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ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

(DS444)

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

December 10, 2013

1. Good afternoon, Madam Chairperson and members of the Panel. On behalf of the United States, we would like to begin by again thanking the Panel and Secretariat for their work in helping to resolve this dispute.

I. INTRODUCTION

2. The United States and co-complainants have submitted evidence and legal analysis demonstrating that Argentina's advance import affidavit (or "DJAI") Requirement and the Restrictive Trade-Related Requirements (or "RTRRs") are inconsistent with Argentina's WTO commitments. Through these measures, Argentina arbitrarily restricts imports and extracts commitments from importers as a condition for importation to advance its economic policy goals.

3. To date, Argentina has not answered complainants' *prima facie* case. Rather, Argentina has raised issues and arguments not directly relevant to the Panel's resolution of this dispute. Argentina's reliance on the SAFE Framework illustrates its attempt to rebut the complainants' *prima facie* case with irrelevant considerations. In its first written submission and at the first substantive meeting, Argentina placed major emphasis on the theory that the DJAI Requirement is "specifically designed in accordance with the SAFE Framework."[1] However, once it became clear that this argument was entirely untenable, Argentina's November 19, 2013, comments conceded that the "legal question" in this dispute "is entirely unrelated to, and does not depend on, whether the DJAI procedure wholly or partly implements the SAFE Framework into Argentine law."[2]

4. In its second written submission, Argentina focuses on additional matters that, again, do

[1] Argentina's First Written Submission, pp. 40-57 and para. 192.
[2] Letter of Argentina to Chair of the Panel (DS438/444/445), Nov. 19, 2013, p. 2; *see also* Argentina's Second Written Submission, para. 201.

nothing to rebut the complainants' *prima facie* case showing that Argentina's measures breach numerous WTO obligations. In particular, Argentina raises irrelevant factual assertions – such as the amount of foreign direct investment ("FDI") in Argentina and statements of company officials unrelated to this dispute[3] – and non-existent legal burdens – such as the purported need to show quantitative "trade effects" under Article XI:1 of the GATT 1994[4] or meet a special burden of proof for unwritten measures.[5]

5. In its statement today, the United States will respond to the evidence and legal arguments that Argentina presented, for the first time, in its second written submission, and explain why none of Argentina's arguments rebut the *prima facie* case established by the United States and its co-complainants.

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

6. Instead of rebutting the U.S. *prima facie* case that the DJAI Requirement is inconsistent with Article XI:1 of the GATT 1994, Argentina mischaracterizes the U.S. positions and otherwise raises irrelevant matters. In its second written submission, Argentina implies that complainants have accepted Argentina's categorization of measures as "procedural" or "substantive" in nature.[6] This is wrong and without any basis in any U.S. written or oral submission. Rather, as the United States has previously explained, the DJAI Requirement is not merely procedural – as Argentina argues – but rather is itself a restriction on the importation of goods.[7] And indeed, the focus of

[3] Argentina's Second Written Submission, paras. 2-46.
[4] *See, e.g.*, Argentina's Second Written Submission, paras. 151-52.
[5] *See, e.g.*, Argentina's Second Written Submission, paras. 72-117.
[6] Argentina's Second Written Submission, para.119.
[7] *See, e.g.*, U.S. First Opening Statement, para. 10.

complainants' Article XI:1 claim is on this restriction, and not on the procedural aspects of the DJAI Requirement. Moreover, as the United States has explained, there is no basis for the procedural-substantive distinction on which Argentina attempts to rely.

7. Argentina states with respect to the DJAI Requirement that "complainants have not disputed[] that the substantive rules affecting the importation of goods are set forth elsewhere in Argentine law."[8] To the contrary, as the United States has explained,[9] *there are no rules under* the DJAI Requirement or elsewhere that limit the discretion of Argentine officials to restrict imports through the use of the DJAI system. Indeed, Argentina has pointed to no criteria for the evaluation of a DJAI application, potential reasons for denial, or requirements for resolution of an observation anywhere in Argentina's laws.

8. Argentina also implies that complainants take the position that the claims with respect to the DJAI Requirement must be completely independent from any "substantive" requirement, including the RTRRs.[10] That is not the case. As noted, the distinction between substantive and procedural requirements is one that has been invented by Argentina in this dispute.

9. Further, the existence of the RTRRs helps illustrate that the DJAI requirement can be used, and is used, to restrict imports. That is, although the measures are distinct, the RTRRs measure is relevant to the U.S. claim regarding the DJAI Requirement because Argentina enforces the RTRRs measure by withholding approvals in the DJAI system, which demonstrates the discretionary nature of the licensing requirement. The DJAI Requirement imposes virtually no restriction on agencies' ability to block the approval of applications. That discretion enables the Secretariat of

[8] Argentina's Second Written Submission, para. 119.
[9] *See, e.g.*, U.S. Second Written Submission, paras 16-17; Annex 1, paras. 30-31.
[10] Argentina's Second Written Submission, para. 120.

Domestic Trade (or "SCI") to withhold permission to import until the importer agrees to undertake RTRR commitments.

10. However, this does not mean that the two measures are the same. To the contrary, DJAI approvals may be withheld for virtually any reason, or none at all, as was the case in the Argentine domestic court proceedings cited by the complainants.[11] And, compliance with RTRRs may be a prior condition for approval of other necessary import permissions.

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

11. In its second written submission, Argentina continues to assert that Article VIII creates an exception to Article XI for some undefined set of "formalities." For the reasons the United States has set out previously,[12] that is not the case. As an initial matter, the U.S. claim under Article XI:1 does not relate to the "formalities" connected to the DJAI requirement, but to the fact that import transactions cannot be completed unless and until an importer receives approval through the DJAI system, which may be withheld for non-transparent, discretionary reasons.

12. Argentina also argues that, under the U.S. interpretation of Article X1:1, "*any* burden on trade" would be a "restriction" under Article XI:1.[13] That is not the U.S. position. The U.S. claims do not relate to "*any* burden," but rather the burden imposed by the DJAI Requirement. A measure is subject to Article XI:1 only if it falls within the meaning of "restriction" in that provision – *i.e.*, because it imposes a "limiting condition" on importation.[14] The DJAI

[11] *Zatel* (JE-57); *Wabro S.A.* (JE-58); *Yudigar S.A.* (JE-59); *Fity SA* (JE-302).
[12] U.S. First Opening Statement, paras. 17-21; U.S. Second Written Submission, paras. 51-63.
[13] Argentina's Second Written Submission, para. 127 (emphasis added).
[14] *See* U.S. First Written Submission, Section IV.A.1.

Requirement is such a restriction because: (a) approvals are not granted in all cases; (b) approvals are discretionary and are made contingent on compliance with RTRRs; and (c) approvals are granted only after delay.[15] Argentina questions how one is to know when a measure falls "into the realm of a prohibited quantitative restriction under Article XI:1."[16] The answer is that the measure must be evaluated against the obligation set out under the terms of the relevant article, and here the complainants have amply demonstrated how the DJAI Requirement serves as a "restriction" on imports, precisely as Argentine authorities intended.

13. Argentina cites Article 10 of the October 23, 2013 negotiating text of the trade facilitation agreement in support of its position that "formalities" are excepted from the disciplines of Article XI by Article VIII. As already explained, the U.S. Article XI:1 claim does not concern "formalities" related to the DJAI Requirement, but the Requirement itself. Further, Argentina has not explained how the trade facilitation agreement, until recently under negotiation, has any interpretive relevance in this dispute. And indeed, neither the October 23 draft, nor the final text constitutes a subsequent agreement of the parties on the interpretation of Article XI, so it does not have interpretive value under Article 31 of the Vienna Convention for understanding the obligations under Article XI:1.

14. Even aside from the lack of relevance of the new agreement, Argentina's approach ignores the interaction of the various provisions of the GATT 1994. Argentina relies in particular on Article 10.1.1(c) of the October draft, which requires that Members ensure, as appropriate, following the review provided for in that Article, that formalities "are the least trade restrictive

[15] U.S. First Written Submission, Section IV.A.1.
[16] Argentina's Second Written Submission, para. 127.

measure chosen." From this, Argentina argues that Article XI:1 cannot apply to any restriction arising from a "formality."[17] Argentina's argument makes no sense. Article XI is an independent obligation from anything in the trade facilitation text. The trade facilitation provision calling for least trade restrictive formalities does not speak to whether or not any particular measure amounts to a restriction within the meaning of Article XI.

15. In addition, Argentina's argument ignores the fact that Members can and do impose restrictions that are inconsistent with Article XI:1 but that are excepted from that provision under Article XX or another provision of the WTO Agreement. In other words, any formalities that amount to a restriction are prohibited by Article XI:1, but a Member may maintain such a restriction if it is excepted by another provision. Article 10 of the October draft does not change this fundamental architecture, but rather would simply minimize the incidence and complexity of formalities by ensuring that they are the least trade restrictive measure chosen out of those that are reasonably available.

16. For these reasons and those set out in prior U.S. submissions, Argentina's argument that Article VIII creates an exception to Article XI:1 for "formalities" is without merit, and Article VIII provides no basis to avoid a finding that the DJAI Requirement imposes a "restriction" on imports in breach of Argentina's obligations under Article XI of GATT 1994.

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

17. In its second written submission, Argentina reiterates its novel theory that Article XI:1 requires a statistical demonstration of quantifiable trade effects to show that a measure is

[17] Argentina's Second Written Submission, paras. 130-33.

inconsistent with that provision.[18] Argentina's theory is based on the existence of the word "quantitative" in the title of Article XI.

18. The ordinary meaning of the text of Article XI:1 does not support Argentina's theory. Article XI:1 states that *no . . . restrictions . . . shall be maintained*. As a number of WTO panels have found, this obligation is not limited to quantitative restrictions or those with actual trade effects.[19] Article XI:1 states that the covered restrictions include restrictions whether made effective through quotas, or import or export licenses, or other measures, thus confirming that a restriction can take a number of different forms. It then excludes duties, taxes or other charges, and Paragraph 2 of Article XI contains limitations on the application of the first paragraph. None of those exclusions or limitations extend, as Argentina would argue, to restrictions that cannot be shown to result in quantifiable trade effects.

19. In other words, what Article XI:1 does *not* contain is any indication that it is limited to those restrictions that can be statistically demonstrated through quantifiable trade effects; in fact the word "quantifiable" does not appear anywhere, including in the title. In addition to the textual points the United States has made in prior submissions, we would note that Article XI:2(b) carves out from Article XI:1 "import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." The implication is that "standards" or "regulations" can serve as "restrictions" that are inconsistent with Article XI:1. But, standards and regulations are not

[18] Argentina's Second Written Submission, paras. 137, 140-50.
[19] *See India – Quantitative Restrictions (Panel)*, para. 5.142; *India – Autos (Panel)*, paras. 7.277-78; *China – Raw Materials (Panel)*, para. 7.946; *Colombia – Ports of Entry*, paras. 7.253-56; *Brazil – Retreaded Tyres (Panel)*, paras. 7.371-73.

"quantitative" or "quantifiable" in nature.

20. The title of Article XI does not support Argentina's position against the clear text of the provision itself. This can be illustrated with the example of a numerical quota, which certainly would be a "quantitative" restriction. Nowhere in the title of Article XI, or elsewhere in the WTO Agreement, is there any support for the proposition that a numerical quota is consistent with Article XI unless and until the quota results in quantifiable trade effects. Such an approach would have the untenable result that the exact same measure adopted by one Member could be WTO-consistent but for another Member that measure could be WTO-inconsistent. More specifically, for one Member, a quota for a product would not be inconsistent with Article XI because it has no quantifiable trade effects, while the same quota for the same product for another Member would be inconsistent because it does.

21. Leaving aside for the moment that the title of Article XI does not support Argentina's position, Argentina places far too much interpretive weight on the title. In each of the disputes cited by Argentina,[20] the Appellate Body or panel noted that the title was *consistent with* the interpretation accorded to the provisions of the relevant article by their terms; the title did not imbue the article with a new and different meaning, nor should it do so here.

22. Finally, the United States would make some additional observations on the type of measures covered by Article XI. Within the context of Article XI:1, including the title, a restriction is not just any burden on an import transaction. As past panels have said, a restriction is a "limiting condition" on imports. Many documentation requirements may place some burden

[20] Argentina's Second Written Submission, para. 143 (citing *EC – Bananas III (AB)*, *US – Carbon Steel (AB)*, *US – Softwood Lumber IV (AB)*, and *EC – Customs Matters (Panel)*).

on trade transactions, but they do not all *limit* or *restrict* that trade.

23. The DJAI Requirement *does* limit or restrict trade; even where all information is submitted, permission for an import transaction may be withheld for virtually any reason. And, the United States has shown that it is withheld for virtually any reason, at the discretion of Argentine officials. Thus, the Requirement limits or restricts trade by imposing a limiting condition on that trade.

24. This interpretation of Article XI:1 is consistent with the Appellate Body's consideration of the concept of "restriction" in *China – Raw Materials* and subsequent disputes, which nowhere indicates that a finding of a restriction requires the demonstration of quantifiable trade effects.[21] And contrary to what Argentina attempted to imply this morning, all that the Appellate Body said in *China – Raw Materials* is that Article XI covers those prohibitions and restrictions that have a limiting effect. This is very different from requiring a demonstration of quantifiable effects to show a breach of that provision.

25. Further, the logical leap that Argentina makes, from the Appellate Body's discussion of "restriction" under Article XI:1 in *China – Raw Materials*, to the conclusion that a complainant must demonstrate trade effects through statistical or quantitative data contradicts the findings of the Appellate Body and past panels that the enforceability of commitments in the WTO agreements does not turn on whether a Member's current trade is directly impacted.[22] Those findings confirm the plain meaning of the text of Article XI:1 – which contains no requirement that

[21] U.S. Second Written Submission, paras. 46-50; U.S. Response to First Panel Questions, para. 5.
[22] *See, e.g.*, *EC – Bananas III (AB)*, para. 136; *see also id.* paras. 252-53 (quoting *US – Superfund (GATT Panel)*, para. 5.1.9); *Argentina – Hides and Leather*, para. 11.20; *Turkey – Textiles (Panel)*, paras. 9.202-06; *Colombia – Ports of Entry*, paras. 7.252-54.

a measure result in quantifiable trade effects to qualify as a restriction.

26. Putting aside the fact that no evidence of "trade effects" or quantifiable effects is needed to establish a breach of Article XI, we note that Argentina has put forward Exhibit ARG-65 to try to support its argument that the DJAI Requirement is not having a restrictive effect on trade. This alleged evidence is not relevant to resolving the legal issue before the Panel, but in any event, the exhibit, prepared by the Argentine government itself, is highly flawed and fails to demonstrate what Argentina contends.

27. First, the analysis fails to include an adequate assessment of the impact of the DJAI Requirement. In other words, it does not adequately isolate the impacts of the DJAI Requirement and has failed to model what the economy would look like in the absence of the DJAI policies.

28. Second, the report examines the relationship between imports and Argentine economic growth (GDP) using a simple model specification which does not adequately control for all the other variables that could impact imports during the time period examined. The analysis, to have any validity at all, would need to adequately control for these other variables to avoid biased estimation. Further, the correlation that Argentina finds does not address causation – that is, whether changes in GDP cause the change in imports, or changes in imports cause changes in GDP.

29. Third, Argentina's use of aggregate trade data is not useful for understanding how trade flows across sectors and time are impacted by the DJAI Requirement. For example, Argentina's energy imports from the United States have comprised an increasing share of total imports,[23] and the United States is not aware that the DJAI is used to restrict energy imports. The increasing

[23] *See* US - Argentina Imports and Exports, Chart 3 (US-2).

importation of energy products obscures the impact of its trade-restrictive measures on the multitude of other products imported from the United States. In addition, the DJAI Requirement may have varying impacts over time and products. One feature of a discretionary import licensing system is that it can be used selectively to restrict trade more or less for certain time periods, or with respect to particular products.[24] An aggregate analysis of trade is unlikely to reflect the selective, discretionary impact of such a measure.

30. Finally, Argentina's approach cannot be expected to fully demonstrate a credible impact of the DJAI Requirement on Argentina's imports. A much longer time frame and more data would be needed to discern the effect of a restriction imposed on all imports into a country.

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

31. The United States has presented more than sufficient evidence to establish a *prima facie* case that the DJAI Requirement is inconsistent with Article XI:1. In its second written submission, Argentina mischaracterizes the U.S. case in this dispute when it states that the "principal evidence relied on by the complainants" to support the claims related to the DJAI Requirement are the surveys conducted by the U.S. Chamber of Commerce (JE-56) and the Government of Japan (JE-312).[25]

32. This is wrong. The surveys are only one element of the extensive evidence submitted by the United States and its co-complainants. Moreover, the primary evidence relied upon by the United States consists of the legal instruments establishing the DJAI Requirement, such as

[24] *See Turkey – Rice*, para. 7.134.
[25] Argentina's Second Written Submission, para. 154.

Resolutions 3252 and *3255*, and related guidance issued by the Argentine government. This evidence alone demonstrates that the DJAI Requirement is a discretionary, non-automatic import licensing requirement inconsistent with Article XI:1 of the GATT 1994, as prior panels have found,[26] and the Import Licensing Agreement. In particular, by virtue of the system established by these instruments, any participating agency may block an import transaction for virtually any reason whatsoever, unrestrained by any evaluation criteria or other limits on its discretion.[27]

33. To address Argentina's criticisms of the U.S. Chamber of Commerce survey, the United States would note that the survey is not, and does not purport to be, scientific in nature. Rather, it is an informal voluntary survey circulated by the U.S. Chamber to its members. That said, it includes responses from 45 companies across a variety of sectors which, together, applied for a minimum of 2,650 DJAI approvals.[28] As such, the information contained therein is probative of the general experience of U.S. companies exporting to Argentina and Argentina's restrictive application of the DJAI Requirement and imposition of RTRRs.

34. And of course, the United States has submitted extensive additional evidence, including statements by Secretary of Domestic Trade Moreno and other government officials, the findings of Argentine domestic courts, publications of trade associations, affidavits provided by U.S. companies, as well as the surveys. All of this evidence, which is consistent and thus is mutually supportive, confirms that Argentina does in fact use the DJAI Requirement to restrict imports of goods into the country.

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[26] *India – Quantitative Restrictions (Panel)*, para. 5.142; *China – Raw Materials (Panel)*, para. 7.946.
[27] *See* U.S. First Written Submission, Section III.A.2.
[28] *See* U.S. Responses to First Panel Questions, para. 48.

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

35. In its second written submission, Argentina speculates that the United States has "distanced" itself from its claims under the Import Licensing Agreement and has a "reluctance to focus" on those claims.[29] This speculation is unfounded. The only reason that the second U.S. submission does not contain new material on these claims is that Argentina has failed to present any substantive response to the U.S. *prima facie* case.

36. Up to this point, Argentina has only addressed the U.S. claim regarding Article 3.2 of the Import Licensing Agreement.[30] Accordingly, the United States has specifically addressed that provision in its subsequent submissions.[31] The United States takes this opportunity to reiterate that it is interested in receiving findings on Articles 1.4(a), 1.6, 3.3, 3.5(f), and 5 of the Import Licensing Agreement as Argentina has breached these provisions in addition to Article 3.2.

A. The DJAI Requirement Is an Import Licensing Procedure

37. Argentina fails to present a viable argument in its second written submission for why the Import Licensing Agreement does not apply to the DJAI Requirement.

38. As the United States explained in its second written submission,[32] Article 1.1 contains a definition of "import licensing regime." That provision defines import licensing as "administrative procedures" used for import licensing regimes, which are those regimes "requiring the submission of an application or other documentation (other than that required for customs

[29] Argentina's Second Written Submission, para. 162.
[30] Argentina's First Written Submission, paras. 305-11.
[31] U.S. Second Written Submission, paras. 96-99.
[32] U.S. Second Written Submission, para. 74.

purposes) to the relevant administrative body as a prior condition for importation."[33]

39. Argentina now advances a different and unsupportable interpretation of "import licensing" under Article 1.1. Argentina argues that import licensing is an administrative procedure "used for the operation of import licensing regimes" – which is "understood as the administration of quantitative restrictions or other measures similarly aimed at regulating the importation of goods."[34] Argentina presents no textual support for this position. And, even under Argentina's proposed definition, the DJAI Requirement would qualify as a measure "aimed at regulating the importation of goods" and therefore would be subject to the Import Licensing Agreement.

40. Argentina also argues that the Appellate Body report in *EC – Bananas III* does not support the interpretation of Article 1.1 as explained by the United States.[35] Argentina's logic is flawed. The Appellate Body stated that the "inescapabl[e] . . . conclusion" from a "careful reading" of Article 1.1 is that licensing procedures for tariff quotas – the measure at issue in that dispute – are within the scope of that Agreement.[36] That finding does not mean that the Import Licensing Agreement is limited to tariff quotas. Rather, the Appellate Body mentioned tariff quotas because that was the type of measure at issue in that particular dispute. The Appellate Body also "note[d]" that Articles 3.2 and 3.3 of the Import Licensing Agreement make clear that the Agreement is not limited to quantitative restrictions but relates to other "restrictions" as set out in Article 3.2.[37] This finding in fact supports the conclusion that an import licensing procedure is one that (a)

[33] *See* U.S. Second Written Submission, para. 74.
[34] Argentina's Second Written Submission, para. 166.
[35] Argentina's Second Written Submission, para. 167.
[36] *EC – Bananas III (AB)*, para. 193.
[37] *EC – Bananas III (AB)*, para. 194.

requires "the submission of an application" (b) as "a prior condition for importation"[38] – the exact language of the definition in the Agreement.

B. The DJAI Procedure Is not for Customs Purposes

41. As previously explained,[39] Argentina advocates for an overly broad interpretation of those applications and documentation which are for "customs purposes" in an attempt to exclude the DJAI Requirement from the disciplines of the Import Licensing Agreement.[40] Argentina's proposed definition is unsupportable. If accepted, this definition would create an exception that would swallow the rule – rendering the entire Import Licensing Agreement meaningless.

42. The DJAI Requirement is not maintained for "customs purposes," as it is does not relate to the implementation of a *customs* law or regulation. As the United States has explained, the ordinary meaning of the word "customs" in this context is "duty levied by a government on imports."[41] Thus, "customs purposes" relates to the accurate identification, classification, valuation, determination of origin and ultimately levying of duties by governments.

43. The DJAI Requirement is not maintained for "customs purposes" in light of the following factors.[42] First, agencies with no customs functions whatsoever participate in the DJAI system and Argentina has cited entire non-customs related laws for the source of reasons that an observation may be placed.[43] Second, a DJAI submission is inadequate to serve customs

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[38] *See also* U.S. First Written Submission, paras. 121-25; U.S. First Opening Statement, paras. 35-46; U.S. Second Written Submission, paras. 72-78.
[39] *See also* U.S. First Opening Statement, paras. 41-42; U.S. Second Written Submission, paras 79-88.
[40] *See* Argentina's Second Written Submission, para. 172.
[41] *New Shorter Oxford English Dictionary* at 577 (1993) (JE-756).
[42] *See also* U.S. Second Written Submission, paras. 83-87.
[43] Argentina's Responses to First Panel Questions, Annex.

purposes. Third, Argentina maintains separate customs procedures requiring the submission of information that only becomes available later in the importation process – information that (unlike the DJAI submission) is necessary and sufficient to serve customs purposes. These separate customs procedures, not the DJAI Requirement, determine whether and how to inspect imports.[44] Fourth, the Administration of Public Revenue (*Administración Federal de Ingresos Públicos*, or "AFIP") – which is the only participating agency with customs-related functions – participates in the DJAI system for internal tax purposes, not for purposes of collecting tariffs.

44. Argentina's second written submission contains assertions as to the reasons the various agencies participate in the DJAI system.[45] These assertions are unsupported by any legal instrument or other documentation that would limit the review of the participating agencies to the reasons that Argentina has cited. Moreover, Argentina only purports to provide examples of the reasons agencies participate in the DJAI system.[46]

45. Further, Argentina's unsupported assertions – if credited – would support the conclusion that these agencies' participation in the DJAI system goes well beyond "customs purposes." For example, Argentina states that AFIP participates in the DJAI system for reasons related "the status of the [importer's] Tax ID, if they are in a state of bankruptcy, if they have [an] ongoing verification process, among others."[47] These reasons do not even comport with Argentina's expansive definition of "customs purposes," as anything "related to importation." Similarly, according to Argentina, SCI verifies "compliance with the laws of which the SCI is the

[44] *See* U.S. Second Written Submission, para. 86.
[45] Argentina's Second Written Submission, paras. 183-97.
[46] *See, e.g.*, Argentina's Second Written Submission, paras. 183 ("among others"), 186 ("for instance") & 197 ("for example").
[47] Argentina's Second Written Submission, para. 183.

implementing authority."[48] This open-ended statement does not reflect any customs purpose.

46. Moreover, nowhere its second submission does Argentina indicate how the information collected by various agencies is evaluated or for what reasons a participating agency may make an observation. To take just one example, there is no information as to how, on the basis of the limited information included in a DJAI application, SCI conducts an analysis "in light of Law No. 19,227 of Markets of Public Interest, preventing maneuvers contrary to good faith and fair trade"[49] and why an observation may be placed.

47. Finally, the World Customs Organization ("WCO") Secretariat's letter helps to confirm that the DJAI Requirement does not implement the SAFE Framework. The WCO Secretariat has confirmed that the SAFE Framework "focuses on the security risk related to terrorism;"[50] "aims to facilitate – as much as possible – legitimate trade;"[51] "contains very specific time limits for the submission of advance cargo data to Customs;"[52] and sets out "data elements strictly limited to the maximum that should be required."[53] In contrast, the DJAI Requirement does not focus at all on security risks related to terrorism, but rather serves broad national economic policy goals and purports to address risks unrelated to importation.[54] The DJAI Requirement does not facilitate, but rather impedes trade. The DJAI's information submission requirements and timelines exceed "the maximum data sets, the maximum requirement and the maximum time require[ments]"

[48] Argentina's Second Written Submission, para. 195.
[49] Argentina's Second Written Submission, para. 196.
[50] WCO Responses on the Interpretation of the SAFE Framework, p. 2 (Dec. 2, 2013).
[51] WCO Responses on the Interpretation of the SAFE Framework, p. 2 (Dec. 2, 2013).
[52] WCO Responses on the Interpretation of the SAFE Framework, p. 6 (Dec. 2, 2013).
[53] WCO Responses on the Interpretation of the SAFE Framework, p. 3 (Dec. 2, 2013).
[54] Argentina's Second Written Submission, para. 183.

established by SAFE.[55] And, according to the WCO Secretariat, "none" of the purported reasons that Argentine government agencies participate in the DJAI system are "covered by the SAFE Framework as interpreted by the (majority of) Members."[56]

48. Against this background, including the evidence that Argentina's existing customs procedures – not the DJAI Requirement – provide for the submission of information that determines whether and how imported goods will be inspected and that determines their disposition for customs purposes, one might ask: Why is the DJAI Requirement necessary? Why does Argentina need its many trade restrictive and non-transparent features – features that include the unlimited discretion afforded to participating agencies to deny DJAI applications for any reason, or no reason at all; the lack of transparency regarding "observation" procedures; the imposition of RTRRs as a condition of lifting "observations;" the extended period of delays; and the unreasonable and non-uniform administration of the DJAI Requirement generally?

49. One needs to look no further than the answers already provided by Argentina itself. According to the head of AFIP, the DJAI Requirement "protect[s] Argentine industry."[57] The Ministry of Industry has explained that the DJAI Requirement is used for "import substitution."[58] As Argentine courts have stated, the DJAI Requirement acts as an "a ban – albeit a temporary one – on imports."[59] These statements clearly indicate that the DJAI Requirement is not a measure put in place "for customs purposes," nor is it a measure "specifically designed in accordance with

[55] WCO Responses on the Interpretation of the SAFE Framework, pp. 3 - 7 (Dec. 2, 2013); *See also* SAFE Framework, paras. 1.3.1-1.3.3; 1.3.7, and Annex II.
[56] WCO Responses on the Interpretation of the SAFE Framework, p. 3 (Dec. 2, 2013).
[57] Ministry of Economia Press Release March 27, 2012 (JE-284).
[58] Ministry of Industry Press Release June 19, 2012 (JE-44).
[59] *See* Yudigar case (JE-59); *See also* Zatel case (JE-57); Wabro case (JE-58); Fity case (JE-302).

the SAFE Framework."[60]

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

50. As regards Article X of GATT 1994, Argentina argues with respect to the DJAI Requirement that complainants must meet novel proof standards that have no basis in the relevant GATT 1994 provisions. Argentina asserts that, instead of demonstrating that the DJAI Requirement is a measure "of general application," complainants must demonstrate that each of the thousands of individual instances in which the DJAI Requirement has been applied to an import transaction constitutes a separate measure of "general application" in its own right.[61] Argentina's proposed legal standard is inconsistent with the ordinary meaning of Article X:1, which disciplines *inter alia* "laws, regulations [and] … administrative rulings of general application" – not their individual instances of application. The DJAI Requirement, rooted in *Resolutions 3252, 3255, 3256* and other measures formally promulgated by the Argentine government, is such a measure of general application. It covers all imported products and all importers, and is enforced by Argentine officials with authority over such import transactions and importers.

51. Second, Argentina persists in misrepresenting the U.S. claim under GATT Article X:3(a), characterizing that claim as a challenge to the underlying DJAI Requirement, rather than as a challenge to the administration of that requirement. This is not correct. In fact, the U.S. claim under Article X:3(a) challenges the unreasonable and non-uniform administration of the DJAI

[60] Argentina's First Written Submission, para. 192.
[61] Argentina's Second Written Submission, para. 203.

Requirement by Argentine authorities (as substantiated in detail in Exhibit US-1)[62] – not the DJAI Requirement itself.

52. Aside from mischaracterizing the U.S. claim, Argentina has not even attempted a rebuttal addressed to the U.S. showing that the DJAI requirement breaches Article X:3(a). In particular, Argentina has failed to address or respond to the extensive evidence showing, among other things, that Argentine authorities act without regard to directly relevant legal authorities; treat similarly situated importers with great variance in terms of the delays, disposition, and other aspects of their administration of the DJAI system; unreasonably alter and add to the demands they make of importers; and renege on commitments to release "observed" DJAI applications, even after importers comply with such demands.[63] This evidence typifies administration that is neither reasonable nor uniform.

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

53. Argentina's argument that the United States has not met its burden to establish the existence of the RTRRs measure fails for two reasons. First, there is no special "higher" burden applicable to unwritten measures. Second, even under the standard Argentina advances, the United States has submitted more than enough evidence to meet it. However, before turning to the question of the burden of proof with respect to the RTRRs measure, the United States will address new evidence that Argentina has submitted with respect to its "trade policy and business

[62] Selected Evidence Supporting GATT Article X:3(a) Claim (US-1).
[63] VP of Company X Affidavit (JE-306).

environment."[64]

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

54. Argentina chose to submit evidence regarding the RTRRs for the first time in its second written submission. In its first submission, Argentina did not address the substantive claims of the complainants at all, nor has it addressed any of the evidence of the co-complainants. Argentina's decision not to engage on these claims until this late stage in the proceedings has delayed the consideration of these issues and impeded the work of the Panel.

55. While regrettable, in any event, this new evidence fails to rebut any of the evidence submitted by the United States. Argentina appears to argue that the limited evidence they have submitted demonstrates that companies are investing in Argentina not because of the need to comply with RTRRs, but because of favorable "economic opportunities."[65] This argument is flawed for several reasons.

56. First, Argentina relies on general statements from corporate officials regarding investment in Argentina.[66] Argentina's assertion that these general statements rebut the specific statements regarding the application of RTRRs is without merit. Most of the corporate statements submitted by Argentina simply suggest that the entities are investing in Argentina for economic reasons. Such explanations do not refute the claims of the United States. Even if companies are investing in Argentina because of cheaper production costs, for example, that fact is not inconsistent with,

[64] Argentina's Second Written Submission, Section I.A.
[65] Argentina's Second Written Submission, para. 34.
[66] Argentina's Second Written Submission, Section I.A.

nor does it refute, the fact that at the same time companies are being forced to comply with RTRRs.

57. To take one example, Argentina quotes a radio interview of an AGCO vice president who indicated that the company produces tractors "with local parts, without being forced by anyone."[67] However, in multiple statements regarding corporate earnings, AGCO executives have indicated that Argentina requires a "balance of trade between what you import and export out of Argentina in order to get product in the market to sell."[68] AGCO officials have also stated, "[w]e had some negative impact from strange political situations in Argentina, where they capped, or they want to cap, your imports to Argentina to the level of last year. And another cap would be that you only can import as much as you export"[69] and "the deal you normally do is that as soon as you have agreed with the government, or have disclosed your plans for investment in local manufacturing in Argentina, they basically allow you more imports."[70] AGCO executives have further stated that the Argentine government "relaxed the import restrictions" once the company took steps to increase its local content in manufacturing.[71] AGCO's statements related to corporate earnings, which are delivered over a two-year period and subject to U.S. regulatory requirements to ensure their veracity, are highly credible and demonstrate that the more generalized statements fail to rebut the application of the RTRRs to AGCO.

58. To assist the panel in evaluating Argentina's new evidence, the United States has identified, at Exhibit US-6, statements by company officials, and from Argentine government

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[67] Argentina's Second Written Submission, para. 22.
[68] AGCO CORP., AGCO at Goldman Sachs Industrials Conference – Final, Fair Disclosure Wire, November 14, 2012 (JE-803).
[69] AGCO CORP., 2011 Q2 Corp Earnings Conference Call – Final, Fair Disclosure Wire, July 28, 2011 (JE-799).
[70] *AGCO Corp 2011 Q4 Earnings Call* (JE-199).
[71] AGCO CORP., 2013 Q2 Corp Earnings Conference Call – Final, Fair Disclosure Wire, July 31, 2013 (JE-804).

sources, which specifically describe the RTRRs imposed on each company discussed by Argentina.

59. Second, Argentina overreaches in its characterization of certain public statements. For example, citing statements by the CEO of Peugeot-Citroen, Argentina claims that Peugeot-Citroen "has managed to maintain its sales volume at the world level thanks to growth in markets such as Argentina, which allows the company to compensate for the grave sales crisis in markets like Europe."[72] However, the quoted statement does not support this claim, but merely announced a reduction in expenditures, *i.e.*, its "rate of cash burn," in 2013 as the European market stabilized. The CEO notes, only as an aside, that Peugeot is "banking on" robust sales in Argentina.[73] Thus, Argentina's claim is not supported by the cited evidence, and in any event, would not rebut the evidence provided by the United States.

60. Third, the statements cited by Argentina must be viewed in context. Corporations investing in Argentina have witnessed the negative effects of non-cooperation with the Argentine Government. The large volume of exhibits submitted by complainants demonstrates that Argentina uses the discretion afforded by the DJAI Requirement and the RTRRs to restrict imports on an arbitrary basis. Corporate officials have an incentive to publicly emphasize the positive factors for investment in Argentina to avoid retaliatory restrictions on imports through the DJAI Requirement. Many of the statements were made contemporaneously with public announcements by the company of either the opening of a domestic production facility or a large

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[72] Argentina's Second Written Submission, para. 29.

[73] "Peugeot Citroen CEO Reaffirms 2013 Cash Flow Guidance at Motor Show", Wall Street Journal, September 10, 2013, available at http://online.wsj.com/article/BT-CO-20130910-701410.html#printMode (ARG-60).

investment in the Argentine economy. For the success of the investment, which may depend on the ability to import parts and components, the corporate officials have an incentive to emphasize the positive factors influencing that economic relationship.

61. Finally, the volume of evidence that complainants have in their submissions demonstrating the existence and operation of the DJAI Requirement and the RTRRs far outweighs the selective and limited citations raised by Argentina of only a few corporate executives.[74]

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

62. Before turning to the burden of proof applicable to unwritten measures, it is important to clarify that, contrary to Argentina's assertions, the United States has not characterized the RTRRs as "a single overarching unwritten measure whose content consists of various other measures."[75] The United States has neither used the term "overarching" nor described any measure other than the RTRRs measure. Moreover, Argentina does not even explain why the term "overarching" would have any significance for the evidentiary burden of the complainants. As such, there is no basis for Argentina's assertions that the United States must explain how "disparate requirements . . . come together to form the 'overarching measure.'"[76] The explanation is that there is only one measure at issue. This measure is the decision by high-level Argentine officials to require commitments relating to Argentina's economic policy goals as a prior condition to importation. The commitments required by Argentina include exporting a certain dollar value of goods;

[74] *See* U.S. First Written Submission, Section III.
[75] Argentina's Second Written Submission, para. 75.
[76] Argentina's Second Written Submission, para. 102.

reducing the volume or value of imports; incorporating local content into products; making or increasing investments in Argentina; and/or refraining from repatriating profits.

63. As the United States explained in its second written submission, there is no special higher burden of proof on complainants who allege the existence of an unwritten measure.[77] With respect to any fact claimed by a party in dispute settlement proceedings, including the existence and nature of an unwritten measure, the party must establish its *prima facie* case as to the claimed fact. As the Appellate Body has explained:

> [T]he burden of proof rests upon the party . . . 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 evident to rebut the presumption.[78]

What evidence is sufficient in any instance will depend on the fact to be proven and the context.[79] 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.

64. Moreover, not all unwritten measures are subject to the three-element evidentiary standard on which Argentina bases its argument.[80] For the reasons that the United States has already explained in its second written submission,[81] Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC – Large Civil Aircraft*, both of which address "norms

[77] U.S. Second Written Submission, paras. 102-09.
[78] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Sardines (AB)*, para. 270.
[79] *See US – Wool Shirts and Blouses (AB)*, p. 14.
[80] Argentina's Second Written Submission, paras. 77-96.
[81] U.S. Second Written Submission, paras. 104-09.

or rules," is misplaced. In short, both of those disputes involved challenges to a "norm or rule" that allegedly governed the administrative application of another measure. That is not what is at issue here.

65. Argentina cites two additional panel reports in its second written submission, *US – Zeroing (Japan)* and *Thailand – Cigarettes (Philippines)*, both of which also concern "norms or rules" of administrative application of another measure. The relevant facts and conclusions in *US – Zeroing (Japan)* mirror those of *US – Zeroing (EC)*. 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.[82] Thus, the *Thailand – Cigarettes (Philippines)* dispute also concerned the administration application of other measures – Thailand's customs laws and regulations.

66. The United States is not challenging a "norm or rule" that governs the administrative application of another measure. The RTRRs measure does not provide "administrative guidance" as the rules or norms that were alleged to exist in the disputes cited by Argentina.

67. Rather, the facts presented in this dispute are more analogous to those which confronted the panel in *EC – Biotech.*[83] The measure alleged by the complainants in that dispute was the EC's moratorium on the approval of biotech products, not a "norm or rule" of administrative application.[84] The panel noted that the relevant question was "whether the evidence supports the

[82] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.112
[83] *See also* U.S. Second Written Submission, paras. 106-07.
[84] *EC – Biotech*, para. 7.456.

Complaining Parties' assertion."[85] Further, the panel observed that the evidence in that dispute, including statements by member State officials, were "relevant to the issue of whether certain member States intentionally prevented the final approval of applications" and that prepared statements "cannot properly be considered casual statements" in consideration of the weight to be accorded this type of evidence.[86]

68. The evidence submitted by the United States in this dispute meets the *EC – Biotech* standard. To recall, the evidence that the United States has submitted to establish the existence of this measure includes the following:

- statements by Argentine officials in governmental press releases,
- speeches and interviews by Argentine government officials
- news reports describing the actions taken by the Argentine government;
- statements by company officials in earnings calls and reports, news reports, press releases, and in anonymized affidavits;
- trade publications describing the actions taken by the Argentine government and the difficulty in importing to Argentina due to the restrictions it imposes; and
- surveys of companies doing business in Argentina.

This overwhelming evidence clearly establishes the existence of the RTRRs measure.

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

69. Even under the standard articulated by Argentina, the United States has submitted more

[85] *EC – Biotech*, para. 7.459.
[86] *EC – Biotech*, para. 7.532.

than enough evidence to establish a *prima facie* case. In particular, the United States has demonstrated: (1) that the RTRRs measure is attributable to Argentina; (2) the precise content of the RTRRs measure; and (3) that the RTRRs measure has general and prospective application.

70. Before turning to each element, it is important to note that, although the Appellate Body has noted that "[p]articular rigour is required" of panels that examine whether an unwritten "rule or norm" exists,[87] and has proposed the three elements for determining the existence of a rule or norm in a context where it is alleged to govern the administrative application of another measure, the Appellate Body has *not* said that there is a higher evidentiary burden on the demonstration of a *prima facie* case. Rather, the Appellate Body has stated that the "high threshold" is the application of the three evidentiary elements and that a complainant must put "forth *sufficient evidence* with respect to each of these elements"[88] *i.e.*, evidence sufficient to establish a *prima facie* case with respect to each element.

71. The evidence presented by the United States in this dispute demonstrates the existence of the RTRRs measure, its enforcement through the DJAI Requirement, and the fact that both measures are restrictions within the meaning of Article XI:1 of the GATT 1994. This evidence is summarized in detail in Section III of our first written submission and is supplemented in our later submission and satisfies each element of proof that Argentina argues complainants must meet.

72. With respect to the first element, Argentina does not even argue that the measure is not attributable to Argentina.[89] This is likely because the measure is repeatedly described by government officials, such as Minister of Industry Giorgi and Secretary of Domestic Trade

[87] *US – Zeroing (EC) (AB)*, para. 198.
[88] *US – Zeroing (EC) (AB)*, para. 198 (emphasis added).
[89] *See* Argentina's Second Written Submission, Section III.C.

Moreno. Further, numerous press releases of the Ministry of Industry describe the administration of the RTRRs measure in particular instances.[90] In addition, trade associations and other organizations have described the need to submit information related to compliance with the RTRRs measure to SCI in order to secure approval of DJAI applications.[91] Finally, companies themselves in affidavits, public earnings statements, and in the press attribute the enforcement of the RTRRs measure to the Argentine government.

73. The evidence submitted by the United States also fulfills the second element – it demonstrates the precise content of the RTRRs measure. Pursuant to the RTRRs measure, Argentine officials require, as a prior condition for importation, commitments to export a certain dollar value of goods; reduce the volume or value of imports; incorporate local content into products; make or increase investments in Argentina; and/or refrain from repatriating profits. Contrary to Argentina's assertions, this description of the measure is not is not indistinct[92] but rather has "precise content."

74. The large volume of evidence with respect to the content of the RTRRs measure is too

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[90] *See, e.g.*, JE-4, JE-5, JE-81, JE-82, JE-84, JE-85, JE-86, JE-87, JE-90, JE-91, JE-92, JE-95, JE-102, JE-103, JE-128, JE-129, JE-133, JE-201, JE-209, JE-530, JE-236, JE-244, JE-245, JE-400, JE-424, JE-499, JE-501, JE-564, JE-577, JE-590, JE-613.

[91] *See, e.g.*, Information Bulletin, Industrial Union of the West (JE-46); PlastiNoticias, Newsletter (JE-52); DJAI – Defensa *de Mercado, Consultores Industriales Asociados*, 2012, *available at* http://consultoresind.com.ar/DJAI.html (Arg.) (JE-47); *DJAI – Defensa de Mercado, Consultores Industriales Asociados*, 2012, *available at* http://consultoresind.com.ar/DJAI.html (Arg.) (JE-48); *DJAI observada* [*DJAI Observed*], UNITED LOGISTIC COMPANY NEWSLETTER 369, *available at* http://www.ulc.com.ar/espanol/newsletter_visualizacion.php?newsID=390 (Arg.) (JE-49); Declaración Jurada Anticipada de Importación [DJAI] Cámara Argentina de Comercio at 9, *available at* http://www.cac.com.ar/documentos/1_CAC%20-%20Presentaci%C3%B3n%20DJAI%20del%2015-03-12%20final.pdf (Arg.) (JE-50); Instrucciones sobre D.J.A.I., Declaración Jurada Anticipada de Importación", SIQAT, *available at* http://www.siqat.com.ar/novedades/post/271/instrucciones-sobre-dji-declaracion-jurada-anticipada-de-importacion/ (Arg.) (JE-51).

[92] Argentina's Second Written Submission, paras. 103-04.

lengthy to recount in this statement, but is summarized at Section III.B of the U.S. first written submission.

75. Argentina argues that the United States must satisfy each of the three elements with respect to each of the five requirements imposed pursuant to the RTRRs measure.[93] However, that is not the case. In no other dispute has a panel or Appellate Body required a complainant to demonstrate separately each part of the alleged rule or norm, including in *EC – Large Civil Aircraft*, where the alleged program included four "core terms."[94] Rather, the requirements are part of the content of the RTRRs measure, which is amply demonstrated through the evidence set out at Section III.B of the U.S. first written submission.

76. Argentina claims that the evidence related to the requirement that importers make or increase investments in Argentina, incorporate local content into their products, and reduce the volume or value of imports is insufficient to demonstrate they are part of the RTRRs measure.[95] That is not the case, and we will now highlight some of our evidence with respect to each of these three requirements.

77. With respect to evidence that importers were required to make or increase investments, the evidence does demonstrate that this requirement was a prior condition of importation. One Argentine government press release contains the headline "Fiat: Another Automaker Signs an Agreement with the Government to Ensure Trade Balance."[96] According to that press release, Ministry Giorgi, Secretary Moreno, and the Minister of Economy

[93] Argentina's Second Written Submission, paras. 105, 114.
[94] *EC – Large Civil Aircraft*, para. 7.522.
[95] Argentina's Second Written Submission, paras. 107-13.
[96] *Ministry of Industry Press Release May 5, 2011* (JE-88).

> signed a plan with Fiat Argentina President Cristiano Ratazzi to ensure the company's trade balance. The Ministry of Industry stated that, toward this end, the Fiat Group will invest more than US $1.2 billion in Argentina to produce a new automobile model and farm machinery in the country."[97]

78. The title of this release, indicating that it aimed at ensuring Fiat's "trade balance," demonstrates that Fiat's investment satisfied the Ministry of Industry's trade balancing requirement as explained in a prior press release which stated:

> 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.[98]

79. To take one example of the requirement to increase incorporation of local content, a Ministry of Industry press release stated that "[Minister Giogi] called on agricultural machinery importers and Argentine manufacturers **to balance** the US$450 million trade deficit in the . . . sector . . . Giorgi told them they will **have to increase exports and replace imports with domestically manufactured machinery**. . . . Giorgi **ordered the John Deere, Agco, and Class representative to submit a plan for replacing imports with domestic production**."[99] After that meeting occurred, an AGCO company official stated in an earnings statement that "[t]he deal you normally do is that as soon as you have agreed with the government, or have disclosed your plans for investment in local manufacturing in Argentina, they basically allow you more

[97] *Ministry of Industry Press Release May 5, 2011* (JE-88).
[98] *Ministry of Industry Press Release, March 25, 2011* (JE-1) (emphasis added).
[99] *Ministry of Industry Press Release February 11, 2011* (JE-197) (emphasis added).

imports."[100]

80. Finally, the evidence also demonstrates the requirement that importers reduce the volume or value of imports. For example, the affidavit of the vice president of Company X explained that the Company did not receive the release of its DJAI applications until it had both reduced the import price of its products and committed to increase exports.[101]

81. This evidence as well as the rest of the evidence submitted by the United States demonstrates that the RTRRs are imposed as a prior condition for importation and Argentina's sweeping characterization of the evidence is inaccurate.

82. Finally, the RTRRs measure satisfies the third element; it has general and prospective application. Argentina asserted this morning that the complainants have only provided evidence of discrete one-off actions. However, the statements of Argentine officials submitted indicate that the RTRRs measure is both general and prospective, applying broadly to all types of goods imported into Argentina and applying into the future. Examples of 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."[102]

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

[100] *AGCO Corp 2011 Q4 Earnings Call* (JE-199).
[101] *VP of Company X Affidavit* (JE--306)
[102] *Buenos Aires Económico January 31, 2012* (JE-3); *see also Robert Navarro, El Plan 2012* (JE-8).

have to generate another in this country. If that's not convenient for you, bring me the keys to your company . . ."[103] and "for every dollar's worth [that companies] import, they must export one"[104]

- A Ministry of Industry press release explaining that "[f]rom now on, imports must be compensated for by exports, which have on year to be fulfilled . . . or alternatively, an irrevocable capital contribution can be made . . . in the amount of the net total of imports."[105]

- A 2012 Ministry of Industry Press Release states:

  "[Giorgi] advised agricultural machinery manufacturers that those wanting to do business and obtain profit in the national [Argentine] market should integrate their production with increasing amounts of parts and components produced in Argentina."

  "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.'"[106]

83. The hundreds of additional exhibits provided by complainants demonstrate that the RTRRs measure applies generally across products and sectors. As described in Section III.B of the U.S. first written submission, these include autos and auto parts, trucks, motorcycles, agricultural machinery, books and other publishers, audiovisual products, tires, agricultural

[103] Carlos Mazoni, *Trabas a las importaciones* [*Obstacles to Imports*], LA NACION (Arg.), August 23, 2009, *available at* http://www.lanacion.com.ar/1165656%ADtrabas%ADa%ADlas%ADimportacionesH (JE-249).
[104] *Buenos Aires Económico January 31, 2012* (JE-3).
[105] *Ministry of Industry Press Release, March 25, 2011* (JE-1).
[106] 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.) (JE-203) (emphasis added).

products, white goods, electronic products, clothing, retail, toys, pharmaceuticals, auto software and services, pork, mining related imports, liquor, and consumer goods.

84. The prospective application of the RTRRs measure is further supported by evidence of its repeated and continuing systematic application to importers. As the Appellate Body observed in *US – Zeroing (EC)*, evidence of the prospective application "may include proof of the systematic application of the challenged 'rule or norm'."[107]

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

85. Contrary to Argentina's assertions, the evidence submitted by the United States is sufficient to satisfy the three-element test as it was applied by past panels and the Appellate Body.

86. The evidence that the United States has submitted over the course of this dispute is, at a minimum, comparable to the evidence submitted in *US – Zeroing (EC)* and *US – Zeroing (Japan)* and far exceeds, in volume and probative value, that which was submitted in *Thailand – Cigarettes (Philippines)* and *EC– Large Civil Aircraft*

87. Argentina argues that the evidentiary case of the United States in this dispute is weaker than that in the zeroing disputes because zeroing was applied in all instances.[108] It also argues that it suffers from the fact that it is not based on related written procedures or contracts.[109] Let's step back for a moment and consider what Argentina argued this morning in this regard, which is that the U.S. claim must fail because the measure at issue is unwritten and not applied in every

[107] *US – Zeroing (EC) (AB)*, para. 198.
[108] Argentina's Second Written Submission, para. 99.
[109] Argentina's Second Written Submission, para. 101.

potential instance of application. Is it really the case that where the complainants have produced hundreds and hundreds of documents evidencing a discretionary, trade-restrictive measure that Argentina should be able to avoid the scrutiny under the WTO Agreement because these actions are not published? In other words, Argentina would have the Panel reward it for flouting its transparency obligations and hiding the ball.

88. None of these arguments are persuasive; the Panel should reject them and should reject Argentina's argument that the United States has not met its burden in demonstrating the existence of the RTRRs measure. The United States has presented evidence that is more than sufficient to fulfill each of the three elements Argentina argues that co-complainants must meet. For that reason, even if the Panel accepts the application of the standard articulated by the Appellate Body in *US – Zeroing (EC)* to the RTRRs measure, the United States has presented a *prima facie* case with respect to the existences of the RTRRs measure.

89. Moreover, Argentina makes no attempt to rebut complainants' specific legal claims demonstrating that the RTRRs measure is inconsistent with Articles X:1 and XI of the GATT 1994. Accordingly, if the panel finds that complainants have demonstrated the existence of the RTRRs measure, the United States submits that the panel should also find the measure to be inconsistent with Articles X:1 and XI of the GATT for the reasons stated in detail in the U.S. first and second written submissions.

VI. CONCLUSION

90. For the reasons we have explained today, Argentina has failed to rebut the *prima facie* case presented by the United States and other co-complainants. Accordingly, we respectfully request

the Panel to find that Argentina's measures breach its WTO commitments. We thank the Panel for its attention and look forward to answering its questions.

Table of Additional Exhibits

Exhibit No.	Description	Short Title
US-6	Table of Exhibits Rebutting Argentina's Second Written Submission	

Exhibit No.	Description	Short Title
JE-799	AGCO CORP., 2011 Q2 Corp Earnings Conference Call – Final, Fair Disclosure Wire, July 28, 2011	
JE-800	AGCO CORP., 2012 Q1 Event Brief Corp Earnings Conference Call – Final, Fair Disclosure Wire, May 1, 2012	
JE-801	*Vamos a mover parte de nuestra producción de Brasil a la Argentina*, EL CRONISTA (Arg.), May 14, 2012, *available at* http://www.cronista.com/negocios/Vamos-a-mover-parte-de-nuestra-produccion-de-Brasil-a-la-Argentina-20120514-0005.html	
JE-802	AGCO CORP., AGCO Corp. at RBC Capital Market Global Industrials Conference – Final, Fair Disclosure Wire, September 12, 2012	
JE-803	AGCO CORP., AGCO at Goldman Sachs Industrials Conference – Final, Fair Disclosure Wire, November 14, 2012	
JE-804	AGCO CORP., 2013 Q2 Corp Earnings Conference Call – Final, Fair Disclosure Wire, July 31, 2013	
JE-805	Alfredo Sainz, *Crece la producción local por trabas a la importación*, LA NACION (Arg.), June 12, 2009, *available at* http://www.lanacion.com.ar/1138339-crece-la-produccion-local-por-trabas-a-la-importacion	
JE-806	*El Gobierno reforzará el control de las importaciones*, CLARIN (Arg.), Sept. 15, 2011, *available at* http://www.ieco.clarin.com/empresas/Gobierno-reforzara-control-importaciones_0_554944748.html	
JE-807	*Anuncian plan para sustituir insumos de las automotrices*, CLARIN (Arg.), January 28, 2012, *available at* http://www.clarin.com/politica/Anuncian-plan-sustituir-insumos-automotrices_0_635936498.html	

JE-808	Luis Ceriotto, *Fiat busca insumos locales para su nueva línea agrícola y busca proveedores locales*, CLARIN (Arg.), March 23, 2012, *available at* http://www.ieco.clarin.com/empresas/Fiat-insumos-locales-agricola-proveedores_0_668933160.html	
JE-809	*Ahora Giorgi comparó al país con EE.UU. y la Unión Europea*, CLARIN (Arg.), August 23, 2013, *available at* http://www.ieco.clarin.com/economia/Ahora-Giorgi-EEUU-Union-Europea_0_979702078.html	
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