizes as "procedural". Article XI by its terms applies to prohibitions or restrictions on importation in whatever form they take, other than duties, taxes, or other charges. The Panel correctly found that the DJAI Requirement is a non-automatic trade restriction, as a result of the discretion given to unidentified Argentine authorities to withhold approval to import products for unidentified reasons and for indeterminate periods of time.

10. With respect to the TRRs measure, Argentina again seeks to create formalistic hurdles to evade scrutiny of its breaches of WTO obligations. Argentina urges the Appellate Body to find

[4] DSU, Article 3.3.

that the Panel was required to apply an "as such" label to the complaining Party's claims – even though the "as such" and "as applied" labels are merely heuristic devices, as the Appellate Body has noted,[5] and not DSU terms that a party must apply to its complaint. And Argentina asks the Appellate Body to find that the complaining Parties, in order to challenge the TRRs measure, were required to prove more than just the existence of the measure alleged in their panel requests, but also other facts. Again, the DSU contains no such requirement, but instead requires only that a complaining party identify a "measure[] … taken" by another Member,[6] whether written or unwritten, that is the subject of the claim.[7]

11. Argentina's attempted evasion of WTO scrutiny is even more striking given that Argentina effectively asks the Appellate Body to ignore the fact that the Panel, when examining the joint claims, *did* find the extra facts that Argentina deems necessary even under its approach *and* that the Panel then later in its report *explicitly* set forth conclusions under that approach – about the exact same TRRs measure, and on the basis of the same evidence. Argentina seeks reversal of the findings on the TRRs measure on the basis of false formalism and not substance.

12. Even when raising what are ostensibly DSU Article 11 claims, Argentina essentially asks the Appellate Body to establish artificial standards that would make unwritten or discretionary measures impossible to challenge. Argentina criticizes the Panel's findings on the ground that the complaining parties did not establish that *all* TRRs were *always* imposed, or that *all* operators would be subjected to TRRs or *exactly* which TRRs would be imposed upon them in the future. Argentina's approach would mean that an unwritten measure could not be challenged

[5] Appellate Body Report, *US – Continued Zeroing*, para. 179.
[6] DSU, Article 4.2 ("Each Member undertakes to … afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.").
[7] *See* DSU Articles 4.4, 6.2.

unless it applied to *all* operators at *all* times in the *identical* way – a requirement not set out in the DSU and not inherent in the notion of a "measure" taken by a Member.

13. In considering Argentina's appeal, the United States respectfully requests the Appellate Body to bear in mind the negative consequences to the dispute settlement system that could result from endorsing those false hurdles. For example, Argentina's arguments regarding the TRRs measure would severely undermine the ability of WTO Members to challenge unwritten or discretionary measures that impair their WTO rights. By insisting on use of the "as such" and "as applied" labels, and on a demonstration of general and prospective effect for a challenge to an unwritten measure used to extract commitments from various economic operators, Argentina would immunize from challenge the numerous unwritten measures that do not fall neatly into one category or the other – as indeed, many unwritten measures will not.

14. And Argentina's invitation to require that the content of unwritten measures be established with more precision than necessary for a challenge to a written measure would impose an extra burden – unsupported by anything in the DSU – on parties seeking to challenge precisely the measures whose content is most difficult to demonstrate. This too would only incentivize Members to evade their WTO obligations through unwritten measures, mimicking what Argentina has done here.

15. Likewise, Argentina's theory that only those unwritten measures that are applicable in all circumstances should be challengeable "as such" in WTO dispute settlement would preclude challenges to some of the most pernicious and trade restrictive measures – those, like Argentina's, where government officials have discretion, and can choose which countries, importers, or shipments will be subject to WTO-inconsistent restrictions. A Member seeking to

evade WTO commitments would be able to do so by simply ensuring some variation in the way that its officials apply an unwritten measure.

16. In sum, Argentina's arguments amount to request after request for the Appellate Body to endorse false and formalistic distinctions and standards – distinctions and standards that would have the effect of deferring or preventing WTO scrutiny of measures the Panel has found, on the basis of overwhelming evidence, are restricting the importation of goods into Argentina.

17. Before concluding, the United States would comment briefly on Japan's request that the Appellate Body reverse the Panel's exercise of judicial economy with respect to the claim under Article X:1 of the GATT 1994 and complete the analysis, finding the TRRs measure contrary to Article X:1.

18. The United States fully agrees that the Panel has already made findings that demonstrate the existence of a breach of Article X:1, and that, as Japan pointed out, Argentina has not specifically contested the claims that the TRRs measure breaches Article X:1. In these circumstances, and if the Appellate Body upholds the Panel's findings that the TRRs measure exists, as it should, then there would be no disagreement on issues of fact or law. Accordingly, the Appellate Body could reverse the Panel's exercise of judicial economy and instead complete the analysis and conclude that Argentina breached Article X:1 by failing to publish the TRR measure. This would ensure that there is no uncertainty that it would be inconsistent with the DSB's recommendations in this dispute for Argentina to maintain unwritten restrictions on imports.

19. Presiding Member, members of the Division, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions you may have.