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

EXECUTIVE SUMMARY OF

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

February 11, 2014

SECOND WRITTEN SUBMISSION

1. The United States has challenged two restrictions – the advance import affidavit ("DJAI") Requirement and the Restrictive Trade-Related Requirements ("RTRRs"). The DJAI Requirement is a discretionary, non-automatic import licensing procedure, and Argentine government officials (in particular the *Secretaría de Comercio Interior* or "SCI") have the ability to withhold approvals of applications for virtually any reason. With respect to the RTRRs measure, the United States has demonstrated a *prima facie* case as to its existence and inconsistency with Articles XI:1 and X:1, which Argentina has failed to rebut.

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

A. THE DJAI REQUIREMENT IS A RESTRICTION UNDER ARTICLE XI:1 OF THE GATT 1994 AND IS INCONSISTENT WITH THAT PROVISION

2. The DJAI Requirement is a non-automatic licensing system that operates as an import restriction; it allows officials to deny a license for discretionary reasons. Extensive evidence shows that, in fact, Argentine officials use this discretion to enforce the RTRRs.

3. Argentina appears to argue that the DJAI Requirement is not discretionary because "the basis on which a reviewing agency would consider a DJAI [application]" . . . "will depend upon the customs-related laws and regulations that it and other intervening agencies administer." Argentina has no factual basis for this assertion; none of the laws and regulations cited by Argentina contain criteria applicable to DJAI applications, the reasons an observation may be placed, or what further information or action may be needed. Argentina also argues that Article XI:1 cannot apply generally to non-automatic discretionary import licensing because if this is so, any time an importer fails to provide customs documentation, a Member denying importation will have violated Article XI:1. This argument is a *non sequitor*. Under the DJAI system, the denial is *not* conditioned on a failure to provide customs documentation. *Even if* an importer submits all required information, the application may be denied.

4. Article XI:1 applies to all restrictions, whether characterized as "procedural" or "substantive." Nothing in the text requires an artificial distinction between "procedural" and "substantive" measures, nor provides for the exclusion of measures characterized as "procedural." Article XI:1 prohibits "prohibitions or restrictions other than duties, taxes or other charges," *however* made effective. The DJAI Requirement is not merely "procedural;" it is a restriction because importers cannot import unless and until they receive approval, which can be withheld for undisclosed reasons. This constitutes a discretionary, non-automatic licensing regime. Whether the DJAI Requirement is "substantive" or "procedural," it is a restriction.

5. Contrary to Argentina's assertions, the *India – Quantitative Restrictions* panel correctly explained that discretionary import licensing may be used where one of the exceptions to Article XI applies. If an exception applies, a Member may apply discretionary import licensing procedures. Argentina argues that the panel should have considered the licensing measure under Article 3.2 of the Import Licensing Agreement, instead of Article XI:1. The Import Licensing Agreement disciplines the procedural aspects of licensing and not whether a restriction imposed

by import licensing is consistent with the GATT 1994 under Article XI:1. A discretionary, non-automatic import licensing requirement is a restriction under Article XI:1 and prohibited under that provision. If another provision exempts the requirement, then the procedures must comply with the Import Licensing Agreement. As a result, it is appropriate for a panel to begin its analysis of a non-automatic import licensing requirement with Article XI:1.

6. The Import Licensing Agreement does not support the proposition that "procedural" aspects of a licensing regime are outside the scope of Article XI:1. Procedural features of an import licensing regime may be inconsistent with both Article XI:1 as well as the Import Licensing Agreement, which provides additional obligations for procedures. The DJAI Requirement is inconsistent with Article XI:1 both because it is a non-automatic, discretionary import licensing procedure and because the procedures render it restrictive.

7. The *Korea – Beef* and *China – Raw Materials* panel reports are consistent with a correct understanding of Article XI:1 and *India – Quantitative Restrictions*. In all three disputes, the panels recognized that discretionary import licensing systems that do not implement any restrictions are inconsistent with Article XI:1. The *China – Raw Materials* 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 licence based on unspecified criteria." There is no underlying measure implemented through the DJAI Requirement. Further, decisions to grant or deny approvals are based on unspecified criteria.

8. Argentina advances a "subsidiary" or "alternative" argument 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." Argentina's formulation is aimed at different factual situation than the one present in this dispute. To the extent a licensing procedure implements another identifiable restriction, that procedure should be examined according to the same justification as the underlying WTO-consistent restriction it implements. But, there is no WTO-consistent underlying restriction implemented by the DJAI Requirement.

9. Argentina argues that co-complainants are required to demonstrate that the DJAI Requirement has a limiting effect that is separate *from the RTRRs*, and that the U.S. arguments are flawed because some of the same evidence presented by the complainants relates to both the DJAI Requirement and RTRRs. Neither of these arguments have merit. The DJAI Requirement is a non-automatic, discretionary licensing measure. Argentine authorities may deny permission to import until an importer complies with RTRRs or for no reason at all. Similarly, RTRRs may be enforced by the withholding of permission to import, whether through the *Certificado de Importacion* ("CI") Requirement, the DJAI Requirement, or another measure. Because the two measures are distinct, the body of evidence with respect to the two is also distinct and only overlaps as it relates to both. It is false for Argentina to state that the evidence related to the two measures is "indistinguishable" or the "same," and Argentina has not explained what the

relevance would be if that were the case. Further, the claims under Article XI:1 with respect to the measures are distinguished.

B. ARTICLE XI:1 DOES NOT REQUIRE A DEMONSTRATION OF "TRADE EFFECTS"

10. Argentina relies on the Appellate Body report in *China – Raw Materials* to support its argument that a party asserting a violation of Article XI:1 must demonstrate "quantitative" or "trade" effects on imports. This reliance is misplaced. The Appellate Body did not address "trade effects." Argentina ignores the Appellate Body's elaboration on "restriction" in subsequent reports which confirms that there is no requirement to show trade effects. The term "quantitative restrictions" does not appear in the text of Article XI:1. The carve-out of "duties, taxes, or other charges" from "prohibitions or restrictions" demonstrates that Article XI is not limited to "quantitative restrictions" in the strict sense of the term. Similarly, there is no basis in the text to conclude that the restrictions must have "quantitative effects." The word "effects" does not appear.

11. The Appellate Body and past panels have found that trade effects are not a necessary or sufficient factor in determining whether a measure is inconsistent with WTO obligations, including those under Article XI. Argentina points to the statement by the Appellate Body in *China – Raw Materials*. The Appellate Body did not state that such an "effect" must be demonstrated through trade data. No panel which has endorsed the term "limiting effect" to describe "restriction" concluded that trade effects are part of an Article XI:1 analysis. The Appellate Body considered "trade-restrictiveness" in *US – COOL* and *US – Tuna II (Mexico)*, and concluded that trade effects were not part of the analysis. This is despite the fact that, in *US – Tuna II (Mexico)*, the Appellate Body relied on its consideration of "restriction" in *China – Raw Materials*, and in turn, in *US – COOL* referred to the *US – Tuna II (Mexico)* discussion.

12. The enforceability of commitments in the WTO agreements does not turn on whether a Member's current trade is directly impacted. Quantitative data may or may not demonstrate trade effects, but that does not excuse a Member's maintenance of a measure that is inconsistent with the WTO Agreement.

C. ARTICLE VIII DOES NOT LIMIT THE APPLICATION OF ARTICLE XI:1

13. Argentina puts forth a flawed interpretation of Article XI:1 in arguing that Article VIII and Article XI:1 of the GATT 1994 are "mutually exclusive" in their application. Article XI:1 is broad in its scope, and nothing in Article VIII limits, or creates an exception to, Article XI:1. The U.S. claim under Article XI:1 does not relate to the "formalities" connected to the DJAI requirement, but rather with the fact that import transactions cannot be completed until an importer receives approval, which may be withheld for nontransparent, discretionary reasons. As a result, the question of whether or not "formalities" are excluded from the scope of Article XI:1 is not directly relevant.

14. Article XI:1 relates to any prohibitions or restrictions on imports and carves out only "duties, taxes or other charges." Article XI:1 is definitive; it states that "*no prohibitions or restrictions . . . shall be maintained*." Nothing in the text exempts any overlapping coverage of

Article VIII. It is not the case that "formalities" are "permitted" by Article VIII. Aspirational-type language, such as the Article VIII language, does not permit or prohibit anything. Argentina's reading of Articles VIII and XI:1 is inconsistent with principles of treaty interpretation and fails to give effect to the definitive language in Article XI:1; that "*no* prohibitions or restrictions *other than duties, taxes or other charges*," may be maintained.

15. Formalities may or may not restrict trade; to the extent they do, Article XI:1 disciplines their use. There is nothing inconsistent with the simultaneous application of the mandatory requirements in Article XI:1 and the aspirational language in Article VIII. Argentina essentially argues that Article VIII creates an exception to Article XI, even though the text of neither article describes such an exception. Further, Argentina's logic does not make sense when applied to other provisions of Article VIII. Article VIII:1(b) states that Members "recognize the need for reducing the number and diversity of fees and charges." Under Argentina's theory, this language would create an exception to Article XI:1 for "fees and charges." If that were the case, the carve-out for "charges" would be surplusage because they are already excluded in Article XI:1.

16. Contrary to Argentina's assertions, the Import Licensing Agreement is not "in essence, an elaboration upon Article VIII in the specific context of import licensing procedures." The preamble to the Import Licensing Agreement recognizes "provisions," plural, "of GATT 1994 as they apply to import licensing procedures" and states that Members desire "to ensure that import licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994." Thus by its terms, the Import Licensing Agreement acknowledges that various provisions of the GATT 1994 relate to import licensing procedures, not just Article VIII.

17. Argentina cites the panel in *China – Raw Materials*. However, that panel considered Article VIII:1(a), with respect to "fees and charges," and not formalities. So, it is unclear that the discussion in *China – Raw Materials* is applicable. That panel stated that "it seems appropriate to construe Article VIII as regulating something different from . . . GATT Article XI:1." However, the panel did not state that the provisions were mutually exclusive; but concluded that the scope of Article VIII:1(a) was narrower than Article XI:1.

D. THE PRINCIPLE OF *LEX SPECIALIS* DOES NOT BAR THE EVALUATION OF THE DJAI REQUIREMENT UNDER ARTICLE XI OF THE GATT 1994

18. Argentina misapplies the principle of *lex specialis* in arguing that it bars the evaluation of the DJAI Requirement under Article XI. The principle of *lex specialis* concerns situations where there is a *conflict* between two provisions such that they cannot be applied simultaneously. There is no conflict between Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. In this dispute, considering the logical relationship between Article XI:1 and Article 3.2, the United States submits that it would be appropriate for the Panel to first consider claims under Article XI:1 before turning to Article 3.2. The United States is challenging the DJAI Requirement as a restriction on imports imposed through import licensing. As a result, Article XI more specifically and in detail deals with the nature of the matter raised in this dispute.

II. THE DJAI REQUIREMENT IS AN IMPORT LICENSING PROCEDURE SUBJECT TO THE IMPORT LICENSING AGREEMENT

19. Argentina does not dispute the essential characteristics of the DJAI Requirement, which demonstrate that the requirement it is an import licensing procedure. Rather, Argentina presents untenable l arguments and attempts to shield the DJAI Requirement from scrutiny under the Import Licensing Agreement. Argentina's reliance on the SAFE Framework is misplaced; that instrument does not create any exceptions to the WTO agreements, and the DJAI Requirement does not share the features of a procedure implemented according to the SAFE Framework.

A. THE DJAI REQUIREMENT IS AN IMPORT LICENSING PROCEDURE

20. The DJAI is an import licensing procedure because it (a) requires the "submission of an application or other documentation" (b) as a "prior condition for importation." An importer must submit an application for each import through the DJAI system and wait 15 days to determine whether an approval is granted ("exit" status) or withheld ("observed" status). If approval is withheld, the importer must approach the relevant agency and submit further, unspecified, information or documentation in the hope of obtaining the "exit" status.

21. Complainants are not required to "demonstrate that the DJAI procedure is 'used for the operation of import licensing regimes.'" Article 1.1 makes clear that "import licensing" is a procedure, and an "import licensing regime" is one "requiring the submission of an application or other documentation . . . as a prior condition for importation." The DJAI procedures are "used for the operation" of the DJAI regime, or system, as a whole, whereby Argentine agencies can review and either grant or block DJAI applications required as a prior condition of importation.

22. Not all applications or documentation submitted as a prior condition for importation are for import licensing. The Import Licensing Agreement explicitly carves out those required for "customs purposes." The DJAI is not for customs purposes. Argentina is not correct that additional (unspecified) application and documentation requirements are excluded. Such an interpretation of Article 1.1 is contrary to the text, which includes one carve-out for customs purposes. The examples of documents Argentina alleges would be covered by complainants' "overly expansive" interpretation of import licensing are not at issue in this dispute.

B. THE DJAI REQUIREMENT IS NOT FOR "CUSTOMS PURPOSES"

23. Argentina advocates for an overly broad interpretation of those applications and documentation which are for "customs purposes" and thereby excluded from the definition of import licensing procedures at Article 1.1 of the Import Licensing Agreement. Argentina argues that any application or document required for the administration of customs laws, or "*any other laws and regulations related to importation, exportation, or the movement or storage of goods*" is for "customs purposes." This interpretation contradicts the plain meaning of Article 1.1. Argentina's definition would prevent the application of the Import Licensing Agreement to any procedures whatsoever, as by definition, import licensing laws and regulations are "related to importation." "Customs purposes" relates to the implementation of a *customs* law or regulation. The ordinary meaning of the word "customs" in this context is "duty levied by a government on imports." Thus, "customs purposes" relates to the accurate identification, classification, valuation, determination of origin and ultimately levying of duties.

24. The DJAI Requirement is not maintained for customs purposes. First, Argentine agencies with no customs purpose whatsoever participate in the DJAI system and may place observations, withholding permission to import. Second, at the stage at which the DJAI submission must be made – prior to the issuance of a purchase order, information that is needed for "customs purposes" to determine classification, origin and valuation of an item is not even available. Third, Argentina maintains separate customs procedures which require the submission of more detailed data much later in the importation process. Fourth, the only guidance published by AFIP states that it intervenes for internal tax administration purposes, and does not list any "customs risks" of the type it purports to monitor under the SAFE Framework. Even if AFIP does make "customs control" observations, the vast majority of reasons that AFIP, let alone any other agency, places an observation is for non-customs reasons. Finally, the DJAI Requirement is not a formality implemented in accordance with the SAFE Framework.

C. THE DJAI REQUIREMENT IS NOT IMPLEMENTED ACCORDING TO THE SAFE FRAMEWORK

25. Argentina argues that the DJAI Requirement is not a license requirement, but is instead "an advance electronic information customs formality specifically designed in accordance with the SAFE Framework." Argentina's arguments are legally irrelevant and factually incorrect. First, Argentina's arguments cannot justify a WTO-inconsistent measure, and so they do not have any direct legal relevance to the Panel's evaluation. Second, Argentina's arguments are factually incorrect, because the DJAI is not "specifically designed in accordance with the SAFE Framework." The DJAI system has nothing to do with a system of border security.

26. The DJAI Requirement does not "allow AFIP to determine, in advance of the arrival of the goods, whether a particular consignment should be targeted for physical inspection, non-intrusive inspection methods, or not be screened at all." The DJAI system is designed and operates in a manner that is disconnected from, and possibly detrimental to, the management of supply chain security risk in the global trading system or other import cargo risks. First, the DJAI system lacks any substantive basis upon which to manage supply chain security risk or to identify high-risk consignments. It contains no criteria relating to supply chain security risk; it does not reflect the standards set forth under the four "core components" the SAFE Framework; and it does not specify other criteria for identifying other "risks" associated with imported cargo shipments. Second, nothing in Argentina's response explains why or how the DJAI Requirement (and all of its trade restrictive and non-transparent features) is necessary or relevant to ascertaining risk on imports from other countries. Third, the DJAI system requires the submission and approval of an application before an importer can place an order for, or secure foreign exchange financing for, the goods – a point in time at which insufficient information would exist to allow a customs authority to "identify high-risk consignments" or to select "particular consignment[s for]… physical inspection, [or] non-intrusive inspection methods."

III. THE UNITED STATES HAS DEMONSTRATED THAT THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE 3.2 OF THE IMPORT LICENSING AGREEMENT

27. Argentina argues that both Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement cannot apply to the DJAI Requirement. Further, Argentina argues that the United States must show that the DJAI Requirement is more trade-restrictive than the RTRRs in order to prevail under Article 3.2. Both provisions apply to non-automatic import licenses such as the DJAI requirement, and the principle of *lex specialis* does not prevent either claim.

28. The DJAI Requirement and the RTRRs are separate measures, each of which restricts the importation of goods. The DJAI Requirement is a discretionary, non-automatic import licensing requirement that serves as a restriction because Argentine officials may withhold permission for virtually any reason whatsoever, including compliance with the RTRRs. The RTRRs impose requirements that restrict the ability to import goods, and are enforced through the withholding of permission to import through the DJAI system, and previously the CIs. Because the RTRRs and DJAI Requirement are separate, and because a WTO-inconsistent measure cannot justify the restrictions imposed by an import licensing measure, the United States is not required to show that the DJAI Requirement imposes trade-restrictive effects additional to those caused by the RTRRs. Because the DJAI Requirement does not impose an underlying "restriction," it necessarily has "additional" "trade-restrictive" or "trade-distortive" effects inconsistent with Article 3.2 of the Import Licensing Agreement.

IV. THE DJAI REQUIREMENT IS INCONSISTENT WITH ARTICLE X:3(A) OF THE GATT 1994

29. Argentina has failed to rebut the evidence demonstrating that it has not administered the DJAI Requirement in a reasonable, uniform manner, consistent with GATT 1994 Article X:3(a). Argentina has failed to respond to the evidence showing, among other things, that Argentine authorities act without regard to legal authorities and treat similarly situated importers with great variance in their administration of the DJAI system as detailed in Exhibit US-1.

V. THE UNITED STATES HAS ESTABLISHED A PRIMA FACIE CASE OF THE EXISTENCE OF THE RTRRS MEASURE

30. There is no separate and higher burden on a party that alleges the existence of an unwritten measure. The burden is on complainants to provide sufficient evidence the RTRRs measure exists; the United States and co-complainants have done so.

31. Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC – Large Civil Aircraft* to support a higher standard of proof for unwritten measures is misplaced. The evidence required in *US – Zeroing (EC)* must be considered in the context of that dispute. That case concerned a "rule or norm" relating to how a particular law or regulation is applied. Similarly, the panel in *EC– Large Civil Aircraft* examined the "existence of an alleged unwritten measure with 'normative value.'" It is in this context that the panel and Appellate Body stated that a "high threshold" applies. In this dispute, the measure being challenged is not a "norm or rule", but a measure in the form of a decision by Argentina to impose the RTRRs. The facts are similar to those in *EC – Biotech*. The panel observed that "[i]t is . . . necessary to examine in detail whether the evidence supports the Complaining Parties' assertion." In *EC – Biotech*, the panel considered the evidence and concluded it was sufficient to establish the existence of the moratorium.

32. In some cases, the only evidence necessary to establish the existence of a measure is a written instrument that promulgates it, and in others additional evidence may be required. Complainants have submitted a large volume of evidence supporting the existence of the RTRRs measure. However, the fact that a *larger volume of evidence* is often involved where a complainant challenges an unwritten measure does not mean that a *higher standard of proof* applies. The Panel must examine this evidence and evaluate whether it is sufficient to meet the complainants' burden. Considered in its totality, this evidence meets this standard.

33. Argentina argues that complainants have failed to establish a *prima facie* case because they have not demonstrated the "precise content of the alleged 'overarching' RTRR measure." Argentina bases this argument on conclusory statements about the evidence submitted in this dispute and the creation of non-existent evidentiary hurdles. The RTRR measure is the decision by high-level Argentine officials to require commitments of importers as a prior condition for permission to import goods. The RTRR measure is demonstrated by statements of Argentine officials describing the measure and a large number of sources substantiating the application of the measure across sectors and product groups. The evidence amply demonstrates its content.

34. Argentina does not discuss individual pieces of evidence, claiming generally that sources published by *La Nación* and *Clarín* and related companies are less probative because of past actions and reporting. This evidence makes up only a small portion of the evidence submitted, and Argentina has not explained how past events impact the probity of the information. Argentina has not presented any grounds for the Panel to disregard any of the evidence. As part of its analysis of the factual issues, the Panel will accord probative weight to the various pieces of evidence and determine whether complainants have established their *prima facie* case.

35. Argentina obscures the questions before this Panel when it argues that the U.S. case is deficient because it has not "demonstrated whether and to what extent the precise content of such overarching [RTRR] measure is any different than the content of the various unwritten alleged requirements that supposedly comprise it." Argentina places significance on the term "overarching," but the United States cannot discern what that significance may be, how it relates the U.S. evidentiary burden, or why it is necessary to demonstrate a "difference" between the RTRR measure and the five types of requirements.

36. Argentina further argues that complainants have failed to demonstrate that the RTRR measure "has general and prospective application." Argentina again misplaces its reliance on the evaluation of the Appellate Body in *US – Zeroing (EC)* and the Panel in *EC – Large Civil Aircraft*. Even if the United States did need to demonstrate "general and prospective application," this element would be evidenced by statements of Argentine officials and the repeated imposition across sectors of the RTRRs up to, and after, the establishment of this Panel. The United States has satisfied its burden of proof as to the existence of the RTRRs measure, and Argentina has offered no facts or legal arguments which rebut the *prima facie* case.

VI. THE RTRRS MEASURE IS INCONSISTENT WITH ARTICLES X:1 AND XI:1

37. Argentina's RTRRs are a distinct measure that causes trade restrictions, and results in a separate breach of Article XI:1. The imposition of RTRRs constitutes a "restriction" under Article XI:1 because it serves as a "limitation" on imports. In particular, Argentina limits the importation of goods on the importer's ability to export goods, make investments in Argentina, produce or source locally, limit the volume or value of imports, or repatriate profits.

38. Argentina has failed to fulfill the Article X:1 obligation to publish "promptly" and "in such a manner as to enable governments and traders to become acquainted with them," the "laws, regulations, judicial decisions and administrative rulings of general application" "pertaining to . . . requirements, restrictions, or prohibitions on imports . . ." that a Member has "made effective." The RTRRs, which pertain to "requirement, restriction or prohibition on imports…," constitute "regulations" or "administrative rulings of general application." The evidence demonstrates that Argentine officials widely apply the RTRRs to DJAI applicants and their prospective importations and also makes clear that that these unpublished rules are "of general application." The RTRRs have not been "published" in a manner that would enable governments and traders to become familiar with them. Argentine authorities made the RTRRs "effective" from at least 2010. To date, the RTRRs remain unpublished. An extended period of delay in publishing a measure does not meet the requirement of "prompt" publication.

SECOND OPENING STATEMENT

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

39. Argentina mischaracterizes the U.S. positions and raises irrelevant matters. Argentina implies that complainants have accepted Argentina's categorization of measures as "procedural" or "substantive" in nature. The DJAI Requirement is not merely procedural but rather is itself a restriction on the importation of goods. Moreover, there is no basis for the procedural-substantive distinction. Further, *there are no rules under* the DJAI Requirement or elsewhere that limit the discretion of Argentine officials to restrict imports through the DJAI system. Argentina has pointed to no criteria for the evaluation of a DJAI application, potential reasons for denial, or requirements for resolution of an observation in Argentina's laws. Argentina enforces the RTRRs measure by withholding approvals in the DJAI system, which demonstrates the discretionary nature of the licensing requirement. However, this does not mean that the two measures are the same. DJAI approvals may be withheld for virtually any reason, or none at all. And, compliance with RTRRs may be a prior condition for approval of other import permissions.

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

40. 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, which may be withheld for non-transparent, discretionary reasons. Argentina argues that, under the U.S. interpretation of Article X1:1, "*any* burden on trade" would be a "restriction" under Article XI:1. That is not the U.S. position. The U.S. claims do not relate to "*any* burden," but rather the DJAI Requirement.

41. Argentina cites negotiating text of the trade facilitation agreement in support of its

position that "formalities" are excepted from Article XI. Argentina has not explained how the trade facilitation agreement has any interpretive relevance in this dispute. Argentina's approach ignores the interaction of the provisions of the GATT 1994. Article XI is independent from the trade facilitation text. The trade facilitation provision does not speak to whether a measure amounts to a restriction within the meaning of Article XI. In addition, Argentina 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. Argentina's argument that Article VIII creates an exception to Article XI:1 for "formalities" is without merit.

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

42. Argentina reiterates its novel theory that Article XI:1 requires a statistical demonstration of quantifiable trade effects to show that a measure is inconsistent with that provision. The ordinary meaning 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.

43. Article XI:1 does *not* contain any indication that it is limited to restrictions that can be demonstrated through quantifiable effects. Article XI:2(b) carves out from Article XI:1 "prohibitions or restrictions necessary to the application of standards or regulations . . . ." "Standards" or "regulations" can serve as "restrictions" inconsistent with Article XI:1. But, standards and regulations are not "quantitative" or "quantifiable." The title of Article XI does not support Argentina's position, and Argentina places far too much interpretive weight on the title. In each dispute cited by Argentina, the Appellate Body or panel noted that the title was *consistent with* the interpretation of the relevant article; the title did not imbue the article with a new and different meaning.

44. Within the context of Article XI:1, including the title, a restriction is not just any burden on an import transaction. Many documentation requirements may burden trade transactions, but they do not all *limit* or *restrict*. The DJAI Requirement *does* limit or restrict trade; even where all information is submitted, permission may be withheld. This interpretation is consistent with the Appellate Body's consideration of "restriction" in *China – Raw Materials* and subsequent disputes. The Appellate Body said in *China – Raw Materials* that Article XI covers prohibitions and restrictions that have a limiting effect. The logical leap, from *China – Raw Materials*, to the conclusion that a complainant must demonstrate trade effects 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.

45. Argentina has put forward Exhibit ARG-65 to support its argument that the DJAI Requirement is not having a restrictive effect on trade. This evidence is not relevant to resolving the legal issue, but in any event, the exhibit is flawed and fails to demonstrate what Argentina contends. First, the analysis fails to include an adequate assessment of the impact of the DJAI Requirement. Second, the report examines the relationship between imports and Argentine economic growth using a simple model specification which does not adequately control for other variables that could impact imports. Third, aggregate trade data is not useful for understanding how trade flows across sectors and time are impacted. Finally, Argentina's approach cannot be

expected to fully demonstrate a credible impact of the DJAI Requirement on imports.

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

46. 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. Argentina mischaracterizes 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 and the Government of Japan. The surveys are one element of the extensive evidence submitted by the United States. The primary evidence consists of the legal instruments establishing the DJAI Requirement, 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.

47. The U.S. Chamber of Commerce survey is not scientific in nature; it is an informal voluntary survey. That said, it includes responses from 45 companies across a variety of sectors which, together, applied for a minimum of 2,650 DJAI approvals. The information contained therein is probative of the experience of U.S. companies. The United States has submitted extensive additional evidence, which is consistent and mutually supportive and confirms that Argentina does use the DJAI Requirement to restrict imports.

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

48. Argentina speculates that the United States has "distanced" itself from its claims under the Import Licensing Agreement. The reason that the second U.S. submission does not contain new material on these claims is that Argentina has failed to respond to the U.S. *prima facie* case. The United States is interested in receiving findings on Articles 1.4(a), 1.6, 3.3, 3.5(f), and 5 of the Import Licensing Agreement, in addition to Article 3.2.

A. The DJAI Requirement Is an Import Licensing Procedure

49. Argentina fails to present a viable argument for why the Import Licensing Agreement does not apply to the DJAI Requirement. 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." Argentina presents no textual support for this position. Even under Argentina's proposed definition, the DJAI Requirement would be subject to the Import Licensing Agreement. 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. Argentina's logic is flawed. The Appellate Body "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." This finding supports the conclusion that an import licensing procedure is one that (a) requires "the submission of an application" (b) as "a prior condition for importation."

B. The DJAI Procedure Is not for Customs Purposes

50. Argentina advocates for an overly broad interpretation of those applications and documentation which are for "customs purposes." If accepted, this definition would create an exception that would swallow the rule – rendering the entire Import Licensing Agreement meaningless. The DJAI Requirement is not maintained for "customs purposes," as it is does not relate to the implementation of a *customs* law or regulation.

51. Argentina's second written submission contains assertions as to the reasons the various agencies participate in the DJAI system. These assertions are unsupported by any legal instrument or other documentation that would limit the review of the participating agencies to the reasons cited. Moreover, Argentina only purports to provide examples of the reasons agencies participate in the DJAI system. Argentina's unsupported assertions – if credited – would support the conclusion that agencies' participation in the DJAI system goes well beyond "customs purposes." Moreover, nowhere does Argentina indicate how the information collected by agencies is evaluated or for what reasons a participating agency may make an observation.

52. Finally, the World Customs Organization ("WCO") Secretariat's letter helps to confirm that the DJAI Requirement does not implement the SAFE Framework. The SAFE Framework "focuses on the security risk related to terrorism;" "aims to facilitate – as much as possible – legitimate trade;" "contains very specific time limits for the submission of advance cargo data to Customs;" and sets out "data elements strictly limited to the maximum that should be required." The DJAI Requirement does not focus on security risks related to terrorism; it does not facilitate, but rather impedes trade. "None" of the purported reasons that agencies participate in the DJAI system are "covered by the SAFE Framework as interpreted by the (majority of) Members."

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

53. As regards Article X, Argentina argues with respect to the DJAI Requirement that complainants must meet novel proof standards that have no basis in the GATT 1994. Argentina asserts that 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." 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 is such a measure of general application.

54. 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. The U.S. claim challenges the unreasonable and non-uniform administration of the DJAI Requirement by (as substantiated in Exhibit US-1) – not the DJAI Requirement itself. Argentina has not attempted a rebuttal addressed to the U.S. showing that the DJAI requirement breaches Article X:3(a).

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

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

55. Argentina appears to argue that the limited evidence it has submitted demonstrates that companies are investing in Argentina not because of the need to comply with RTRRs, but because of favorable "economic opportunities." This argument is flawed. First, Argentina relies on general statements from corporate officials regarding investment in Argentina. Such explanations do not refute the claims of the United States. The United States has identified, at Exhibit US-6, statements by company officials, and from Argentine government sources, which specifically describe the RTRRs imposed on each company discussed by Argentina. Second, Argentina overreaches in its characterization of certain public statements. Third, the statements cited by Argentina must be viewed in context. Corporate officials have an incentive to publicly emphasize the positive factors for investment in Argentina to avoid retaliatory restrictions on imports. Finally, the volume of evidence demonstrating the existence and operation of the DJAI Requirement and the RTRRs far outweighs the citations raised by Argentina.

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

56. The United States has not characterized the RTRRs as "a single overarching unwritten measure whose content consists of various other measures." There is no basis for Argentina's assertions that the United States must explain how "disparate requirements . . . come together to form the 'overarching measure.'" There is only one measure at issue.

57. There is no special higher burden of proof on complainants who allege an unwritten measure. 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. 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.

58. Not all unwritten measures are subject to the three-element evidentiary standard on which Argentina bases its argument. 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 or rules," is misplaced. 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. The United States is not challenging a "norm or rule" that governs the administrative application of another measure. The facts presented in this dispute are more analogous to those in *EC – Biotech.* The panel noted that the relevant question was "whether the evidence supports the Complaining Parties' assertion." The evidence submitted by the United States in this dispute meets the *EC – Biotech* standard and establishes the existence of the RTRRs measure.

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

59. Even under the standard articulated by Argentina, the United States has submitted more than enough evidence to establish a *prima facie* case. 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. 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, and has proposed the three elements for determining the existence of a rule or norm 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 "high threshold" is the application of the three evidentiary elements and a complainant must put "forth *sufficient evidence* with respect to each of these elements" *i.e.*, evidence sufficient to establish a *prima facie* case with respect to each element.

60. The evidence 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. With respect to the first element, Argentina does not even argue that the measure is not attributable to Argentina. The evidence submitted by the United States 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. This measure has "precise content." The evidence with respect to the content is summarized at Section III.B of the U.S. first written submission.

61. 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. 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. 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. That is not the case.

62. Finally, the RTRRs measure satisfies the third element; it has general and prospective application. Argentina asserted the complainants have only provided evidence of discrete one-off actions. However, the statements of Argentine officials indicate that the measure is both general and prospective, applying broadly to all types of goods and applying into the future. The hundreds of additional exhibits provided by complainants demonstrate that the RTRRs measure applies generally across products and sectors. 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, evidence of prospective application "may include proof of the systematic application of the challenged 'rule or norm'."

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

63. The evidence that the United States has submitted is, at a minimum, comparable to the evidence submitted in *US – Zeroing (EC)* and *US – Zeroing (Japan)* and far exceeds that which was submitted in *Thailand – Cigarettes (Philippines)* and *EC– Large Civil Aircraft*. 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. It also argues that it suffers from the fact that it is not based on related written procedures or contracts. Argentina would have the Panel reward it for flouting its transparency obligations. 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.

64. Argentina makes no attempt to rebut complainants' legal claims demonstrating that the 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 panel should also find the measure to be inconsistent with Articles X:1 and XI.