



**ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS**

AB-2014-9

*Reports of the Appellate Body*

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Note:

The Appellate Body is issuing these Reports in the form of a single document constituting three separate Appellate Body Reports: WT/DS438/AB/R; WT/DS444/AB/R; and WT/DS445/AB/R. The cover page, preliminary pages, sections 1 through 5, and the annexes are common to all Reports. The page header throughout the document bears the three document symbols WT/DS438/AB/R; WT/DS444/AB/R; and WT/DS445/AB/R, with the following exceptions: section 6 on pages EU-128 and EU-129, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS438/AB/R; section 6 on page US-130, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS444/AB/R; and section 6 on pages JPN-131 and JPN-132, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS445/AB/R.

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**ABBREVIATIONS USED IN THESE REPORTS**

<b>Abbreviation</b>	<b>Description</b>
AFIP	Federal Public Revenue Administration ( <i>Administración Federal de Ingresos Públicos</i> )
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CBD	customs bond directive
CIs	<i>Certificados de Importación</i>
complainants	European Union, United States, and Japan
DJAI	Advance Sworn Import Declaration ( <i>Declaración Jurada Anticipada de Importación</i> )
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU Panel Report	Panel Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R
EU Panel Request	Request for the Establishment of a Panel by the European Union, WT/DS438/11
First Preliminary Ruling	First Preliminary Ruling of the Panel of 16 September 2013, reproduced in Annex D-1 to the Panel Reports, WT/DS438/R/Add.1 / WT/DS444/R/Add.1 / WT/DS445/R/Add.1
GATT 1994	General Agreement on Tariffs and Trade 1994
Import Licensing Agreement	Agreement on Import Licensing Procedures
Japan Panel Report	Panel Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS445/R
Japan Panel Request	Request for the Establishment of a Panel by Japan, WT/DS445/10
LA/MSF	launch aid/member State financing
Panel Reports	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R / WT/DS444/R / WT/DS445/R
PEI 2020	Ministry of Industry of Argentina, Argentina's Industrial Strategic Plan 2020 ( <i>Plan Estratégico Industrial 2020</i> ) (Panel Exhibits ARG-51 and JE-749)
SCI	Secretariat of Domestic Trade ( <i>Secretaría de Comercio Interior</i> )
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Second Preliminary Ruling	Second Preliminary Ruling of the Panel of 20 November 2013, reproduced in Annex D-2 to the Panel Reports, WT/DS438/R/Add.1 / WT/DS444/R/Add.1 / WT/DS445/R/Add.1
SIM system	MARIA information system ( <i>Sistema Informático MARIA</i> )
SMEs	small and medium-sized enterprises
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRRs	trade-related requirements

Abbreviation	Description
TRRs measure	a combination of one or more TRRs constituting a single unwritten measure
US Panel Request	Request for the Establishment of a Panel by the United States, WT/DS444/10
US Panel Report	Panel Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS444/R
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
WCO	World Customs Organization
WCO SAFE Framework	World Customs Organization's SAFE Framework of Standards to Secure and Facilitate Global Trade
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

## CASES CITED IN THESE REPORTS

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<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
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<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
<i>Canada – Provincial Liquor Boards (EEC)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304, adopted 22 March 1988, BISD 35S, p. 37
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<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R / WT/DS395/R / WT/DS398/R / Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
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<i>EC – Bananas III</i>	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)</i> , WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085

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<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753

Short Title	Full Case Title and Citation
<i>US – Shrimp (Thailand)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
<i>US – Shrimp (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Argentina – Measures Affecting the Importation of Goods**

Argentina, *Appellant/Appellee*  
European Union, *Other Appellant/Appellee/ Third Participant*<sup>1</sup>  
Japan, *Other Appellant/Appellee/ Third Participant*<sup>2</sup>  
United States, *Appellee/ Third Participant*<sup>3</sup>

Australia, *Third Participant*  
Canada, *Third Participant*  
China, *Third Participant*  
Ecuador, *Third Participant*  
Guatemala, *Third Participant*  
India, *Third Participant*  
Israel, *Third Participant*  
Korea, *Third Participant*  
Norway, *Third Participant*  
Saudi Arabia, *Third Participant*  
Switzerland, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*  
Thailand, *Third Participant*  
Turkey, *Third Participant*

AB-2014-9

Division:

Chang, Presiding Member  
Bhatia, Member  
Ramírez-Hernández, Member

## 1 INTRODUCTION

1.1. Argentina appeals certain issues of law and legal interpretations developed in the Panel Reports, *Argentina – Measures Affecting the Importation of Goods*<sup>4</sup> (Panel Reports). The European Union appeals certain issues of law and legal interpretations developed in the Panel Report WT/DS438/R (EU Panel Report), and Japan appeals certain issues of law and legal interpretations developed in the Panel Report WT/DS445/R (Japan Panel Report).<sup>5</sup> The Panel was established to consider complaints by the European Union<sup>6</sup>, the United States<sup>7</sup>, and Japan<sup>8</sup> (the complainants) with respect to measures taken by Argentina affecting the importation of goods.<sup>9</sup>

1.2. Among the measures challenged by the complainants were: (i) Argentina's imposition on economic operators of one or more trade-related requirements (TRRs) constituting a single

<sup>1</sup> In DS444 and DS445.

<sup>2</sup> In DS438 and DS444.

<sup>3</sup> In DS438 and DS445.

<sup>4</sup> WT/DS438/R (EU Panel Report), WT/DS444/R (US Panel Report), WT/DS445/R (Japan Panel Report), 22 August 2014. The Panel issued its findings in the form of a single document containing three separate reports, with a common cover page, table of contents, and sections 1 through 6, and with separate conclusions and recommendations in respect of each of the disputes initiated by the European Union, the United States, and Japan. We refer to these three reports collectively as the "Panel Reports".

<sup>5</sup> The United States does not appeal the Panel Report WT/DS444/R (US Panel Report).

<sup>6</sup> Request for the Establishment of a Panel by the European Union, WT/DS438/11 (EU Panel Request).

<sup>7</sup> Request for the Establishment of a Panel by the United States, WT/DS444/10 (US Panel Request).

<sup>8</sup> Request for the Establishment of a Panel by Japan, WT/DS445/10 (Japan Panel Request).

<sup>9</sup> At its meeting held on 28 January 2013, the Dispute Settlement Body (DSB) established a single panel in accordance with Articles 6 and 9.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). (Panel Reports, para. 1.11)

unwritten measure (TRRs measure)<sup>10</sup>; and (ii) the procedure through which Argentina requires an Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*) (DJAI) for any imports for consumption in Argentina.<sup>11</sup>

1.3. The complainants identified the following five TRRs: (i) to export a certain value of goods from Argentina related to the value of imports; (ii) to limit the volume of imports and/or reduce their price; (iii) to refrain from repatriating funds from Argentina to another country; (iv) to make or increase investments in Argentina (including in production facilities); and/or (v) to incorporate local content into domestically produced goods.<sup>12</sup>

1.4. According to the complainants, the single TRRs measure:

- a. consists of a combination of one or more of the five identified TRRs;
- b. is an unwritten measure that is not stipulated in any published law, regulation, or administrative act, but is instead either reflected in agreements signed between specific economic operators and the Argentine Government, or contained in letters addressed by economic operators to the Argentine Government;
- c. is imposed on economic operators in Argentina as a condition to import or to obtain certain benefits;
- d. is enforced by withholding permission to import through, *inter alia*, the DJAI procedure; and
- e. is imposed by the Argentine Government with the objective of eliminating trade deficits and increasing import substitution.<sup>13</sup>

1.5. The European Union claimed before the Panel that the TRRs are inconsistent with Argentina's obligations under Articles XI:1 and III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), as well as under Article X:1 of the GATT 1994. The European Union also claimed, in the alternative, that the application of one or more TRRs in certain specific instances is inconsistent with Argentina's obligations under Article XI:1 and/or Article III:4 of the GATT 1994.<sup>14</sup> The United States, for its part, claimed that the TRRs are inconsistent with Argentina's obligations under Articles XI:1 and X:1 of the GATT 1994.<sup>15</sup> Japan claimed that the TRRs are inconsistent with Argentina's obligations under Articles XI:1, III:4, and X:1 of the GATT 1994, in each of the following three respects: (i) the TRRs as an unwritten rule or norm as such; (ii) the TRRs as an unwritten practice or policy, as confirmed by the systematic application of the measure; and

<sup>10</sup> EU Panel Request, pp. 3-4; US Panel Request, p. 4; Japan Panel Request, pp. 3-4; Panel Reports, paras. 6.126-6.128. The complainants referred to these trade-related requirements (TRRs) in their panel requests and in some parts of their submissions as "Restrictive Trade-Related Requirements" or "RTRRs". For uniformity, we refer to these as TRRs, individually, and as the TRRs measure, collectively.

<sup>11</sup> Panel Reports, para. 6.364. The European Union, the United States, and Japan originally identified a third measure, the imposition of non-automatic import licences (*Licencias No Automáticas de Importación*) by requiring import certificates (*Certificados de Importación*) (CIs) as a condition for the importation of goods. (EU Panel Request, pp. 2-3; US Panel Request, pp. 3-4; Japan Panel Request, pp. 2-3) However, in their first written submissions to the Panel, the complainants indicated that they were no longer pursuing their claims against the CI requirement because, on 25 January 2013, the Argentine Government had repealed the various resolutions containing the CI regime. (European Union's first written submission to the Panel, paras. 15 and 16; United States' first written submission to the Panel, fn 6 to para. 7, and para. 17; Japan's first written submission to the Panel, fn 34 to para. 15)

<sup>12</sup> Panel Reports, para. 6.121 (referring to EU Panel request, p. 3; US Panel Request, p. 4; and Japan Panel Request, p. 3).

<sup>13</sup> Panel Reports, para. 6.125.

<sup>14</sup> Panel Reports, para. 2.1.b (referring to European Union's first written submission to the Panel, paras. 22, 328, 385, and 491; and response to Panel question No. 1).

<sup>15</sup> Panel Reports, para. 2.3.b (referring to United States' first written submission to the Panel, paras. 3 and 211; and second written submission to the Panel, paras. 5 and 128).

(iii) the application of the TRRs in particular instances, as identified in the complainants' submissions.<sup>16</sup>

1.6. With respect to the DJAI procedure, this measure was implemented by Argentina's Federal Public Revenue Administration (*Administración Federal de Ingresos Públicos*) (AFIP) on 5 January 2012 by means of AFIP General Resolution 3252/2012.<sup>17</sup> With the exception of certain limited cases, Argentina requires importers to file a DJAI through which they provide necessary information prior to the issuance of an order form, purchase order, or other similar document necessary for the purchase of items from abroad that are destined for consumption in Argentina.<sup>18</sup>

1.7. The European Union claimed before the Panel that the DJAI procedure is inconsistent with Argentina's obligations under Articles XI:1, X:1, and X:3(a) of the GATT 1994, as well as under Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, and 3.5(f) of the Agreement on Import Licensing Procedures (Import Licensing Agreement).<sup>19</sup> For its part, the United States claimed that the DJAI procedure is inconsistent with Argentina's obligations under Articles XI:1 and X:3(a) of the GATT 1994, as well as under Articles 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement.<sup>20</sup> Japan claimed that the DJAI procedure is inconsistent with Argentina's obligations under Articles XI:1, X:3(a), and X:1 of the GATT 1994, as well as under Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement.<sup>21</sup>

1.8. In response, Argentina requested the Panel to reject the complainants' claims on the following grounds:

- a. the DJAI is a customs formality established in accordance with Article VIII of the GATT 1994 and the World Customs Organization's (WCO) SAFE Framework of Standards to Secure and Facilitate Global Trade (WCO SAFE Framework). Alternatively, the complainants failed to establish that the DJAI procedure is a quantitative restriction under Article XI:1 of the GATT 1994, or is in breach of Articles X:3(a) and X:1 of the GATT 1994<sup>22</sup>;
- b. the DJAI is not an import licence. Even if it were, it is a procedure used for customs purposes, and is, therefore, not within the scope of the Import Licensing Agreement. Alternatively, the complainants have failed to establish that the DJAI is in breach of the Import Licensing Agreement<sup>23</sup>; and
- c. the TRRs are outside the Panel's terms of reference, and the complainants failed to prove the existence of an unwritten "overarching" measure of general and prospective application that would support their claims against the TRRs.<sup>24</sup>

<sup>16</sup> Panel Reports, para. 2.4.b (referring to Japan's first written submission to the Panel, para. 218; second written submission to the Panel, paras. 7, 20, and 134; and responses to Panel questions Nos. 2 and 44).

<sup>17</sup> AFIP General Resolution 3252/2012 is contained in Panel Exhibits JE-15 and ARG-6.

<sup>18</sup> Panel Reports, para. 6.364.

<sup>19</sup> Panel Reports, para. 2.1.a (referring to European Union's first written submission to the Panel, paras. 21 and 491).

<sup>20</sup> Panel Reports, para. 2.3.a (referring to United States' first written submission to the Panel, paras. 3 and 211; and second written submission to the Panel, para. 128).

<sup>21</sup> Panel Reports, para. 2.4.a (referring to Japan's first written submission to the Panel, para. 218; second written submission to the Panel, paras. 7, 39, and 134; and response to Panel question No. 3).

<sup>22</sup> Panel Reports, para. 2.5.a (referring to Argentina's first written submission to the Panel, paras. 14, 18, 21, 164, 191, 195, 196-217, 257, 263, and 313-359; opening statement at the first Panel meeting, paras. 52-61 and 74-83; responses to Panel questions Nos. 21, 34, and 40; second written submission to the Panel, paras. 125-161, 199, 200, and 202-206; opening statement at the second Panel meeting, paras. 47-61; and closing statement at the second Panel meeting, para. 7).

<sup>23</sup> Panel Reports, para. 2.5.b (referring to Argentina's first written submission to the Panel, paras. 268, 269, and 273-296; opening statement at the first Panel meeting, paras. 62-73; second written submission to the Panel, paras. 162 and 165-201; opening statement at the second Panel meeting, paras. 62-77; and closing statement at the second Panel meeting, paras. 8 and 9).

<sup>24</sup> Panel Reports, para. 2.5.c (referring to Argentina's first written submission to the Panel, paras. 15 and 113-146; opening statement at the first Panel meeting, paras. 40 and 42-48; second written submission to the Panel, paras. 72-117; opening statement at the second Panel meeting, paras. 13-45; and closing statement at the second Panel meeting, paras. 3-6).

1.9. In its first written submission to the Panel, Argentina challenged the identification of the TRRs as a measure at issue in accordance with Articles 6.2 and 7.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and requested the Panel to issue a preliminary ruling that such measure was outside its terms of reference. Argentina argued that the complainants' requests for consultations did not identify any measures or claims in relation to the TRRs, and the subsequent identification of these TRRs in the complainants' requests for the establishment of a panel impermissibly expanded the scope of the dispute.<sup>25</sup> In addition, Argentina claimed that the unwritten "overarching measure" described in the Request for the Establishment of a Panel by the European Union (EU Panel Request) was outside the Panel's terms of reference because none of the complainants' requests for consultations referred to it.<sup>26</sup> Lastly, Argentina contended that, although all three complainants had raised claims against the TRRs "as applied", only the EU Panel Request identified the specific TRRs that were the object of such claims.<sup>27</sup> In Argentina's view, the inclusion in the EU Panel Request of a list of instances of application of the TRRs was an impermissible departure from its request for consultations, which did not identify at least some of these specific instances of application that were the object of its claims.<sup>28</sup>

1.10. The Panel issued a preliminary ruling on 16 September 2013<sup>29</sup> (First Preliminary Ruling), just before the first Panel meeting.<sup>30</sup> In this Ruling, which forms an integral part of the Panel Reports<sup>31</sup>, the Panel found that:

- a. the TRRs were identified by the complainants as a measure at issue in their respective requests for consultations, their inclusion in the panel requests was not inappropriate, and these measures are within the Panel's terms of reference; and
- b. the characterization of the TRRs as a single "overarching measure" in the complainants' panel requests did not expand the scope or change the essence of the dispute.<sup>32</sup>

1.11. The Panel did not consider it necessary or appropriate to rule on Argentina's argument regarding the alleged non-identification of the complainants' "as applied" claims. Instead, the Panel decided to consider this matter further in the course of the proceedings.<sup>33</sup>

1.12. The Panel sought the views of the parties regarding the circulation of the First Preliminary Ruling to Members of the World Trade Organization (WTO).<sup>34</sup> While the complainants expressed no objection<sup>35</sup>, Argentina did not agree with such circulation.<sup>36</sup> The third parties, however, were provided with copies of the First Preliminary Ruling.<sup>37</sup>

1.13. During the Panel's first meeting with the parties, Argentina requested the Panel to resolve two outstanding issues concerning the Panel's terms of reference, namely: (i) Japan's and the United States' "as applied" claims; and (ii) the European Union's 23 specific instances of

<sup>25</sup> Argentina's first written submission to the Panel, paras. 112-146 and 360.

<sup>26</sup> First Preliminary Ruling, para. 2.3 (referring to Argentina's first written submission to the Panel, paras. 135 and 136).

<sup>27</sup> First Preliminary Ruling, para. 2.4 (referring to Argentina's first written submission to the Panel, paras. 129-134 and 138).

<sup>28</sup> First Preliminary Ruling, para. 2.4 (referring to Argentina's first written submission to the Panel, para. 133).

<sup>29</sup> The First Preliminary Ruling is reproduced in Annex D-1 to the Panel Reports, WT/DS438/R/Add.1 / WT/DS444/R/Add.1 / WT/DS445/R/Add.1, pp. D-2 to D-13.

<sup>30</sup> Argentina requested the Panel to issue a preliminary ruling "preferably after the First Substantive Meeting of the Panel with the Parties". (First Preliminary Ruling, para. 1.1 (quoting Argentina's first written submission to the Panel, para. 146)) The European Union and Japan contended that Argentina's request was untimely, considering that Argentina should have raised its concerns regarding the requests for consultations at an earlier stage. Thus, the European Union and Japan requested the Panel to rule on Argentina's request as soon as possible, and before the date of the first Panel meeting. (First Preliminary Ruling, paras. 2.6-2.8)

<sup>31</sup> Panel Reports, paras. 1.36 and 6.15; First Preliminary Ruling, para. 4.3.

<sup>32</sup> First Preliminary Ruling, para. 4.1.a and b; Panel Reports, para. 6.14.

<sup>33</sup> First Preliminary Ruling, para. 3.42.

<sup>34</sup> Second Preliminary Ruling, para. 1.7; Panel Reports, para. 1.34.

<sup>35</sup> Second Preliminary Ruling, para. 1.7 (referring to complainants' joint e-mail communication to the Panel, 17 September 2013); Panel Reports, para. 1.35.

<sup>36</sup> Second Preliminary Ruling, para. 1.7 (referring to Argentina's e-mail communication to the Panel, 19 September 2013); Panel Reports, para. 1.35.

<sup>37</sup> Panel Reports, para. 6.15.

application of the TRRs.<sup>38</sup> Thus, on 20 November 2013, the Panel issued its Second Preliminary Ruling<sup>39</sup> following the second written submissions, but before the second Panel meeting. In its Second Preliminary Ruling, which forms an integral part of the Panel Reports<sup>40</sup>, the Panel found that:

- a. the complainants' panel requests properly identified the alleged TRRs as measures at issue in these disputes, and these measures are part of the Panel's terms of reference; and
- b. the 23 measures described by the European Union in section 4.2.4 of its first written submission to the Panel as "specific instances" of application of the alleged TRRs do not constitute "measures at issue" in these disputes.<sup>41</sup>

1.14. The Panel again invited the parties to express their views regarding the circulation of the two Preliminary Rulings. The complainants submitted a joint communication expressing no objection thereto<sup>42</sup>, but Argentina once more objected to the circulation of both preliminary rulings.<sup>43</sup>

1.15. During the Panel proceedings, the Panel considered several procedural issues. First was Canada's request for enhanced third party rights<sup>44</sup>, which the Panel declined.<sup>45</sup> Second was the parties' request for the adoption of additional procedures for the protection of business confidential information<sup>46</sup>, which were not adopted.<sup>47</sup> Finally was the issue of consultations with the WCO for clarification of certain aspects relating to the WCO SAFE Framework.<sup>48</sup>

1.16. The Panel Reports were circulated to WTO Members on 22 August 2014. In each of the Panel Reports, with respect to the TRRs measure, the Panel found that:

- a. the complainants properly identified the alleged TRRs in their requests for consultations as well as in their panel requests and that, therefore, these actions are part of the Panel's terms of reference<sup>49</sup>;
- b. the characterization of the TRRs as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute<sup>50</sup>;

<sup>38</sup> Second Preliminary Ruling, paras. 2.3-2.5.

<sup>39</sup> The Second Preliminary Ruling is reproduced in Annex D-2 to the Panel Reports, WT/DS438/R/Add.1 / WT/DS444/R/Add.1 / WT/DS445/R/Add.1, pp. D-14 to D-28.

<sup>40</sup> Panel Reports, paras. 1.36 and 6.15; Second Preliminary Ruling, para. 5.2.

<sup>41</sup> Second Preliminary Ruling, para. 5.1.a and b; Panel Reports, para. 6.14.

<sup>42</sup> Panel Reports, para. 1.36 (referring to the complainants' joint e-mail communication to the Panel, 26 November 2013).

<sup>43</sup> Panel Reports, para. 1.36 (referring to Argentina's e-mail communication to the Panel, 26 November 2013).

<sup>44</sup> Canada requested enhanced third party rights to: (i) receive copies of all submissions and statements of the parties preceding the issuance of the Panel's interim report; and (ii) be present for the entirety of all substantive meetings of the Panel with the parties. (Panel Reports, para. 1.23)

<sup>45</sup> The Panel reasoned that Canada failed to explain, among other things, why the matter at issue would have a significant economic or trade policy effect for Canada that is different from that of other WTO Members, and why the third party rights provided for in the DSU would not be sufficient for its interests to be fully taken into account. (Panel Reports, para. 1.24)

<sup>46</sup> Panel Reports, para. 1.25.

<sup>47</sup> The Panel decided not to adopt its proposed special proceedings in view of the fact that none of the parties supported their adoption. The United States, Japan, and Argentina expressed concerns about the proposed special procedures, their consistency with the DSU, and their systemic implications. (Panel Reports, paras. 1.29 and 1.30)

<sup>48</sup> On 26 November 2013, the Panel sent a communication with a list of questions to the WCO. On 2 December 2013, the WCO responded to the Panel, and the Panel invited the parties to express their views thereon. On 14 January 2014, the Panel received the parties' comments as part of their responses to the Panel questions after the second Panel meeting. (Panel Reports, para. 1.38)

<sup>49</sup> EU Panel Report, para. 7.1.a; US Panel Report, para. 7.5.a; Japan Panel Report, para. 7.9.a.

<sup>50</sup> EU Panel Report, para. 7.1.b; US Panel Report, para. 7.5.b; Japan Panel Report, para. 7.9.b.

- c. the Argentine authorities' imposition on economic operators of one or more of the five TRRs identified by the complainants as a condition to import or to obtain certain benefits operates as a single measure (TRRs measure) attributable to Argentina<sup>51</sup>;
- d. the TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994<sup>52</sup>; and
- e. an additional finding under Article X:1 of the GATT 1994 regarding the TRRs measure was not necessary or useful in resolving the matter at issue; accordingly, the Panel refrained from making any findings with respect to this claim.<sup>53</sup>

1.17. Additionally, in the EU and Japan Panel Reports, the Panel ruled that:

- a. the 23 measures described by the European Union in section 4.2.4 of its first written submission as "specific instances" of application of the TRRs were not precisely identified in the EU Panel Request as measures at issue; accordingly, those 23 measures did not constitute "measures at issue" in the present dispute<sup>54</sup>; and
- b. the TRRs measure, with respect to its local content requirement, modifies the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products; accordingly, the TRRs measure, with respect to its local content requirement, is inconsistent with Article III:4 of the GATT 1994.<sup>55</sup>

1.18. Further, in the Japan Panel Report with respect to Japan's "as such" claims against the TRRs measure, the Panel held that:

Having found that the TRRs measure is inconsistent with Article XI:1 of the GATT 1994, as well as with Article III:4 of the GATT 1994 with respect to the local content requirement, and that the TRRs measure is of general and prospective application, the TRRs measure is also inconsistent with the above-mentioned provisions "as such".<sup>56</sup>

1.19. In each of the Panel Reports, with respect to the DJAI procedure, the Panel found that:

- a. the DJAI procedure, irrespective of whether it constitutes an import licence, constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994<sup>57</sup>;
- b. having found that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994, an additional finding under the same provision regarding the DJAI procedure considered as an import licence was not necessary or useful in resolving the matter at issue; accordingly, the Panel refrained from making any findings with respect to this claim<sup>58</sup>;
- c. having found that the DJAI procedure is inconsistent with the substantive obligation prescribed by Article XI:1 of the GATT 1994, the question of whether Argentina had administered the DJAI procedure in a manner inconsistent with Article X:3(a) of the GATT 1994 or with Articles 1.3, 1.4(a), 1.6, and 3.5(f) of the Import Licensing

<sup>51</sup> EU Panel Report, para. 7.1.d; US Panel Report, para. 7.5.c; Japan Panel Report, para. 7.9.d.

<sup>52</sup> EU Panel Report, para. 7.1.e; US Panel Report, para. 7.5.d; Japan Panel Report, para. 7.9.e.

<sup>53</sup> EU Panel Report, para. 7.1.g; US Panel Report, para. 7.5.e; Japan Panel Report, para. 7.9.g.

<sup>54</sup> We note that the Panel included this finding in the Conclusions and Recommendations section of the Japan Panel Report notwithstanding that, in its comments on the Interim Reports, Japan requested the Panel to delete this finding from the Conclusions and Recommendations with respect to DS445 "as it does not relate to Japan's Complaint". (Comments by the Government of Japan on the Panel's Interim Reports (DS438/444/445), 4 June 2014, Appendix 1, p. 23 (referring to para. 7.9.c of the Interim Reports))

<sup>55</sup> EU Panel Report, para. 7.1.f; Japan Panel Report, para. 7.9.f.

<sup>56</sup> Japan Panel Report, para. 7.9.h.

<sup>57</sup> EU Panel Report, para. 7.2.a; US Panel Report, para. 7.6.a; Japan Panel Report, para. 7.10.a.

<sup>58</sup> EU Panel Report, para. 7.2.b; US Panel Report, para. 7.6.b; Japan Panel Report, para. 7.10.b.



Agreement was irrelevant for the resolution of this dispute; accordingly, the Panel refrained from making any findings in respect of these claims<sup>59</sup>;

- d. having found that the DJAI procedure is inconsistent with the substantive obligation prescribed by Article XI:1 of the GATT 1994, an additional finding regarding the same measure under Articles 3.2 and 3.3 of the Import Licensing Agreement was not necessary or useful in resolving the matter at issue; accordingly, the Panel refrained from making any findings in respect of this particular claim<sup>60</sup>; and
- e. having found that the DJAI procedure is inconsistent with the substantive obligation prescribed by Article XI:1 of the GATT 1994, the question of whether Argentina had failed to notify the DJAI procedure in a manner inconsistent with Article 1.4(a), 5.1, 5.2, 5.3, or 5.4 of the Import Licensing Agreement was irrelevant for the resolution of this dispute; accordingly, the Panel refrained from making any findings in respect of these particular claims.<sup>61</sup>

1.20. As for the claims under Article X:1 of the GATT 1994 concerning the DJAI procedure, the Panel ruled that an additional finding under Article X:1 of the GATT 1994 regarding the DJAI procedure was not necessary or useful in resolving the matter at issue. Thus, the Panel refrained from making any findings with respect to this claim.<sup>62</sup>

1.21. In each Panel Report, the Panel found that, pursuant to Article 3.8 of the DSU, Argentina has nullified or impaired benefits accruing to the European Union, the United States, and Japan, respectively, under that Agreement to the extent that Argentina has acted inconsistently with Article XI:1 of the GATT 1994.<sup>63</sup> The Panel also found that, to the extent that Argentina has acted inconsistently with Article III:4 of the GATT 1994, Argentina has nullified or impaired benefits accruing to the European Union and Japan, respectively, under that Agreement.<sup>64</sup>

1.22. In each Panel Report, pursuant to Article 19.1 of the DSU, the Panel recommended that Argentina bring the inconsistent measures into conformity with its obligations under the GATT 1994.<sup>65</sup>

1.23. On 26 September 2014, Argentina notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>66</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>67</sup> (Working Procedures). On 1 October 2014, the European Union and Japan each notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered, and certain legal interpretations developed by the Panel, in, respectively, the EU Panel Report (WT/DS438/R) and the Japan Panel Report (WT/DS445/R) and each filed a Notice of Other Appeal<sup>68</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 14 October 2014, the European Union, the United States, and Japan each filed an appellee's submission.<sup>69</sup> On the same day, Argentina filed an appellee's submission in DS438 and DS445.<sup>70</sup> On 17 October 2014, Australia, Saudi Arabia, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each filed a third

<sup>59</sup> EU Panel Report, para. 7.2.d; US Panel Report, para. 7.6.c; Japan Panel Report, para. 7.10.c.

<sup>60</sup> EU Panel Report, para. 7.2.e; US Panel Report, para. 7.6.d; Japan Panel Report, para. 7.10.d.

<sup>61</sup> EU Panel Report, para. 7.2.f; US Panel Report, para. 7.6.e; Japan Panel Report, para. 7.10.e.

<sup>62</sup> Panel Reports, paras. 6.488 and 6.489. The Panel's finding in this regard is included in the EU Panel Report as paragraph 7.2.c, but not does not figure in the corresponding section of the Japan Panel Report. In the Interim Reports, the Panel included its decision to exercise judicial economy in respect of the Article X:1 claim in respect of the DJAI procedure in the Conclusions and Recommendations section relating to both the complaint by the European Union and the complaint by Japan.

<sup>63</sup> EU Panel Report, para. 7.3; US Panel Report, para. 7.7; Japan Panel Report, para. 7.11.

<sup>64</sup> EU Panel Report, para. 7.3; Japan Panel Report, para. 7.11.

<sup>65</sup> EU Panel Report, para. 7.4; US Panel Report, para. 7.8; Japan Panel Report, para. 7.12.

<sup>66</sup> WT/DS438/15 / WT/DS444/14 / WT/DS445/14 (attached as Annex 1 to these Reports).

<sup>67</sup> WT/AB/WP/6, 16 August 2010.

<sup>68</sup> WT/DS438/16 (attached as Annex 2 to these Reports); WT/DS445/15 (attached as Annex 3 to these Reports).

<sup>69</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>70</sup> Pursuant to Rule 23(4) of the Working Procedures.

participant's submission.<sup>71</sup> On the same day, Canada, China, Ecuador, Guatemala, India, Israel, Korea, Norway, Thailand, Turkey, and the United States<sup>72</sup> each notified its intention to appear at the oral hearing as a third participant.<sup>73</sup> On 29 October 2014, Switzerland also notified the Secretariat of its intention to appear at the oral hearing as a third participant.<sup>74</sup>

1.24. On 29 September 2014, before the Working Schedule in this appeal had been communicated to the participants and third participants, the Appellate Body received a letter from Japan requesting that the oral hearing not be scheduled between 3-5 November 2014 on account of a scheduling conflict of a key member of its litigation team during this period. On the same day, the Appellate Body invited the participants and third participants to comment on Japan's request. On 1 October 2014, Argentina, the European Union, and the United States submitted their comments. Though none of the participants objected to Japan's request, Argentina and the European Union each indicated their own scheduling constraints and requested that the oral hearing not be held on 27-31 October and 11-12 November 2014, respectively. For its part, the United States expressed a preference for the oral hearing to be held within 45 days of the date of filing of the Notice of Appeal, and noted that an oral hearing scheduled after 21 November 2014 would cause a scheduling conflict for its lead counsel. On 3 October 2014, the Appellate Body Division hearing this appeal issued a Procedural Ruling<sup>75</sup> denying Japan's request. The Division explained that, in its draft Working Schedule, drawn up prior to the receipt of Japan's request, the oral hearing had been scheduled to take place on 3-4 November 2014, and that such scheduling was coordinated with the working schedules in the two other proceedings also before the Appellate Body, namely, the appeals in *US – Carbon Steel (India)* (DS436) and *US – Countervailing Measures (China)* (DS437). The overlap in the dates of the three working schedules, and in the composition of the Divisions hearing these three appeals, left the Appellate Body with limited choices for scheduling the oral hearings as well as its internal deliberations in this appeal. For these reasons, and taking into consideration the concerns expressed by the other participants over alternative dates for the oral hearing, the Division considered itself unable to accommodate Japan's request.

1.25. The oral hearing in this appeal was held on 3-4 November 2014. The participants each made an opening oral statement.<sup>76</sup> Seven of the third participants (Australia, Canada, Korea, Norway, Saudi Arabia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Turkey) made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by Argentina – Appellant

#### 2.1.1 The Panel's terms of reference

2.1. Argentina appeals the Panel's conclusion, in paragraph 4.1.b of its First Preliminary Ruling, that the unwritten "overarching" TRRs measure was within its terms of reference. Argentina submits that this finding by the Panel is inconsistent with Articles 6.2 and 7.1 of the DSU. Argentina thus requests the Appellate Body to reverse that finding, as well as the Panel's conclusions, in paragraphs 7.1.b, 7.5.b, and 7.9.b of the Panel Reports, and to conclude that the unwritten "overarching" TRRs measure was outside the Panel's terms of reference.<sup>77</sup> Argentina puts forward two main arguments in support of its appeal, namely: (i) none of the complainants'

<sup>71</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>72</sup> In DS438 and DS445.

<sup>73</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>74</sup> Switzerland submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, we have interpreted this action as a notification expressing Switzerland's intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

<sup>75</sup> Attached as Annex 4 to these Reports.

<sup>76</sup> Argentina made a single opening statement as appellant in DS438, DS444, and DS445 and as appellee in DS438 and DS445. The European Union made a single opening statement as other appellant and appellee in DS438, and Japan made a single opening statement as other appellant and appellee in DS445. The United States made a single opening statement as appellee in DS444 and as a third participant in DS438 and DS445.

<sup>77</sup> Argentina's appellant's submission, para. 15.

consultations requests identified the unwritten "overarching" measure or their broad claims in respect of the TRRs<sup>78</sup>; and (ii) the inclusion of the "overarching" TRRs measure, as well as the "as such" or "equally expansive" claims against this alleged measure, in the complainants' panel requests impermissibly expanded the scope of these disputes or changed its essence.<sup>79</sup>

2.2. Argentina argues that the complainants did not identify in their consultations requests an unwritten "overarching measure", or any "as such" or other "equally expansive" claims in respect of the TRRs.<sup>80</sup> Each of the complainants' request for consultations identifies the *Declaración Jurada Anticipada de Importación* (DJAI) and *Certificados de Importación* (import certificates) (CIs) as "measures" maintained through specific "legal instruments", which are identified in annexes to the consultations requests.<sup>81</sup> While Argentina acknowledges that the requests for consultations reference certain "commitments" allegedly required by Argentina for importers to undertake, Argentina stresses that the discussion of these "commitments" contains no reference to "measures" that might be subject to challenge or to any "legal instruments" providing for such measures.<sup>82</sup> Moreover, there is no annex similar to those provided for the DJAI and CIs identifying any relevant "legal instruments" for these "commitments". In Argentina's view, the phrase "[t]hese measures" in the final two descriptive paragraphs of the consultations requests can only be read as pertaining to the DJAI and the CIs, and not to the TRRs.<sup>83</sup> Thus, the "commitments" language could, at most, suggest that the complainants were challenging, on an "as applied" basis, specific "statements" or "agreements" between Argentina and importers to "limit imports" or "increase the local content of products manufactured in Argentina", but cannot possibly encompass an "as such" or "equally expansive" challenge to an unwritten "overarching" TRRs measure.<sup>84</sup>

2.3. Argentina further contends that the Panel erred in concluding that the complainants' addition of the "overarching measure" in relation to the TRRs did not impermissibly expand the scope of the dispute or change its essence. The Panel relied on the "similarities" between the language used in the complainants' consultations requests to describe each of the "commitments" and the language used in their panel requests to describe the five "requirements". However, such similarities have "no bearing" on the issue of whether the complainants had identified in their consultations requests a "single unwritten measure" with "distinct normative content".<sup>85</sup> Argentina maintains that the Panel's analysis could, at most, support a conclusion that each of the "commitments" constituted a "measure at issue", but not that the complainants had also identified a "single unwritten measure" subject to challenge.<sup>86</sup> Moreover, citing *EC and certain member States – Large Civil Aircraft* as regards the required clarity in identifying unwritten measures in the panel request, Argentina asserts that "it is difficult to imagine that a responding party would not, at the very least, be entitled to notice in a consultations request that such a measure was potentially subject to challenge in the dispute."<sup>87</sup>

2.4. In addition, Argentina argues that the complainants' claims against the unwritten "overarching measure" were in the nature of "as such" or "other equally expansive" claims. While none of the complainants actually used the phrase "as such" in their panel requests, Argentina understood that all the complainants were bringing "as such" claims or something akin thereto. "As such" challenges are serious challenges, and complainants should be expected to provide a respondents with notice of such broad claims in their requests for consultations.<sup>88</sup> This was precisely the conclusion of the panel in *US – Anti-Dumping and Countervailing Duties (China)*, where the complainant identified an "as such" challenge against a rule or norm of general application in its panel request, even though its request for consultations had only included individual instances of application of that rule of general application. The panel in that dispute found that, although the measure of general application was "closely related" to the measures in the consultations request, such "close relationship" did not outweigh the fact that the panel

<sup>78</sup> Argentina's appellant's submission, heading II.C and para. 23.

<sup>79</sup> Argentina's appellant's submission, headings II.D and II.D.2.

<sup>80</sup> Argentina's appellant's submission, para. 22.

<sup>81</sup> Argentina's appellant's submission, para. 25.

<sup>82</sup> Argentina's appellant's submission, paras. 26 and 27.

<sup>83</sup> Argentina's appellant's submission, para. 30.

<sup>84</sup> Argentina's appellant's submission, para. 28.

<sup>85</sup> Argentina's appellant's submission, para. 43. (emphasis omitted)

<sup>86</sup> Argentina's appellant's submission, para. 44. See also para. 49.

<sup>87</sup> Argentina's appellant's submission, para. 47 (referring to Argentina's first written submission to the Panel, para. 140).

<sup>88</sup> Argentina's appellant's submission, paras. 52 and 53.

request introduced a "wholly new type of measure" and added "as such" claims to the "as applied" challenges.<sup>89</sup> Thus, the panel in that dispute found the measure of general application to be outside its terms of reference. Argentina argues that the complainants' expansion of the scope of these disputes was "far more evident" than in *US – Anti-Dumping and Countervailing Duties (China)*, considering that the unwritten "overarching measure" in the complainants' panel requests "bears no relationship" to the measures identified in their consultations requests.<sup>90</sup>

2.5. Lastly, Argentina contends that the Panel failed to address the nature of the complainants' claims against the "overarching" measure, leading the Panel wrongly to conclude that the addition of this new measure did not expand the scope of these disputes. For Argentina, this constitutes an independent reason for the Appellate Body to reverse the Panel's finding that the unwritten "overarching" TRRs measure was within its terms of reference.<sup>91</sup>

### 2.1.2 Identification of the single unwritten TRRs measure

2.6. Argentina claims that the Panel erred in finding that the complainants had established that the alleged TRRs measure exists or operates as a single measure, and consequently that such measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994. Argentina also claims that the Panel acted inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter when assessing Japan's "as such" claims against the alleged TRRs measure. Argentina therefore requests the Appellate Body to reverse the Panel's conclusions, in paragraphs 7.1.d and e, 7.5.c and d, and 7.9.d and e of its Reports, that the alleged TRRs measure operates as a single measure that is inconsistent with Article XI:1 of the GATT 1994; in paragraphs 7.1.f and 7.9.f, that the alleged TRRs measure is inconsistent with Article III:4 of the GATT 1994; and, in paragraph 7.9.h, that the alleged TRRs measure is "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994.

#### 2.1.2.1 The joint claims against the single TRRs measure

2.7. Argentina requests the Appellate Body to declare moot and of no legal effect the Panel's findings, in paragraphs 6.221 through 6.231 of its Reports, concerning the operation of the alleged TRRs as a single measure and, consequently, to reverse the Panel's ultimate finding that the complainants established that the TRRs measure exists or "operates as a single measure (TRRs measure)" that is inconsistent with Articles XI:1 and III:4 of the GATT 1994.<sup>92</sup>

2.8. Argentina observes that the three complainants identified in their respective panel requests, as specific measures at issue, certain TRRs pursuant to which Argentina allegedly required economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. The three complainants later confirmed in their submissions before the Panel that they were challenging these TRRs as a single overarching measure. Argentina points out that all of the complainants' panel requests suggest that the complainants were challenging the overarching TRRs measure outside of "any application thereof"<sup>93</sup>, and considers it evident from the content of the complainants' submissions that each of the complainants had, in effect, advanced "as such" claims in respect of the alleged TRRs measure.

2.9. In Argentina's view, each of the complainants challenged the alleged TRRs measure as an unwritten "rule", "norm", or "measure" of general and prospective application, pursuant to which the importation of goods into Argentina is prospectively conditioned upon a number of alleged unwritten "requirements". The Appellate Body has explained that "as such" claims are challenges against measures that have "general and prospective application", whereby a complainant asserts that a Member's conduct is WTO-inconsistent, "not only in a particular instance that has occurred, but in future situations as well", and seeks *ex ante* to prevent that Member from engaging in that

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<sup>89</sup> Argentina's appellant's submission, para. 55 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.36).

<sup>90</sup> Argentina's appellant's submission, para. 56.

<sup>91</sup> Argentina's appellant's submission, para. 58.

<sup>92</sup> Argentina's appellant's submission, para. 136.

<sup>93</sup> Argentina's appellant's submission, paras. 78 and 79.

conduct.<sup>94</sup> To Argentina, this is precisely the nature of the complainants' "joint claims" in respect of the alleged TRRs measure.

2.10. For this reason, Argentina submits that the Panel wrongly treated the complainants' statements that they were not pursuing "as such" claims as dispositive in relation to the Panel's evaluation of those claims. The Panel's focus on terminology, rather than on the nature of the alleged TRRs measure and the prospective relief sought by the complainants, led it to apply an inappropriate legal standard in relation to the complainants' claims. Argentina considers that, regardless of the manner in which the complainants may choose to characterize their claims, the central inquiry is whether, "*in substance*", the complainants have challenged a measure with normative content that is separate and distinct from any individual instances of application.<sup>95</sup>

2.11. In *US – Zeroing (EC)*, the Appellate Body stated that, in order to support a finding as to the existence of an unwritten measure of general and prospective application, the complainant must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member, its precise content, and that it has general and prospective application. Argentina asserts that the Panel was under an obligation to apply the legal standard articulated by the Appellate Body in *US – Zeroing (EC)*, given the purported normative character of the alleged unwritten TRRs measure and the prospective nature of the findings sought by the complainants. The Panel, however, considered that the legal standard in *US – Zeroing (EC)* applies only in the case of "as such" challenges to unwritten measures, and then "apparently" only when a complainant "*expressly* characterizes its claim as 'as such'".<sup>96</sup> It is "undisputed" that, in assessing the complainants' joint claims, the Panel did not examine the "general and prospective" elements of the TRRs measure prior to concluding that such measure "exists". For Argentina, "[t]he Panel's failure in this regard irreparably taints its conclusion that the complainants had succeeded in demonstrating that the alleged TRRs measure is an unwritten rule or norm that regulates the prospective importation of goods (or the concession of certain benefits) in Argentina."<sup>97</sup>

2.12. Argentina submits that, having failed to apply the relevant legal standard, the Panel erroneously ascertained the existence of the alleged TRRs measure on the basis of the legal standard articulated by the panels in *US – COOL*, *US – Tuna II (Mexico)*, and *Japan – Apples*. The panels in those disputes addressed only the appropriateness of assessing the WTO-consistency of multiple written measures, whose existence was undisputed, "*as if they were a single measure*".<sup>98</sup> It follows, according to Argentina, that the Panel erred in determining that the complainants had established the existence of the alleged TRRs measure on the basis of the legal standard set out in those three disputes. In Argentina's estimation, this legal error resulted in the determination, on the part of the Panel, "that the alleged TRRs measure supposedly 'exists' on the basis of criteria that bear no relationship whatsoever to those that were applicable under the legal standard articulated in *US – Zeroing (EC)* to ascertain the existence of unwritten measures of general and prospective application."<sup>99</sup>

2.13. Argentina further submits that, having uncritically accepted the complainants' description of the content of each alleged TRR, the Panel then sought to determine whether the alleged individual TRRs apply and operate in a combined manner and as part of a single measure. The Panel undertook that inquiry by reviewing three factors: (i) the manner in which the complainants have presented their claims in respect of the measures; (ii) the respondent's position; and (iii) the manner in which the TRRs operate and are related to each other, in order to determine whether they can be considered to be autonomous or independent. In Argentina's view, none of these factors says anything about whether the alleged TRRs measure is attributable to Argentina, its precise content, or, most importantly, whether it has general and prospective application. As a result of this legal error, the Panel effectively presumed at the outset of its analysis the very purpose of its inquiry: i.e. that the alleged TRRs measure exists. For Argentina, the Panel could only have determined that the alleged TRRs measure exists if it was satisfied that the complainants had put forward sufficient evidence to demonstrate that it is attributable to

<sup>94</sup> Argentina's appellant's submission, para. 86 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172 (emphasis original)).

<sup>95</sup> Argentina's appellant's submission, para. 117. (emphasis original)

<sup>96</sup> Argentina's appellant's submission, para. 65. (emphasis original)

<sup>97</sup> Argentina's appellant's submission, para. 119. (fn omitted)

<sup>98</sup> Argentina's appellant's submission, para. 121. (emphasis added)

<sup>99</sup> Argentina's appellant's submission, para. 126.

Argentina, its precise content, and that it has general and prospective application. Argentina argues that, without such findings, there was no basis for the Panel to conclude that the alleged TRRs measure "exists".

### **2.1.2.2 Article 11 of the DSU – The Panel's finding on Japan's "as such" claims against the single TRRs measure**

2.14. Argentina argues that the Panel further acted inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter when assessing Japan's "as such" claims against the alleged TRRs measure and, therefore, respectfully requests the Appellate Body to reverse the Panel's conclusion in paragraph 7.9.h of the Japan Panel Report that the alleged TRRs measure is "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994.

2.15. Argentina submits that, after having erroneously concluded and made findings against the alleged TRRs measure on the basis of an inapposite legal standard, the Panel addressed Japan's separate "as such" claims against the same measure based on the legal standard articulated by the Appellate Body in *US – Zeroing (EC)*. Nevertheless, in Argentina's view, the Panel found that Japan had established the existence of the alleged TRRs measure without properly examining whether and to what extent Japan had adduced sufficient evidence to demonstrate the alleged measure's precise content, or its general and prospective application. Argentina claims that the Panel acted inconsistently with its duties to conduct an objective assessment of the matter under Article 11 of the DSU in assessing Japan's separate "as such" claims against the alleged TRRs measure.

2.16. Argentina considers that, contrary to the complainants' assertions, it cannot be the case that an unwritten measure that may include one or more of five, and possibly more, constituent components, some of which have yet to be specified at all, has precise content. According to Argentina, the complainants' characterization of the measure at issue was so broad and amorphous as to encompass any content that the complainants cared to attribute to it – the antithesis of what the term "precise" means. Moreover, Argentina contends that, even accepting the complainants' characterization of the evidence with respect to the alleged individual "requirements" comprising the single TRRs measure, at face value, the most that such evidence could possibly demonstrate is a series of discrete "one-off" actions relating to a limited number of individual economic operators, in a limited number of sectors, the particular content of which varied widely, and with nothing resembling the general and prospective application characteristic of a rule or norm. Argentina submits that the complainants' overarching TRRs "mega-measure" simply does not exist.<sup>100</sup>

2.17. Furthermore, Argentina considers that there was no credible basis for the Panel to conclude that the complainants had demonstrated that the alleged overarching TRRs measure has "general and prospective application" as that term is commonly understood and as it has been interpreted by panels and the Appellate Body in the "zeroing" disputes, *EC – Approval and Marketing of Biotech Products*, and *EC and certain member States – Large Civil Aircraft*. The complainants asserted that the evidence on which they relied demonstrated the existence of an unwritten measure with "precise content", whose "systematic application" is both general and prospective. However, Argentina contends that this would be the case only if the terms used were rendered meaningless.

2.18. Argentina argues that the Panel "lightly assumed" the precise content of the alleged TRRs measure. For this reason, the Panel's analysis falls far below the minimum threshold required for an objective assessment of the matter under Article 11 of the DSU.<sup>101</sup> In Argentina's view, the Panel uncritically accepted the complainants' characterization of the content of the alleged TRRs measure; failed to examine the record evidence in an even-handed manner; failed to ensure that its findings were properly based on the record evidence; and failed to provide a sufficiently reasoned and adequate explanation for its findings concerning the precise content of the alleged TRRs measure.

2.19. First, Argentina argues that the fact that the complainants' task was rendered more difficult because they decided to challenge a series of unwritten measures as a single "overarching" TRRs

<sup>100</sup> Argentina's appellant's submission, para. 151.

<sup>101</sup> Argentina's appellant's submission, para. 168.

measure, which is also unwritten, cannot serve as a basis to absolve them from demonstrating the content of the alleged TRRs measure with the required degree of precision. In order to establish that the alleged TRRs measure exists, the complainants were under an obligation to demonstrate the existence of the individual requirements and that the alleged TRRs measure has normative content that is distinct from any of the individual requirements that allegedly constitute it. Argentina underlines that the complainants failed in this crucial respect.

2.20. Second, Argentina submits that the Panel's assertion that the "available evidence provide[d] it with sufficient elements to establish the existence and the precise content" of the TRRs measure was unsubstantiated and did not provide a sufficient evidentiary basis for establishing the precise content of the TRRs measure.<sup>102</sup> Argentina stresses that the Panel's analysis of the "precise content" of the alleged TRRs measure does not contain a single citation to evidence on the Panel record, or any cross-reference to earlier sections of the Panel Reports. Argentina presumes that the Panel's cryptic reference to the "available evidence" refers to the earlier section of the Panel Reports in which it concluded that the TRRs measure exists or "operates as a single measure". However, because the Panel made that determination on the basis of an incorrect legal standard, it failed to analyse or determine whether the alleged TRRs measure has precise content under the standard articulated in *US – Zeroing (EC)* for determining the existence of an unwritten norm of general and prospective application.

2.21. Third, Argentina argues that the Panel's reasoning in support of its finding that the alleged TRRs measure has general application fails to reflect an objective assessment of the matter under Article 11 of the DSU. By the complainants' acknowledgement, the alleged TRRs measure does not apply to all imports, to all importers, or to all economic operators who utilize imported items for manufacture in Argentina. Indeed, it is precisely because the complainants were unable to establish the "general" application of the alleged TRRs measure that the Panel was forced to accept the unprecedented notion that an unwritten measure may have general application merely because it "could affect any economic sector" or "can apply to any economic operator".<sup>103</sup> Such an understanding is not only directly contrary to the ordinary meaning of the term "general", but also would fundamentally alter the legal standard set forth in *US – Zeroing (EC)*, such that an unwritten measure would be deemed to exist merely if it had "the *potential* to be generally applicable".<sup>104</sup>

2.22. Finally, Argentina argues that the Panel's reasoning in support of its finding that the alleged TRRs measure has prospective application fails to reflect an objective assessment of the matter and is insufficient to meet the evidentiary threshold required to establish that the alleged TRRs measure has prospective application. Argentina notes that the Panel cited only a single piece of evidence, Panel Exhibit JE-759, in support of its conclusion that the alleged TRRs measure implements a "deliberate policy".<sup>105</sup> This exhibit contains an interview with Argentina's former Secretary of Internal Trade, in which he stated that the policy of "managed trade" would continue to be applied in the future pursuant to instructions from the President of Argentina. In Argentina's view, the above-mentioned evidence reflects, at most, the uncontroversial fact that the Government of Argentina pursues re-industrialization and import substitution policies. These macroeconomic objectives are common to many WTO Members, and generic references to them do not suffice to establish that they are implemented through a WTO-inconsistent unwritten rule or norm of general and prospective application.

2.23. For the above-mentioned reasons, Argentina claims that the Panel "lightly assumed" the existence of the alleged TRRs measure, thereby acting inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.<sup>106</sup>

<sup>102</sup> Argentina's appellant's submission, para. 181 (quoting Panel Reports, para. 6.327).

<sup>103</sup> Argentina's appellant's submission, para. 191 (quoting Panel Reports, paras. 6.334 and 6.335).

<sup>104</sup> Argentina's appellant's submission, para. 192. (emphasis original)

<sup>105</sup> Argentina's appellant's submission, paras. 197 and 198.

<sup>106</sup> Argentina's appellant's submission, para. 201.

### 2.1.3 The DJAI procedure: Articles VIII and XI:1 of the GATT 1994

2.24. Argentina requests the Appellate Body: (i) to modify or reverse the Panel's findings concerning the scope of Article VIII of the GATT 1994<sup>107</sup>; (ii) to modify the Panel's reasoning<sup>108</sup>, and find that import formalities and requirements can only be found to be inconsistent with Article XI:1 of the GATT 1994 when it is demonstrated that: (a) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (b) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature; and (iii) to reverse the Panel's finding that, because the DJAI procedure is not "automatic", it is inconsistent with Article XI:1.<sup>109</sup>

2.25. Argentina contends that the DJAI procedure is an "import formality or requirement" subject to Article VIII of the GATT 1994, which cannot be evaluated as a potentially prohibited "quantitative restriction" under Article XI:1 of the GATT 1994. This is because the respective scopes of application of Articles VIII and XI are mutually exclusive to ensure that Members are allowed to maintain the types of import formalities and requirements that Article VIII expressly contemplates. Argentina contends that, at a minimum, a harmonious interpretation of Articles VIII and XI must identify when an Article VIII import formality or requirement becomes an Article XI:1 "restriction".

#### 2.1.3.1 The scope of Article VIII of the GATT 1994

2.26. Argentina requests the Appellate Body to modify or reverse certain aspects of the Panel's findings concerning the scope of Article VIII of the GATT 1994. Although the Panel did not make an ultimate finding as to the applicability of Article VIII to the DJAI procedure, Argentina appeals certain statements made by the Panel in its discussion of whether the DJAI procedure can be considered an import formality or requirement under Article VIII. These statements reflect legal error and appear to have influenced the Panel's conclusions regarding the relationship between Article VIII and Article XI of the GATT 1994, and the Panel's examination of the DJAI procedure under the latter provision.

2.27. Argentina refers, in particular, to two statements in paragraph 6.433 of the Panel Reports: (i) "a DJAI in exit status is a necessary pre-requisite for importing goods into Argentina"; and (ii) the DJAI procedure is "a procedure by which Argentina determines the right to import." The clear implication of these statements, as well as of paragraph 6.433 as a whole, is that the Panel considered any import procedure that is a "necessary pre-requisite for importing goods", or by which a Member "determines the right to import", to be outside the scope of Article VIII. This is particularly apparent in the last two sentences of paragraph 6.433, where the Panel expressly contrasts a procedure that is "directed at a mere observance of forms" with "a procedure by which Argentina determines the right [to] import". In Argentina's view, the Panel clearly considered only the former to fall within the scope of Article VIII of the GATT 1994.

2.28. Referring to examples such as inspection requirements for goods that pose a sanitary or phytosanitary risk, and ordinary import documentation requirements, Argentina contends that the fulfilment of formalities or requirements will often constitute a "pre-requisite for importing goods" or a procedure by which a Member "determines the right to import". Yet, such formalities and requirements imposed in connection with importation are not, as the Panel implied, outside the scope of Article VIII of the GATT 1994. The Panel's erroneous interpretation appears to have resulted, at least in part, from its focus on the ordinary meaning of only the term "formality". Had the Panel also considered the term "requirement", it would have been apparent that procedures that constitute a "necessary pre-requisite for importing goods", or by which an importing Member "determines the right to import" are "requirements" within the scope of Article VIII. Argentina cautions that the Panel's statements regarding the scope of Article VIII reflect an incorrect legal interpretation and, if left uncorrected, will create confusion and uncertainty concerning the interpretation and application of this provision.

<sup>107</sup> Argentina refers to paragraph 6.433 of the Panel Reports.

<sup>108</sup> Argentina refers to paragraphs 6.435-6.445 of the Panel Reports.

<sup>109</sup> Argentina refers to paragraphs 6.474 and 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report.



### 2.1.3.2 The relationship between Articles VIII and XI:1 of the GATT 1994

2.29. Argentina requests the Appellate Body to modify the Panel's reasoning, in paragraphs 6.435-6.445 of the Panel Reports, and find that the Panel should have followed an approach similar to the one that Argentina proposes. Argentina claims that the Panel erred in not establishing and applying a proper analytical framework for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and the scope and disciplines of Article XI:1 of the GATT 1994, on the other hand. In particular, the Panel erred in its interpretation and application of Article XI:1 because it failed to recognize that an import formality or requirement could have some degree of trade-restricting effect that is an ordinary incident of the formality or requirement itself, and which does not render it inconsistent with Article XI:1.

2.30. For Argentina, the Panel's understanding of the relationship between Articles VIII and XI:1 of the GATT 1994 leaves no room for an evaluation of whether an import formality or requirement has independent trade-restricting effects and, if so, whether those effects are ordinarily associated with a formality or requirement of that nature. The Panel's reasoning creates the possibility that a type of measure that Members are allowed to adopt and maintain under Article VIII would be prohibited *per se* under Article XI:1. In Argentina's view, this is not a harmonious interpretation of these two provisions of the GATT 1994 for the following reasons.

2.31. First, Argentina considers that Article VIII already contemplates that import formalities and requirements can have trade-restricting effects because it acknowledges "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements". Thus, Argentina argues that the drafters of Article VIII were aware that formalities and requirements are potentially an impediment to trade, at least to some degree.

2.32. Second, Argentina argues that a harmonious interpretation of Articles VIII and XI:1 of the GATT 1994 would require, at a minimum, some means of distinguishing between the trade-restricting effect of the formality or requirement itself and the trade-restricting effect of any substantive rule of importation that the measure implements. Argentina proposes that, for an import formality or requirement to be found to constitute an Article XI:1 restriction, in its own right, then it must be shown that: (i) the formality or requirement limits the quantity of imports to a material degree that is independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. This approach reconciles the Article XI prohibition with the fact that import formalities and requirements are both "necessary and expressly contemplated" by Article VIII. Argentina finds support for its proposed approach in the reasoning employed by the panels in *Korea – Various Measures on Beef*<sup>110</sup> and *China – Raw Materials*.<sup>111</sup> In assessing the consistency of the licensing procedures at issue with Article XI:1, the panels in those disputes framed the relevant inquiry as whether the procedure had trade-restricting effects that were "independent" of, and "additional" to, the "underlying measure" that the procedure was used to implement.

2.33. Argentina states that its proposed framework is similar to the approach used in the final text of the Agreement on Trade Facilitation, which is meant to "clarify and improve relevant aspects" of, *inter alia*, Article VIII of the GATT 1994.<sup>112</sup> Article 10.1.1(c) of the Agreement on Trade Facilitation recognizes that import formalities and requirements can restrict trade independently of any underlying rule of importation that the formality or requirement implements.<sup>113</sup> The fact that import formalities and requirements can have certain types of trade-restricting effects does not render them "restrictions" under Article XI:1 of the GATT 1994. However, Argentina contends that, due to the Panel's broad interpretation of the scope of Article XI:1, even measures that are the

<sup>110</sup> Argentina's appellant's submission, para. 225 (quoting Panel Report, *Korea – Various Measures on Beef*, para. 782).

<sup>111</sup> Argentina's appellant's submission, para. 226 (quoting Panel Reports, *China – Raw Materials*, para. 7.917).

<sup>112</sup> Argentina's appellant's submission, paras. 229 and 230 (quoting the Agreement on Trade Facilitation (WT/L/931, 15 July 2014), third preambular paragraph, and referring to Article 10 thereof, entitled "Formalities Connected with Importation, Exportation and Transit").

<sup>113</sup> Argentina's appellant's submission, para. 231. Argentina contends that "the underlying rule" is referred to in Article 10.1.1(c) of the Agreement on Trade Facilitation as the "policy objective". (Ibid.)

least trade-restrictive in the sense of Article 10.1.1(c) of the Agreement on Trade Facilitation could constitute Article XI:1 "restrictions". Moreover, left undisturbed, the Panel's incomplete reasoning would have implications for the interpretation of that Agreement, if and when it enters into force.

### 2.1.3.3 The application of Article XI:1 of the GATT 1994 to the DJAI procedure

2.34. Argentina claims that the Panel erred in finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because it is not "automatic". The Panel appears to have concluded that any import formality or requirement that is "a necessary condition to import goods" and that is not "automatic" is, necessarily, a restriction under Article XI:1. Argentina seeks reversal of this specific basis as one of the four independent bases for the Panel's finding in paragraph 6.474 of the Panel Reports, and ultimate conclusion in paragraph 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report, that the DJAI procedure is inconsistent with Article XI:1. Even assuming that an evaluation under Article XI:1 is possible, it cannot be the case that an import formality or requirement is an Article XI:1 restriction merely because it is not "automatic".

2.35. Argentina contends that the Import Licensing Agreement, the subject-matter of which is a subset of the subject-matter of Article VIII of the GATT 1994, provides relevant context for the interpretation of Article XI:1 of the GATT 1994. Although the Import Licensing Agreement contemplates that some types of licensing procedures are not "automatic", it cannot be understood to suggest that "non-automatic" import licensing procedures are *per se* inconsistent with Article XI:1. In particular, Article 3.2 of the Import Licensing Agreement distinguishes between the potential trade-restricting effects of the procedure and of the underlying rule of importation that the procedure implements. To interpret Article XI:1 of the GATT 1994 as prohibiting non-automatic import licensing procedures *per se* would conflict with Article 3.2 of the Import Licensing Agreement. In Argentina's view, this conflict is avoided by recognizing that an import procedure is not an Article XI:1 restriction merely because it is not "automatic".

## 2.2 Arguments of the European Union – Appellee

### 2.2.1 The Panel's terms of reference

2.36. The European Union requests the Appellate Body to uphold the Panel's finding that the European Union's challenge to the TRRs as a "single overarching measure" was within the Panel's terms of reference. The European Union maintains that it was not required to identify the TRRs in its consultations request with the same degree of detail as in its panel request. The European Union also submits that the Panel was correct in saying that the challenge against the TRRs either as a "single unwritten overarching measure", or when viewed as separate measures, did not change the essence of the dispute because the characterization of the TRRs as a "single overarching measure" in the panel requests was nothing more than an enunciation in different terms of the same claims as set out in the consultations requests.

2.37. In the European Union's view, Argentina wrongly seeks to have the standard to identify "as such" claims in panel requests apply equally to consultations requests. The European Union contends that it was not required to identify the TRRs measure, as well as the manner in which it intended to bring its claims, in its consultations request with the same degree of detail as in its panel request. A comparison between Articles 4.4 and 6.2 of the DSU shows that the language of Article 6.2 is stricter, considering that the panel request serves to "delimit the jurisdiction of the panel".<sup>114</sup> In contrast, consultations are "the first step in the WTO dispute settlement process" that provide parties the opportunity to "define and delimit the scope of the dispute between them" and "clarify the facts of the situation".<sup>115</sup>

2.38. Moreover, echoing previous Appellate Body jurisprudence, the European Union contends that "[p]recise and exact identity" in the identification of the measures at issue between the consultations request and the panel request is not necessary, as long as the "essence of the

<sup>114</sup> European Union's appellee's submission, para. 64.

<sup>115</sup> European Union's appellee's submission, para. 64 (quoting, respectively, Appellate Body Reports, *US – Upland Cotton*, para. 293; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54; and *Brazil – Aircraft*, para. 131).

challenged measure had not changed".<sup>116</sup> The consultations process allegedly helped the European Union to have "a deeper knowledge of the measures at issue as well as Argentina's position on them".<sup>117</sup> In turn, this allowed the European Union to shape its panel request in accordance with the requirements of Article 6.2. The European Union clarifies that its panel request neither characterized its claim against the single TRRs measure "as such", nor requested an "as such" finding against that measure. Rather, the EU Panel Request described the elements of the unwritten measure and explained why they are inconsistent with the covered agreements either when viewed as a single overarching TRRs measure, or as separate measures, i.e. the specific instances of application of the TRRs on particular economic operators.

2.39. With respect to Argentina's assertion that the unwritten "overarching measure" identified in the complainants' panel requests "bears no relationship" to the measures referred to in their consultations requests, the European Union argues that the single TRRs measure is composed of one or several of the TRRs listed in the consultations requests, and is equally based on the policy objectives mentioned therein. The relationship between the measures in the consultations requests and those in the EU Panel Request was "manifestly obvious".<sup>118</sup> Therefore, the European Union maintains that its panel request does not introduce "new" measures that were not already mentioned in its consultations request.<sup>119</sup>

2.40. In this regard, the European Union compares the language of its consultations request with that of its panel request. On the one hand, its consultations request identifies as measures at issue TRRs "in the form of specific types of commitments which restrict imports and discriminate between imported and domestic goods with a view to advancing the Argentinean Government's stated policies of re-industrialization, import substitution and elimination of trade balance deficits".<sup>120</sup> On the other hand, the EU Panel Request identifies the TRRs "as an overarching measure having the same characteristics as those described in the consultations requests and pursuing the same policy objectives".<sup>121</sup> Annex III to the EU Panel Request also lists as separate measures some instances of application of specific TRRs imposed on individual economic operators, with these separate measures having the "same characteristics" as those described in its consultations request. Thus, the measures identified in its consultations request are not "legally distinct" from those identified in its panel request.<sup>122</sup> The European Union concludes that its reference to the TRRs as an "overarching measure" did not expand the scope of the dispute or change its essence. Rather, the description of the TRRs as an "overarching measure" was meant to identify, in conformity with Article 6.2 of the DSU, the "measure at issue" that formed part of the Panel's terms of reference, as well as to specify the "manner in which the European Union was framing its case".<sup>123</sup>

## 2.2.2 Identification of the single unwritten TRRs measure

2.41. The European Union argues that Argentina's claim that the Panel erred in finding that the single TRRs measure exists is unfounded and should be rejected by the Appellate Body. First, the European Union argues that the fact that the Panel split its analysis of whether the TRRs measure has precise content and general and prospective application does not amount to a reversible error, because the Panel recalled its earlier findings in assessing the general and prospective application of the measure. Second, with respect to Japan's "as such" findings, Argentina's allegation of error under Article 11 of the DSU should be rejected given the Panel's detailed, objective, and balanced assessment of the arguments and evidence on the record. In the light of the above, the European Union requests the Appellate Body to reject Argentina's claim of error.

### 2.2.2.1 The joint claims against the single TRRs measure

2.42. As to Argentina's argument that the complainants' claims were all "as such" or something akin to "as such" claims, the European Union submits that the "as such" and "as applied"

<sup>116</sup> European Union's appellee's submission, para. 64 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137).

<sup>117</sup> European Union's appellee's submission, para. 64.

<sup>118</sup> European Union's appellee's submission, para. 63.

<sup>119</sup> European Union's appellee's submission, para. 75.

<sup>120</sup> European Union's appellee's submission, para. 92.

<sup>121</sup> European Union's appellee's submission, para. 93.

<sup>122</sup> European Union's appellee's submission, para. 93.

<sup>123</sup> European Union's appellee's submission, para. 94.

distinction is a "heuristic device" that does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. Moreover, the "as such"/"as applied" distinction is not foreseen in the text of the covered agreements, and there is no legal requirement to indicate expressly that a Member challenges a measure "as such". The European Union states that it did not rely on the "as such"/"as applied" distinction to frame its case against the TRRs as a single overarching measure or against the 23 separate measures where Argentina has imposed TRRs on specific economic operators. In fact, the European Union notes that the terms "as such", "as applied", and "application" do not appear in its panel request, nor does the term "as such" appear in its first written submission to the Panel. Indeed, the European Union considers that such a characterization or "label" would have been confusing, as the European Union was not challenging, either "as such" or "as applied", the single TRRs measure or each of the TRRs individually.

2.43. In addition, the European Union points out that, in paragraphs 112 through 115 of its second written submission to the Panel, it argued and showed that the single TRRs measure has general and prospective application. The European Union also argued and showed that the imposition of TRRs on economic operators is not, as Argentina argued, limited to one-off unrelated cases. Rather, the imposition of TRRs is part of a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade-balancing and import-substitution objectives. The single TRRs measure was shown to be "overarching", "all-embracing", or "in extended use" in Argentina, since it applies to a wide range of situations, and thus, it is "general" in its application.<sup>124</sup> The European Union considers that it also proved that such a systemic approach has become the "rule" for companies doing business in Argentina, and that such a "rule" applies or would likely apply in the future, insofar as Argentina continues pursuing its trade-balancing and import-substitution objectives. Thus, the European Union showed that the single TRRs measure has general and prospective application.

2.44. As to Argentina's argument that the Panel erred by failing to apply the legal standard articulated in *US – Zeroing (EC)* to determine whether an unwritten "rule or norm" of general and prospective application exists, the European Union contends that the Panel implicitly followed the analytical steps in *US – Zeroing (EC)* when making findings about the single TRRs measure with respect to the complainants' joint claims. The European Union considers that the Panel Reports would be clearer had the Panel explicitly examined the issue of whether the single TRRs measure also has general and prospective application as part of its analysis of these joint claims in section 6.2.2.2 of its Reports. Nevertheless, the fact that the Panel split its analysis does not amount to a reversible error. The European Union understands that the Panel's analysis of the general and prospective application of the measure at issue, in its examination of Japan's request for "as such" findings in two subsequent sections of the Reports (6.2.3.4.2.3 and 6.2.3.4.2.4), should be read together with its determinations on the joint claims in section 6.2.2.2. The numerous cross-references in the sections addressing Japan's "as such" claims to findings made in previous sections, and mainly to findings contained in section 6.2.2.2, show that the Panel's analysis of the general and prospective application of the single TRRs measure was not exclusively contained in the subsequent sections of its Reports addressing Japan's "as such" claims. In the European Union's view, section 6.2.2.2 addressing the joint claims and the two subsequent sections (6.2.3.4.2.3 and 6.2.3.4.2.4) of the Panel Reports addressing Japan's "as such" claims should be read together.

2.45. With respect to the general application of the single TRRs measure, the European Union points out that, in considering Japan's request for "as such" findings, the Panel found in paragraphs 6.334 and 6.335 of its Reports that the single TRRs measure has general application. In making those findings, the Panel explicitly referred to its observations in four prior paragraphs of its Reports (6.157, 6.158, 6.229, and 6.230) that the measure: (i) affects a wide range of sectors; (ii) could affect any economic sector because trade in any good may contribute to achieving a trade balance and import substitution; (iii) is not limited to a single import or importer pursuant to the "managed trade" policy instituted by high-ranking Argentine officials; and (iv) has the flexibility to be adapted to the specific characteristics of any economic operator. These paragraphs and substantive elements were also cited by the Panel in section 6.2.2.2 of its Reports.

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<sup>124</sup> European Union's appellee's submission, para. 124.

2.46. With respect to the prospective application of the single TRRs measure, the Panel also found in paragraphs 6.338 through 6.341 of its Reports that the single TRRs measure has prospective application on several additional bases. The Panel made an explicit reference to paragraph 6.230 in section 6.2.2.2 to support its findings. Moreover, the Panel made relevant findings in paragraphs 6.221 and 6.230 concerning, respectively, evidence of the repeated imposition of TRRs by Argentina "at least since 2009", and the existence of the "managed trade" policy. Therefore, section 6.2.2.2 also contains findings that the single TRRs measure has prospective application. For the above-mentioned reasons, the European Union considers that section 6.2.2.2 of the Panel Reports should not be read in complete isolation from the rest of the Reports.

2.47. Thus, the European Union submits that the Panel did not err in section 6.2.2.2 of its Reports by declining to follow explicitly the analytical steps mentioned by the Appellate Body in *US – Zeroing (EC)*. Rather, the Panel examined the precise content of the single TRRs measure and found, although not so explicitly as later on in its Reports, that the single TRRs measure also has general and prospective application. The European Union considers that this is no different from the substantive inquiry that the Appellate Body said in *US – Zeroing (EC)* should be undertaken by a panel when examining a challenge against an unwritten "rule or norm" constituting a measure of general and prospective application.

2.48. The European Union concludes that, in the present case, the Panel found that the single TRRs measure is attributable to Argentina, determined the content of the single TRRs measure, and also found in section 6.2.2.2 of its Reports that the measure has general and prospective application. Consequently, the European Union submits that the Panel did not make a reversible error. Nevertheless, should the Appellate Body agree with Argentina and consider that the Panel made a reversible error, the European Union requests the Appellate Body to complete the analysis on the basis of the uncontested facts on the record, as well as the Panel's findings (in particular, in sections 6.2.3.4.2.3 and 6.2.3.4.2.4), and to find that the single TRRs measure has general and prospective application. Because Argentina has not contested the Panel's findings that the single TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994, the European Union requests the Appellate Body to uphold those ultimate findings.

#### **2.2.2.2 Article 11 of the DSU – The Panel's finding on Japan's "as such" claims against the single TRRs measure**

2.49. While Argentina's arguments under Article 11 of the DSU address the Panel's finding regarding Japan's explicit "as such" challenge to the single TRRs measure, the European Union considers it appropriate to address those allegations as well, as it may affect the manner in which the Appellate Body were to complete the analysis in this case. Moreover, those findings are, in essence, a recollection of what the Panel had already found in the previous sections.

2.50. The European Union argues that, for a claim under Article 11 of the DSU to succeed, the Appellate Body must be satisfied that a panel exceeded its authority as the initial trier of facts. In addition, a participant must identify specific errors regarding the objectivity of the panel's assessment. A participant claiming that a panel disregarded certain evidence must also explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment. According to the European Union, Argentina has failed to meet this standard with respect to its allegations that the Panel acted inconsistently with Article 11 in finding that Japan had established the precise content and general and prospective application of the single TRRs measure. The European Union considers that the Panel went into detail in the preceding sections of its Reports to determine the precise content of the TRRs measure in an objective and balanced assessment of the arguments and evidence on the record, which Argentina failed to contest.

2.51. The European Union "strongly disagrees" with Argentina's assertion that the complainants failed to specify with sufficient precision the content of the single TRRs measure.<sup>125</sup> Rather, in addressing Japan's "as such" claims, the Panel determined the precise content and general and prospective application of the single TRRs measure based on the arguments and evidence on the record which, as the Panel also noted, Argentina had failed to rebut. The European Union contends that, when reading the report in its totality, the Panel did not "lightly assume" the content of the

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<sup>125</sup> European Union's appellee's submission, para. 147.

single TRRs measure. Moreover, Argentina fails to point out evidence on the record to rebut the Panel's findings, beyond indicating that the totality of the evidence indicates otherwise.

2.52. As regards Argentina's argument that, with respect to the precise content of the single TRRs measure, the alleged measure was "amorphous and ill-defined" because the list of TRRs was non-exhaustive and because the complainants did not put forward the same elements of the single TRRs measure, the European Union agrees with the Panel that "one of the purported characteristics of the challenged measure is precisely its lack of transparency and the broad discretion that the authorities have in its implementation."<sup>126</sup> Thus, requiring a perfect match, as Argentina would have the Appellate Body do, could affect the right of WTO Members to bring a challenge against such a measure under Article 11 of the DSU. In any event, Argentina's contention is inapposite because the single TRRs measure found to exist by the Panel is almost a perfect match with the measure as described by the European Union.

2.53. As for Argentina's argument that the complainants were under an obligation to demonstrate that the single TRRs measure has normative content that is distinct from any of the individual "requirements" that allegedly constitute it, the European Union considers that they did just that. The imposition of one TRR, as a measure, is "manifestly unlike" a measure that permits Argentina to choose the most suitable requirement to be imposed on economic operators in order to achieve its stated policy objectives.<sup>127</sup> For the European Union, this is precisely why the Panel examined the complainants' allegations that the TRRs work as part of a single measure and properly found the existence of such a single TRRs measure.

2.54. With respect to Argentina's claim that the Panel failed to make an objective assessment of the matter because there was insufficient evidence for the Panel to make a finding regarding the general application of the TRRs measure, the European Union first observes that Argentina incorrectly raises an Article 11 allegation of error. In reality, Argentina is questioning the legal interpretation followed by the Panel in determining that the single TRRs measure has general application. Second, the European Union agrees with the Panel, particularly in its reliance upon Article X:1 of the GATT 1994 as context, that a measure need not apply in all cases in order for it to have general application. To this extent, the European Union considers that Argentina disregards an important feature of the single TRRs measure: its "flexibility and versatility".<sup>128</sup> As the Panel found, the discretion embedded in the essence of the single TRRs measure should not be an obstacle to finding that the measure has general application. Therefore, the European Union submits that Argentina's argument should be rejected.

2.55. As to the prospective application of the TRRs measure, the European Union recalls that Argentina questions the Panel's reliance on one exhibit containing the statement of a high-ranking official that the policy of "managed trade" would continue to be applied in the future as per the instructions from the President of Argentina. Contrary to what Argentina asserts, however, the Panel did not rely merely on that one exhibit to show the existence of a "deliberate 'policy'" in this case. For example, in paragraphs 6.161 and 6.162 of its Reports, the Panel referred to the existence of the "managed trade" policy as evidenced in numerous official documents and in the totality of the evidence. Thus, the Panel properly supported its findings on the basis of the evidence on the record. Moreover, the 29 agreements signed between economic operators and the Argentine authorities, as well as the commitments provided by many economic operators, all require a prospective course of action.

2.56. Finally, the European Union submits that the Panel properly supported its findings on the basis of the evidence on the record, none of which was contested by Argentina, and that Argentina failed to refer to evidence on the record showing that the Panel was biased or committed a material error when finding that the single TRRs measure has a precise content and general and prospective application. Moreover, Argentina's claim under Article 11 of the DSU appears to be an attempt at recasting the same arguments that Argentina made with respect to its precedent claims of error, something the Appellate Body has explicitly ruled is not the function of a claim under Article 11 of the DSU. In view of the foregoing, the European Union requests the Appellate Body to reject Argentina's claim of error.

<sup>126</sup> Panel Reports, para. 6.325. (fn omitted)

<sup>127</sup> European Union's appellee's submission, para. 154.

<sup>128</sup> European Union's appellee's submission, para. 159.

### 2.2.3 The DJAI procedure: Articles VIII and XI:1 of the GATT 1994

2.57. The European Union requests the Appellate Body to reject Argentina's claim on appeal and to uphold the Panel's finding that the DJAI procedure restricts imports and is inconsistent with Article XI:1 of the GATT 1994. The European Union considers that: (i) the Panel did not imply that the DJAI procedure fell outside of the scope of Article VIII of the GATT 1994 merely because it is a prerequisite for importing goods; (ii) Argentina's analytical framework is not applicable to these disputes; and (iii) the Panel considered that the DJAI procedure is not "automatic" in the sense that the authorities may decide to withhold authorization to import even when all the prescribed formal requirements are met.

#### 2.2.3.1 The scope of Article VIII of the GATT 1994

2.58. The European Union contends that Argentina's appeal is based on a mischaracterization of the Panel's reasoning, given that the Panel did not imply that the DJAI procedure fell outside of the scope of Article VIII of the GATT 1994 merely because it is a prerequisite for importing goods. Rather, the assertion that a DJAI is a prerequisite for importing goods was just the starting point for the Panel's analysis, and must be read together with the detailed analysis in paragraphs 6.459 through 6.474 of the Panel Reports, where the Panel found that participating agencies have broad discretion to enter and lift observations, and that such discretion is sometimes used to impose TRRs. These findings evidence that the DJAI procedure operates, in essence, as a discretionary system of authorization of imports by which the Argentine authorities decide on an *ad hoc* basis whether to grant the right to import to each applicant on the basis of criteria not specified in advance. Thus, the European Union requests the Appellate Body to reject this claim of error and to confirm the Panel's finding that the aspects of the DJAI procedure challenged by the complainants under Article XI:1 of the GATT 1994 fall outside the scope of Article VIII.

2.59. Additionally, in the European Union's view, the Panel's analysis focused on the term "formalities" because, before the Panel, Argentina consistently characterized the DJAI procedure as a customs or import formality. Argentina now focuses on "requirements" in Article VIII:4 of the GATT 1994. This does not, however, call into question the Panel's findings that the DJAI procedure is not subject to Article VIII of the GATT 1994, because not every import requirement is subject to Article VIII. Article VIII:4 purports to define the scope of Article VIII without prescribing any obligations. Articles VIII:1(c) and VIII:3 refer to "documentation requirements" and "procedural requirements", respectively. The European Union argues that, as no other provision refers to "requirements", it must be concluded that Article VIII:4 refers exclusively to documentation or procedural requirements.

#### 2.2.3.2 The relationship between Articles VIII and XI:1 of the GATT 1994

2.60. The European Union asserts that Argentina's analytical framework is not applicable to these disputes. Argentina's proposed framework seeks to determine whether an Article VIII formality or requirement constitutes a "restriction" under Article XI:1 of the GATT 1994. However, the complainants' claims were not concerned with those elements of the DJAI procedure that are formalities or procedural requirements, but with the DJAI's discretionary system of authorization of imports. In the European Union's view, as the discretionary system is not a mere formality or procedural requirement, it falls outside the scope of Article VIII of the GATT 1994.

2.61. According to the European Union, even assuming *arguendo* that Argentina's framework were legally correct, the Panel would not have erred by not applying it. As the Panel found that the challenged aspects of the DJAI procedure were not a mere formality subject to Article VIII of the GATT 1994, there was no need to apply such framework. Moreover, although the first step of Argentina's proposed framework calls for distinguishing the trade-restricting effects of the "formalities" from those of the underlying "substantive rule of importation", it is impossible to separate and distinguish between the trade-restricting effects of the DJAI's formalities or requirements and those of any underlying conditions or criteria because the latter are unknown. The European Union submits that the panel reports in *Korea – Various Measures on Beef* and *China – Raw Materials* are inapposite to these disputes, because the relevant restrictive effects identified by the Panel do not result from the administration of a quota or other underlying substantive import rule; rather, they result from a self-standing discretionary system for authorizing imports.

2.62. As to the second step of Argentina's framework, which calls for an assessment of whether the trade-restricting effects of a formality or requirement exceed those ordinarily associated with a formality or requirement of that nature, the European Union contends that it implies a dualistic approach to Article XI:1 of the GATT 1994, with a stricter standard for import formalities and requirements. This approach has no basis in the text of Article XI:1 and is not necessary to ensure a "harmonious" interpretation of Articles VIII and XI:1 of the GATT 1994, or of Article XI:1 of the GATT 1994 and Article 10.1.1(c) of the Agreement on Trade Facilitation. Argentina overlooks that, in some cases, formalities or requirements may be equivalent to those applied by Members with respect to the marketing of domestic products (e.g. those related to conformity assessment procedures or sanitary inspection) and, as such, fall outside of the scope of Article XI:1.<sup>129</sup> In the European Union's view, Argentina further ignores that, in other cases, formalities and requirements will be justified under the exceptions to Article XI:1, including Article XX(d) of the GATT 1994.

### 2.2.3.3 The application of Article XI:1 of the GATT 1994 to the DJAI procedure

2.63. According to the European Union, the Panel considered that the approval of a DJAI was not "automatic" in the sense that the authorities may decide not to put a DJAI "in exit status" even when the DJAI has been timely filed and meets all the formal requirements prescribed by the DJAI procedure. It is undeniable that the non-approval of a DJAI may have a limiting effect on imports, and Argentina's claim is based on its own preconceived ideas about what should be the proper scope of Article XI:1 of the GATT 1994, rather than on the terms of that provision. Thus, the European Union requests the Appellate Body to reject this claim and uphold the Panel's finding.

2.64. The European Union submits that Argentina's preconceptions are based on mistaken assumptions for the following reasons. First, the DJAI procedure is not a mere "formality" or "procedural requirement", but, instead, a discretionary system for authorizing imports. Second, Argentina is incorrect that the Panel's interpretation implies that most import formalities or requirements would be prohibited by Article XI:1 of the GATT 1994. As already explained, formalities or requirements enforced at the border that are equivalent to those applied with respect to the marketing of domestic products fall outside the scope of Article XI:1, and other formalities and requirements may be permitted under other WTO provisions, notably Article XX(d) of the GATT 1994. Third, the Panel's interpretation of Article XI:1 of the GATT 1994 does not render ineffective Article 3 of the Import Licensing Agreement because a conflict arises only where it is impossible to comply simultaneously with both obligations.

## 2.3 Arguments of the United States – Appellee

### 2.3.1 The Panel's terms of reference

2.65. The United States requests the Appellate Body to reject Argentina's arguments that the TRRs measure is outside the scope of these disputes, and uphold the Panel's findings in its First Preliminary Ruling.<sup>130</sup> The United States argues that the Panel was correct in finding that the United States identified the TRRs measure in its consultations request in "substantially similar terms" as in its panel request, and that, as a result, the latter did not expand the scope of the dispute.<sup>131</sup>

2.66. The United States highlights the difference between the language of Article 4.4 and that of Article 6.2 of the DSU. While both the consultations request and the panel request must identify the "measure at issue", the standard for a panel request requires more precision, i.e. the identification of the "specific" measure. The Appellate Body has previously considered that the difference in the language of these two provisions does not require a "*precise and exact identity*" between the specific measures that were the subject of consultations and the specific measures identified in the panel request, as long as the "essence" of the measures has not changed.<sup>132</sup> The specificity required in the consultations requests of the identification of the measure at issue is less than that required in the panel request. This is especially so in the case of unwritten measures,

<sup>129</sup> In this regard, the European Union refers to Ad Article III of the GATT 1994.

<sup>130</sup> United States' appellee's submission, para. 50.

<sup>131</sup> United States' appellee's submission, paras. 24 and 26.

<sup>132</sup> United States' appellee's submission, para. 28 (quoting Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original); and *Mexico – Anti-Dumping Measures on Rice*, para. 137).



considering that the complainant may have incomplete information as regards the "content and operation" of the measure at issue prior to consultations. Consequently, the complainant may be unable to identify the "*specific* measure" at that time, as Article 6.2 will subsequently require it to do in its panel request.<sup>133</sup> The United States argues that, since its consultations request identified the TRRs in "substantially similar terms" as its panel request, the TRRs measure fell within the Panel's terms of reference.<sup>134</sup>

2.67. The United States also contends that its consultations request identified the TRRs in a manner that does not indicate that the TRRs measure relates only to the application of the DJAI and CI requirements, or that it excludes any claims related to the TRRs. Its consultations request cannot be read as encompassing only "*individual written* commitments" imposed on and undertaken by importers, considering that its consultations request did not identify any individual instances of application of the requirement to undertake certain commitments.<sup>135</sup> A comparison between the United States' consultations request and its panel request shows that the latter identifies the same measure at issue, albeit with greater specificity. Such specificity includes a confirmation that the TRRs are not published, and that economic operators normally submit a statement or conclude an agreement with Argentina. For the United States, the fact that its consultations request does not contain any reference to "legal instruments" or "measures" does not support Argentina's interpretation that the TRRs measure was not identified in its consultations request. Given that there are no legal instruments through which Argentina imposes the TRRs measure, there was no reason for the United States to include "legal instruments" or any annex similar to how its consultations request presented the DJAI and CI requirements, which were the only measures implemented through written instruments.

2.68. The United States argues that the Panel correctly found that the United States did not impermissibly expand the scope of the dispute in its panel request. The Panel considered the impact of the alleged "reformulation" of the TRRs measure, and found that, regardless of whether the TRRs measure is considered as part of the DJAI or CI requirements or as a separate measure, the complainants' claims with respect thereto would be the same. The United States also cites the Panel's finding that "the characterization of the [TRRs] as a single 'overarching measure' in the complainants' panel requests seems to be nothing more than an enunciation in different terms of the complainants' same claims set out in the request[s] for consultations", and this "reformulation" does not *per se* expand the scope or change the essence of the dispute.<sup>136</sup> In the United States' view, even assuming that its consultations request had identified the TRRs measure only as a component of either the DJAI or CI requirements, its consultations request and its panel request still pertain to the same subject-matter and dispute. The United States argues that, consequently, it could validly bring the same "expansive" claim irrespective of the characterization of the measure at issue.<sup>137</sup>

2.69. The United States contrasts these disputes with *US – Anti-Dumping and Countervailing Duties (China)*, in which the consultations request identified individual instances of application of a measure, while the panel request identified a rule or norm of general application as a measure at issue. In these disputes, the consultations requests did not identify individual instances of application of the TRRs measure. Instead, both the consultations requests and the panel requests identified the same measure and brought the same claims. Therefore, the United States asserts that, unlike the panel request in *US – Anti-Dumping and Countervailing Duties (China)*, there is no expansion in the nature of the legal claims against the TRRs measure in these disputes.

### 2.3.2 Identification of the single unwritten TRRs measure

2.70. The United States requests the Appellate Body to reject all of Argentina's claims on appeal, and to uphold the Panel's findings. The United States considers that Argentina has failed to confront and discuss the actual content of the complainants' evidence on the TRRs, which shows systematic and sustained efforts by Argentina to use TRRs to force businesses to act in accordance with Argentina's trade policy objectives, including import substitution and reducing or eliminating trade deficits. The evidence also shows that the imposition of TRRs on businesses has not been a

<sup>133</sup> United States' appellee's submission, para. 45. (emphasis original)

<sup>134</sup> United States' appellee's submission, para. 29.

<sup>135</sup> United States' appellee's submission, para. 37. (emphasis original)

<sup>136</sup> United States' appellee's submission, para. 47 (quoting First Preliminary Ruling, para. 3.33).

<sup>137</sup> United States' appellee's submission, para. 48.

series of one-off decisions, but is the result of a measure that Argentine officials maintain but never put in writing. The United States further considers that, in addition to relying upon statements by top Argentine officials, the Panel examined and discussed the evidence concerning each of the five identified TRRs. Having completed that analysis, the Panel concluded that "the requirements constitute different elements that contribute in different combinations and degrees ... towards the realization of the common policy objectives that guide Argentina's 'managed trade' policy".<sup>138</sup> In the view of the United States, the evidence overwhelmingly supports the Panel's conclusion that Argentina maintains the TRRs measure, and it strongly undermines Argentina's contentions that there could be any question about the validity of the Panel's findings that the measure is attributable to Argentina, well-defined, and of general and prospective effect.

2.71. In this context, the United States considers that Argentina's claims on appeal that the Panel erred in finding that the single TRRs measure exists and in failing to apply the legal standard articulated in *US – Zeroing (EC)* are misplaced.

2.72. With respect to Japan's "as such" findings, the United States considers that Argentina has failed to meet the high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU.

### 2.3.2.1 The joint claims against the single TRRs measure

2.73. The United States characterizes Argentina's claims that the Panel applied an incorrect legal standard in assessing the existence of the TRRs measure as without merit. The complainants met their burden to provide sufficient evidence for the Panel to determine that the TRRs measure exists. Although it is likely that, in most cases, a greater volume of evidence is necessary to demonstrate the existence of an unwritten measure, the United States considers that such likelihood 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 a measure, merely because the measure is unwritten.

2.74. The United States also contends that there is no basis for Argentina's argument that the Panel erred by failing to require the complainants to demonstrate that the TRRs measure has general and prospective application. In particular, the United States considers Argentina's reliance on the Appellate Body report in *US – Zeroing (EC)* and the panel report in *EC and certain member States – Large Civil Aircraft* to support the existence of a higher standard of proof for unwritten measures to be misplaced. The Appellate Body in *US – Zeroing (EC)* considered whether the "zeroing methodology" could be challenged "as such" as a "rule or norm". In these disputes, however, the measure being challenged is not a "rule or norm" as that term was used by the Appellate Body in *US – Zeroing (EC)*; rather, the measure takes the form of a decision by Argentina to impose the TRRs. Moreover, the Appellate Body in *EC and certain member States – Large Civil Aircraft* considered that it is not necessarily the case that a complainant must demonstrate the existence of a rule or norm of general and prospective application to show that a measure exists.<sup>139</sup>

2.75. The United States considers that the facts in these disputes and the analysis that should be followed are quite similar to those that were before the panel in *EC – Approval and Marketing of Biotech Products*. That panel concluded that the question with respect to the existence of an unwritten measure is the same as that related to any fact asserted by a Member in the course of dispute settlement procedures: i.e. whether the evidence supports the complainants' assertion. Moreover, the evidence presented in *EC – Approval and Marketing of Biotech Products* is very similar to that presented to the Panel here. The United States posits that, like in *EC – Approval and Marketing of Biotech Products*, the evidence here more than sufficed to support the Panel's finding that the TRRs measure exists and is susceptible to challenge in the WTO dispute settlement process.

2.76. As to Argentina's argument that the Panel improperly substituted a standard articulated by the panel in *US – COOL* for a standard applicable to the identification of an unwritten measure, the United States reiterates that there is no separate legal standard applicable to the identification of

<sup>138</sup> United States' appellee's submission, para. 117 (quoting Panel Reports, para. 6.228).

<sup>139</sup> United States' appellee's submission, para. 133 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794).

an unwritten measure. The Panel not only considered the three factors highlighted by the panel in *US – COOL*, but also concluded that the evidence demonstrated the existence of each of the individual TRRs. The Panel then found that the requirements were imposed according to the single measure identified in the complainants' panel requests.

2.77. The United States considers that, even though it did not need to, the Panel did make the factual findings that Argentina thinks the Panel needed to make in order to permit a challenge to its unwritten measure. In applying the legal standard relied upon by Argentina – i.e. relying on the same evidence presented by the United States – to Japan's "as such" claims, the Panel explicitly considered whether the measure's precise content had been established with sufficient precision, and whether the measure has general and prospective effect. Accordingly, for the United States, there would be no basis on which to reverse the Panel's findings even if the Appellate Body were to determine that the Panel needed to apply the standard proposed by Argentina.

2.78. In addition, the United States considers both "illogical and untenable" Argentina's argument that the Panel's failure to apply the legal standard articulated in *US – Zeroing (EC)* resulted in an improper presumption that a single TRRs measure exists.<sup>140</sup> To support its argument, Argentina refers to the Panel's statement that "[t]he fact that the TRRs can be imposed separately does not mean that a single global measure does not exist."<sup>141</sup> However, Argentina's argument rests on its selective quotation of the Panel Reports without taking account of the Panel's statement that, "[i]f the Argentine Government imposed five requirements at once on a specific economic operator, this would not make the TRRs measure in that particular case any more 'global' as compared to a TRRs measure that consisted of a single requirement."<sup>142</sup> In the view of the United States, the Panel did not presume the existence of the TRRs measure; rather, it undertook a lengthy evaluation of whether Argentina was imposing each of the TRRs, and whether those requirements were imposed under a single measure.

2.79. Finally, the United States considers that the Panel was not "simply asserting the single TRRs measure into existence" when it explained that the TRRs constitute different elements that contribute in different combinations and degrees toward the realization of common policy objectives that guide Argentina's "managed trade" policy.<sup>143</sup> Rather, in the view of the United States, the Panel was highlighting the obvious: the fact that the TRRs contribute in different combinations and degrees to the objectives of Argentina's "managed trade" policy constitutes a powerful reason to consider them to be components of a single measure.

2.80. The United States considers that the voluminous record evidence, painstakingly examined and discussed by the Panel in its Reports, was fully consistent with the above-mentioned findings, and demonstrates overwhelmingly that the TRRs do function together to advance common policy objectives, and are often employed in tandem with respect to particular companies or industries.

### **2.3.2.2 Article 11 of the DSU – The Panel's finding on Japan's "as such" claims against the single TRRs measure**

2.81. The United States considers Argentina's claims under Article 11 of the DSU to be without merit. Contrary to established Appellate Body jurisprudence, Argentina is recasting its arguments before the Panel under the guise of an Article 11 claim and attempting to circumvent the fact-finding authority of the Panel by citing to the "particular rigour" that is necessary to find the existence of an unwritten norm or rule.<sup>144</sup> The United States asserts that, before the Panel and now on appeal, Argentina has failed to confront the substantial evidence on the record.

2.82. With respect to Argentina's allegations of error as to the Panel's evaluation of the evidence on the content and general and prospective nature of its measure, the United States submits that the Panel fulfilled its obligation to "consider all the evidence presented to it, assess its credibility,

<sup>140</sup> United States' appellee's submission, para. 145.

<sup>141</sup> United States' appellee's submission, para. 148 (quoting Panel Reports, para. 6.227).

<sup>142</sup> United States' appellee's submission, para. 148 (quoting Panel Reports, para. 6.227).

<sup>143</sup> United States' appellee's submission, para. 149 (quoting Argentina's appellant's submission, para. 133; and referring to Panel Reports, para. 6.228).

<sup>144</sup> United States' appellee's submission, para. 159 (referring to Argentina's appellant's submission, para. 141, in turn quoting Appellate Body Report, *US – Zeroing (EC)*, para. 198).

determine its weight, and ensure that its factual findings have a proper basis in that evidence".<sup>145</sup> Using the voluminous evidence on the record, the Panel explored in detail whether the complainants had established evidence of the TRRs measure and its contours. The Panel then returned to that content in its separate consideration of Japan's "as such" claim, which was based on the same evidence as that supporting the United States' claim. In doing so, the United States submits, the Panel did not need to repeat its earlier discussion of all the evidence showing the content of the TRRs measure.

2.83. The United States considers that the TRRs measure had precise content and was not amorphous or ill-defined. As the United States explained to the Panel, pursuant to the TRRs measure, "Argentine officials require, as a prior condition for importation, commitments to export a certain dollar value of goods; reduce the volume or value of imports; incorporate local content into products; make or increase investments in Argentina; and/or refrain from repatriating profits."<sup>146</sup> Furthermore, the Panel properly understood that requiring the level of detail Argentina considers necessary "could make it almost impossible in practice to challenge [unwritten] measures".<sup>147</sup> Argentina considers that the discretionary and non-transparent nature of the TRRs measure immunizes it from challenge in the WTO dispute settlement process, but the United States contends that the Panel properly recognized that this cannot be the case.

2.84. The United States further disputes Argentina's assertion that the Appellate Body report in *US – Zeroing (EC)* set out a standard for identifying the precise content of an unwritten measure. Argentina has never indicated what it thinks this standard is, and the Appellate Body did not set forth any separate standard for establishing the content of unwritten measures for purposes of an "as such" challenge. Rather, the Appellate Body simply considered a variety of pieces of evidence that were indicative of the content of the measure, before concluding that the evidence on the record was sufficient to identify its precise content. In the United States' estimation, that is precisely what the Panel did: it painstakingly established the content of each individual TRR and the way that the TRRs operate together as a single measure to support Argentina's import substitution policies.

2.85. The United States submits that Argentina's allegations that the Panel erred in finding that the TRRs measure is of general application are without merit. The Panel explained that panels in disputes under Article X of the GATT 1994 have interpreted the term "general application" to refer to measures applicable to "an unidentified number of economic operators" or "a range of situations or cases", as opposed to measures addressed to a single company or applied to a single shipment, and correctly observed that the panel in *China – Raw Materials* considered to be of general application a measure that had the potential to affect trade and traders.<sup>148</sup> Thus, in the United States' view, the Panel properly rejected Argentina's argument that only measures applicable to all cases are measures of general application.

2.86. The United States also submits that Argentina's argument that the Panel failed to make an objective assessment when finding that the measure has prospective effect is equally without merit. Citing *US – Shrimp (Viet Nam)*, Argentina appears to suggest that the Panel should not have found prospective effect because the TRRs measure is not applied in all cases. However, nothing about the panel's decision in *US – Shrimp (Viet Nam)* suggests such a requirement. Rather, that panel was clear that a variety of types of evidence are relevant to whether a measure is prospective. Argentina's suggestion that a measure giving discretion to officials cannot be found to be prospective not only "flies in the face" of an ordinary understanding of the term "prospective", but also would lead to the "absurd" result, in the view of the United States, that Members could insulate their measures from challenge by making them discretionary.<sup>149</sup>

2.87. Finally, as to Argentina's argument that the Panel found that the TRRs measure has prospective effect because it has been applied repeatedly, the United States contends that the Panel did not find the measure to be prospective solely on the basis of mere repeated application.

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<sup>145</sup> United States' appellee's submission, para. 164 (quoting Appellate Body Report, *Brazil – Retreated Tyres*, para. 185 (fn omitted)).

<sup>146</sup> United States' appellee's submission, para. 171 (quoting United States' opening statement at the second Panel meeting, para. 73).

<sup>147</sup> United States' appellee's submission, para. 171 (quoting Panel Reports, para. 6.325).

<sup>148</sup> United States' appellee's submission, para. 181 (quoting Panel Reports, para. 6.331).

<sup>149</sup> United States' appellee's submission, para. 184.

Rather, the Panel observed that the TRRs measure has been applied for several years, and that the measure can be applied to any sector or economic operator. The Panel further highlighted that the policy of "managed trade" or "trade administration," which the TRRs measure is part of and implements, is publically announced and, crucially, that Argentina's Secretary of Domestic Trade has been explicit that this policy will continue. The Panel then explained that evidence on the record suggests that these commitments will continue to be required unless and until the policy is repealed or modified. The United States considers that the Panel's conclusion that the measure will continue to be applied in the absence of a future policy change is the only logical conclusion to be drawn from the evidence.

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

### **2.3.3 The DJAI procedure: Articles VIII and XI:1 of the GATT 1994**

2.89. The United States submits that the Panel correctly found that: (i) Article VIII of the GATT 1994 does not limit the scope of application of Article XI:1 of the GATT 1994; (ii) Members may not exclude a restriction from scrutiny under Article XI:1 merely by characterizing it as a procedural, rather than a substantive, measure; and (iii) the DJAI procedure is a non-automatic trade restriction inconsistent with Article XI:1. For the United States, Argentina's arguments on appeal must be rejected because they depend upon assuming that conflicts exist where they do not and upon imputing concepts and terms into treaty provisions when there is no basis to do so.

#### **2.3.3.1 The scope of Article VIII of the GATT 1994**

2.90. The United States submits that Argentina's argument on formalities and requirements is misplaced in the context of the DJAI procedure. The Panel did not describe the DJAI procedure as a documentation requirement within the scope of Article VIII:1(c) of the GATT 1994. Instead, the Panel concluded that the DJAI procedure is not a "mere formality", but rather a procedure by which Argentina determines the right to import. According to the United States, approval of a DJAI can be withheld for non-transparent and discretionary reasons.

#### **2.3.3.2 The relationship between Articles VIII and XI:1 of the GATT 1994**

2.91. The United States puts forward several reasons to demonstrate: (i) that Article VIII of the GATT 1994 does not limit the scope of Article XI:1 of the GATT 1994; and (ii) that a restriction cannot escape scrutiny under Article XI merely by being characterized as an Article VIII "formality" or "requirement". First, the question of whether or not "formalities" or "requirements" are included or excluded from the scope of Article XI:1 is not directly relevant. According to the United States, this is because its claim under Article XI is not focused on "formalities", but rather on the fact that the DJAI procedure is non-transparent and discretionary.

2.92. Second, the United States contends that the texts of Articles VIII and XI:1 of the GATT 1994 do not support the conclusion that they are mutually exclusive, or that Article XI:1 could not apply to "formalities" or "requirements". Principles of treaty interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended. As the Appellate Body has repeatedly stated, and as the Panel recognized, in the light of the principle of effective treaty interpretation, all WTO provisions should be interpreted harmoniously and cumulatively whenever possible. Article VIII cannot serve as a derogation from Article XI:1 simply by labelling a restriction as a "formality" or "requirement". The primary subparagraph relied on by Argentina, namely Article VIII:1(c) of the GATT 1994, contains hortatory language covering only "documentation requirements", and does not create an exception to Article XI:1. In the United States' view, accepting Argentina's argument would result in the DJAI procedure being subject to no WTO discipline.

2.93. Finally, the United States submits that Argentina's reliance on the text of the Agreement on Trade Facilitation is misplaced. That Agreement does not have interpretative value for understanding the obligations under Article XI of the GATT 1994 because it does not constitute a subsequent agreement of the parties on the interpretation of that provision. In any event, the United States argues there is no conflict between Article XI:1 of the GATT 1994 and the

Agreement on Trade Facilitation, and, as explained above, it is not possible to read into Article XI:1 concepts not present therein.

2.94. In addition, the United States submits that a Member may not shield a trade restriction from scrutiny under Article XI:1 of the GATT 1994 merely by characterizing it as a procedural, rather than a substantive, measure. Regardless of whether it is "substantive" or "procedural", the DJAI procedure is a discretionary restriction, independent from any other measure, because importers cannot import goods until the DJAI is approved, and such approval can be withheld by unidentified Argentine agencies on the basis of undisclosed reasons for indeterminate time periods. The DJAI procedure constitutes a non-automatic restriction. Article XI:1 applies to all restrictions, whether or not characterized as "procedural" or "substantive" in nature. The relevant WTO jurisprudence does not support the conclusion that a Member may exclude procedural measures from scrutiny under Article XI:1. Past panels have recognized that discretionary trade restrictions that do not implement any other restrictions, such as a quota, are, on their face, inconsistent with Article XI:1.<sup>150</sup> As in *India – Quantitative Restrictions*, the DJAI procedure is a discretionary trade restriction independent from any other measure, and does not specify criteria governing the exercise of discretion. In this context, the United States considers that Argentina's proposed analytical framework is inapposite, because the DJAI procedure is a discretionary restriction that, on its face, does not implement a separate WTO-consistent restriction.

### 2.3.3.3 The application of Article XI:1 of the GATT 1994 to the DJAI procedure

2.95. The United States disagrees with Argentina's claim that the Panel erred in concluding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because of its non-automatic nature for the following reasons. First, the United States emphasizes the narrow nature of this part of Argentina's appeal, and that Argentina has not contested any of the three other elements relied upon by the Panel in support of its finding that the DJAI procedure is inconsistent with Article XI:1.

2.96. Second, the United States contends that the DJAI procedure is a non-automatic trade restriction because it is a highly discretionary and non-transparent restriction. The Panel found that the Argentine authorities have discretion to grant or deny DJAI applications for undisclosed reasons and on grounds that are unrelated to the information that importers are required to provide in their DJAIs. Thus, even if an importer complies with all formal DJAI requirements, authorities are free to deny the application on unspecified grounds.

2.97. Third, the United States submits that evidence on the record demonstrates that Argentine authorities frequently exercise their discretion to withhold approval to import, often without explaining the reasons for "observations". Even after an importer has satisfied all additional demands, authorities may choose not to approve the DJAI application. In the United States' view, this evidence reflects the lack of accountability and transparency resulting from the wide discretion to restrict imports.

2.98. Fourth, the United States submits that the extended delays in the approval of the DJAI applications that have been observed are a relevant factor in concluding that the DJAI process is a non-automatic trade restriction. The United States cites evidence in the Panel record of extended delays that commonly arise in connection with the DJAI procedure, and recalls that GATT panels made a connection between the timing of application approvals and whether or not a license requirement constitutes an Article XI restriction, using the terms "non-automatic" and "automatic".

2.99. Finally, the United States submits that Argentina's reliance on the Import Licensing Agreement is misplaced because there is no conflict between Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. Moreover, the DJAI procedure fails to qualify as an automatic licensing measure, and the chapeau to Article 2.2(a) of the Import Licensing Agreement refers to the trade-restricting effects of licensing procedures that do not qualify as "automatic". In the United States' view, Article 3.2 of the Import Licensing Agreement is also inapplicable to these disputes, because that provision anticipates that there is a separate, WTO-consistent restriction imposed through licensing procedures, but the DJAI procedure is itself a trade restriction.

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<sup>150</sup> United States' appellee's submission, paras. 76-80 (referring to Panel Reports, *India – Quantitative Restrictions*; *China – Raw Materials*; and *Korea – Various Measures on Beef*).

## 2.4 Arguments of Japan – Appellee

### 2.4.1 The Panel's terms of reference

2.100. Japan requests the Appellate Body to dismiss Argentina's claims of error, and underlines that there is no basis for the reversal of the Panel's finding that the TRRs measure was within its terms of reference. Japan asserts, first, that the Panel did not err in rejecting Argentina's claim that the TRRs measure was not properly identified in the complainants' consultations requests and, second, that the subsequent inclusion of the TRRs measure in the complainants' panel requests did not expand the scope of these disputes.<sup>151</sup>

2.101. Japan maintains that, although its consultations request did not explicitly use the term "TRR" or "TRRs measure", there is no question that this was precisely what it referred to when it stated that "Argentina often requires importers of goods to undertake certain commitments". Argentina itself admitted, which the Panel acknowledged, that the term "commitments" identified in the consultations requests pertain to the "commitments" that Argentina allegedly requires importers to undertake that are separate from the DJAI and CIs. This set of "commitments", in turn, is precisely what the complainants refer to as the TRRs measure in their panel requests. Thus, by identifying the TRRs measure plainly and succinctly in its consultations request as one of the measures about which to consult Argentina, Japan satisfied its obligations under the DSU, and the Panel correctly found the same.

2.102. In addition, Japan refers to Argentina's argument that the "commitments" language could, at most, be read to suggest that the complainants would be making an "as applied" claim, and "cannot possibly encompass an 'as such' or equally broad challenge".<sup>152</sup> Japan asserts that this contention is inconsistent with the statement in the consultations request that "Argentina often requires the importers of goods to undertake certain commitments". This clause suggests that the subject of consultations between the parties was precisely Argentina's requirement for companies to undertake commitments, in addition to the individual commitments themselves. Nothing in the consultations request indicates that Argentina's requirements for companies to undertake commitments would be outside the scope of the dispute. Consequently, a reading of Japan's consultations request does not support Argentina's narrow interpretation that Japan exclusively put forward an "as applied" challenge.

2.103. Further, Japan points out that Argentina's concerns hinge on the fact that the consultations requests did not explicitly identify: (i) the TRRs "commitments" or "requirements" as an "overarching" or "single measure"; or (ii) the claims as "as such" or "as applied" challenges. However, nothing in the DSU suggests that any kind of specific reference to the "type of challenge" (i.e. "as such" and/or "as applied") or the "nature of the measures" that are alleged to have violated a Member's WTO commitments (i.e. whether these are single or multiple individual measures) needs to be included in the consultations request.<sup>153</sup> Citing prior Appellate Body jurisprudence, Japan underscores that consultations help complainants to define the scope of their challenges and the nature of the measures at issue. Thus, the Appellate Body has, in the past, upheld "as such" challenges even where the request for consultations did not specifically indicate that the claim would be an "as such" claim.

2.104. Japan emphasizes the similarity between its consultations request and its panel request, both of which identify the "Argentine requirement for importers to undertake certain actions", and classify these actions into "the open list of five categories". As between its consultations request and its panel request, there are only two "potentially relevant differences", namely: (i) its panel request used the term "Restrictive Trade Related Requirements" to describe the specific measure at issue, while its consultations request did not; and (ii) its panel request stated that the TRRs measure "and any application thereof" are inconsistent with Argentina's WTO obligations.<sup>154</sup> The Panel took account of this evidence and nevertheless found, in the light of the striking similarity in the two documents, that Japan's consultations request and panel request identify the same TRRs measure, and that the "nature" and the "scope" of the measure were the same in both documents.

<sup>151</sup> Japan's appellee's submission, para. 44.

<sup>152</sup> Japan's appellee's submission, para. 29 (quoting Argentina's appellant's submission, para. 28).

<sup>153</sup> Japan's appellee's submission, para. 37.

<sup>154</sup> Japan's appellee's submission, para. 30.

Hence, the Panel correctly found that Japan's panel request did not impermissibly expand the scope of the dispute or change its essence.

2.105. Moreover, while Argentina anchors its claims on *US – Anti-Dumping and Countervailing Duties (China)*, Japan emphasizes that the present disputes do not resemble that case. The findings in *US – Anti-Dumping and Countervailing Duties (China)* were based on the principle that the identification of specific instances of application of measures in a consultations request does not automatically permit the inclusion of a separate "general authority or legal basis" for those specific instances of application.<sup>155</sup> Thus, that dispute does not stand for the proposition that all "as such" claims must be explicitly identified in the consultations request. Unlike the factual circumstances in *US – Anti-Dumping and Countervailing Duties (China)*, the complainants in these disputes did not identify in their panel requests a new and separate "general authority or legal basis". Instead, the consultations requests and the panel requests identify the same requirements that compose the measure at issue, and the absence of the words "as such" in the consultations requests is immaterial.

2.106. Finally, Japan underscores that it is clear from Argentina's first written submission to the Panel and request for a preliminary ruling that Argentina was in fact well aware of the case against which it had to defend itself. Hence, Argentina was not prejudiced by what it now claims to be an omission from the complainants' consultations requests.

#### 2.4.2 Identification of the single unwritten TRRs measure

2.107. Japan requests the Appellate Body to reject Argentina's claim that the Panel erred in failing to apply the correct legal standard to ascertain the existence of the single TRRs measure. Japan also requests the Appellate Body to uphold, without modification, the Panel's findings at paragraphs 7.9.d through f of the Panel Reports. In addition, for the sake of completeness, and to avoid any future confusion in the implementation stage and to ensure the effective resolution of these disputes, Japan requests the Appellate Body to confirm that both of the "as applied" findings sought by Japan were addressed by the Panel's findings on the joint claims by the three complainants at paragraphs 6.265, 6.295, 7.9.e, and 7.9.f of the Panel Reports. To the extent needed, Japan requests the Appellate Body to complete the legal analysis.

2.108. Japan also rejects Argentina's claim that the Panel failed to meet its obligations under Article 11 of the DSU in finding that Japan had established the precise content and general and prospective application of the TRRs measure in its challenge against the TRRs measure "as such", and requests the Appellate Body to reject Argentina's appeal and uphold the Panel's findings on Japan's "as such" claims.

##### 2.4.2.1 The joint claims against the single TRRs measure

2.109. Japan claims that the Panel applied the correct legal standard in finding that the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994. For Japan, the findings on the joint claims by the three complainants were not "as such" findings, but were related to the existence and operation of the single TRRs measure. For this reason, the Panel was correct not to apply the legal standard articulated in *US – Zeroing (EC)* in making these findings. In addition, Japan considers that, when the Panel reached its "as such" findings, the Panel applied precisely the legal framework that Argentina says it should have applied. In Japan's view, it is quite clear that the findings on the joint claims by the three complainants cover "*the application or operation of the single TRRs measure, both systematically and in individual instances*".<sup>156</sup>

2.110. In Japan's view, Argentina's entire argument is based on "the false premise" that the Panel's findings on the joint claims by the three complainants were "as such" findings.<sup>157</sup> Japan cautions, however, that a careful review of the Panel's findings confirms that these were not "as such" findings. First, the Panel made separate "as such" findings in addressing Japan's "as such" claims. By refraining from using the term "as such" for its findings on the joint claims, the Panel made it clear that these findings were not "as such" findings. Second, the Panel referred to *EC and*

<sup>155</sup> Japan's appellee's submission, para. 41 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.38 and 14.39).

<sup>156</sup> Japan's appellee's submission, para. 45. (emphasis original)

<sup>157</sup> Japan's appellee's submission, para. 48.



*certain member States – Large Civil Aircraft*, in which the Appellate Body stated that a determination that a measure has general and prospective application is not essential in all challenges against unwritten measures, but only if a challenge is against the measure "as such".<sup>158</sup>

2.111. For Japan, this point demonstrates the Panel's intention to reserve its analysis of the general and prospective character of the TRRs measure for the "as such" analysis while proceeding with the "single measure" analysis – exactly as it did in addressing the joint claims. Moreover, though it did not explicitly say so, the Panel appeared to respond to both types of "as applied" findings requested by Japan – i.e. broad "as applied" findings and findings against the TRRs measure in each and every instance of its application – in addressing the joint claims. By contrast, the Panel then dealt with Japan's separate "as such" challenge. Japan adds that the Panel was correct not to treat its broad "as applied" claims together with the claims of the other complainants' "as such" claims. Japan emphasizes, in this connection, that the mere fact that claims would result in prospective compliance obligations, or that they are not only about specific instances, does not mean that the claim itself is an "as such" claim or that "general and prospective" application must be shown.

2.112. In the light of the above, Japan contends that Argentina has failed to engage with any of the clear textual evidence showing that the Panel's findings on the joint claims were not findings on "as such" claims. Moreover, Argentina does not explain why, in its view, these findings were supposedly "indistinguishable" from the findings on Japan's "as such" claims, even though, in Japan's view, the Panel clearly distinguished these two separate sets of findings. Although the Panel's findings on Japan's "as such" claims could be read to rely on – and somehow incorporate – the Panel's earlier findings on the joint claims, Japan considers that the Panel's findings on the joint claims nonetheless stand on their own and led to the separate and independent conclusion that the "single" TRRs measure exists.

2.113. From a systemic point of view, Japan considers that, if unwritten measures could be challenged only on the basis of the "as such" criteria outlined in *US – Zeroing (EC)*, then the requirements for challenging an unwritten measure would effectively be more stringent than for a written measure. In Japan's view, this would have the effect of, *inter alia*, encouraging WTO-inconsistent behaviour via unwritten rather than written measures.

2.114. Finally, Japan notes that Argentina argues that: (i) the Panel erred because, instead of the legal standard in *US – Zeroing (EC)*, it applied the legal standard in *US – COOL, Japan – Apples*, and *US – Tuna II (Mexico)*; (ii) the latter three cases should be distinguished from the current case in that they addressed *written* underlying measures; and (iii) by applying the legal standard from these three cases, the Panel erred because it essentially applied the analysis "backwards".<sup>159</sup>

2.115. Japan considers that these three arguments must fail for several key reasons. Argentina's first argument appears to confuse two separate and distinct concepts that the Panel discusses in separate parts of its Reports: (i) whether there is evidence of the existence of a single measure as described by the complainants; and, if so, (ii) whether there is evidence that this measure has general and prospective application. Japan contends that Argentina's second argument is "obviously incorrect": the Panel cited the three above-mentioned disputes to assess whether to examine certain instruments as one single measure or separate measures, but only after determining, on the basis of individual instances of the TRRs measure's application, that the individual TRRs exist.<sup>160</sup> With respect to Argentina's third argument, Japan points out that the Panel applied the *US – Zeroing (EC)* legal standard to reach its "as such" findings against the TRRs measure. Even assuming *arguendo* that Argentina's reading of the Panel Reports were correct – i.e. that the findings on the joint claims should in fact be understood to be tacitly "as such" or that a finding of "general and prospective nature" was otherwise required – Argentina's appeal would still fail, because the Panel subsequently reviewed the evidence concerning the general and prospective nature of application of the measure, and found it compelling. Accordingly, the Appellate Body could simply rely on those findings to uphold the Panel's findings and/or complete the legal analysis.

<sup>158</sup> Panel Reports, para. 6.42 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792).

<sup>159</sup> Japan's appellee's submission, para. 65.

<sup>160</sup> Japan's appellee's submission, para. 67.

#### 2.4.2.2 Article 11 of the DSU – The Panel's finding on Japan's "as such" claims against the single TRRs measure

2.116. Japan requests the Appellate Body to reject Argentina's claims under Article 11 of the DSU and to uphold the Panel's "as such" findings. In Japan's view, Argentina fails to identify any legitimate basis upon which to question the objectivity of the Panel's finding. Japan considers that Argentina has failed both to provide the Panel with requested evidence and to dispute the existence of the "managed trade" policy. Moreover, Argentina has not provided any evidence that the "managed trade" policy or the TRRs will not be applicable in the future. Japan considers that these factors, alone or in combination with the arguments and evidence submitted by the complainants, constitute a more than adequate basis for the Appellate Body to uphold the Panel's findings and to reject Argentina's claims on appeal.

2.117. Referring to Argentina's claims that the Panel failed to meet its obligations under Article 11 of the DSU in finding that Japan, in its "as such" claim, had established the precise content and general and prospective application of the TRRs measure, Japan underlines that the Appellate Body has found repeatedly that it is the province of panels as the triers of fact to weigh and balance the evidence, and that the Appellate Body will only interfere with the panel's discretion in the case of an "egregious error that calls into question the good faith of a panel", in violation of "due process of law or natural justice".<sup>161</sup> For Japan, then, unless Argentina can establish that there is an egregious error in the Panel's findings, Argentina's appeal should be rejected and the Panel's findings should be upheld. Moreover, the Article 11 standard is the same regardless of whether a claim is "as such" or otherwise, and regardless of whether the measure is written or unwritten. Even though Argentina states that particular rigour is required on the part of a panel to support a conclusion of the existence of a "rule or norm" that is not expressed in the form of a written document, this statement cannot be interpreted to result in a more stringent application of Article 11 of the DSU, or in an evidentiary threshold that is so high as to be nearly impossible to meet.

2.118. Japan considers that the Panel found that the complainants had submitted sufficient evidence to establish the content of the TRRs measure with enough precision so as to allow the Panel to evaluate the measure's WTO-consistency. Any imprecisions in the contours of the TRRs measure challenged by the complainants were due to Argentina's own refusal to provide information requested by the Panel. Japan stresses that, if Argentina believes that "flexibility and versatility" were in fact not essential elements of the TRRs measure, then it should have provided the Panel with evidence to that effect.<sup>162</sup>

2.119. Japan contests Argentina's claims that the Panel "lightly assumed" the content of the TRRs measure, and that its analysis, therefore, falls below the minimum threshold required for an objective assessment of the matter under Article 11 of the DSU. Argentina considers that the "alleged 'overarching' TRRs measure invented by the complainants for the purposes of these disputes is amorphous and ill-defined, and its content *cannot* be identified with the requisite degree of precision."<sup>163</sup> For Japan, however, Argentina's argument wrongly assumes that "flexibility and versatility" can never be features of measures susceptible to "as such" challenges, and that, if it is unclear exactly how Argentina enforces the TRR in any particular circumstance, then the content of the TRRs measure cannot be established precisely.

2.120. Japan cautions that accepting Argentina's "excessively demanding" standard for precision would encourage other Members to adopt similarly non-transparent measures so as to keep them hidden from WTO scrutiny.<sup>164</sup> Moreover, such standard has no basis in the covered agreements or in prior panel or Appellate Body reports. Rather, panels and the Appellate Body have acknowledged that, when a challenge is brought against an unwritten measure, the existence and the precise contours of the alleged measure may not always be certain or crystal clear. In this light, Japan agrees with the Panel that the "precise content" element of an "as such" analysis turns on whether, "based on the available evidence, both a panel and the respondent party have a clear

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<sup>161</sup> Japan's appellee's submission, para. 76 (quoting Appellate Body Reports, *EC – Hormones*, para. 133; and *Canada – Wheat Exports and Grain Imports*, para. 195).

<sup>162</sup> Japan's appellee's submission, para. 88.

<sup>163</sup> Japan's appellee's submission, para. 89 (quoting Argentina's appellant's submission, para. 172). (emphasis added by Japan)

<sup>164</sup> Japan's appellee's submission, para. 90.

understanding of the components and the operation of the challenged measure."<sup>165</sup> Japan submits that, as the Panel found, the complainants met this standard by demonstrating that the TRRs measure consists of the Argentine authorities' imposition on economic operators of one or more of five specific trade-related requirements as a condition to import goods into Argentina.

2.121. Japan challenges Argentina's claim that the Panel's findings regarding the general application of the TRRs measure lacked a sufficient basis in the evidence to support that the TRRs measure applies to all imports, all importers, and all economic operators that utilize imported items for manufacture in Argentina. Japan considers that a measure need not apply in all cases in order to be "general". Japan refers, in this regard, to *US – Underwear*, in which the Appellate Body stated that the term "general" in Article X of the GATT 1994 should be understood as covering "Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens".<sup>166</sup> Japan also points to dictionary definitions that, in its view, confirm that the ordinary meaning of "general" is more akin to "typically" or "in most instances" than to "always" or "without any exception". In Japan's view, Argentina stakes its view on a definition of the term "general" that is not consistent with either the ordinary meaning of this term or prior panel and Appellate Body interpretations thereof. The Panel applied the correct standard of "general" application to the facts and acted within the scope of its discretion in finding that "the TRRs measure can apply to any economic operator, regardless of the sector in which it operates and its size".<sup>167</sup> Japan notes that, in any event, "even when the TRRs measure may not be applied in each and every single instance in the precise same way, it is certainly always 'applicable', in the sense that importers can, at any time, be asked to make TRRs commitments and 'comply' with the measure, as described and found in the Panel Report."<sup>168</sup>

2.122. In addition, Japan considers that Argentina's arguments on the "prospective" element of the analysis do not identify any error at all, let alone an error that rises to the level required for a finding of inconsistency with Article 11 of the DSU. Rather, Argentina attempts to draw a narrow factual distinction between the facts of *US – Shrimp (Viet Nam)* and those of these disputes. Nevertheless, in Japan's view, Argentina ignores the fact that, while the panel in *US – Shrimp (Viet Nam)* was asked to make findings against a measure on the basis of only four instances of its application, the Panel in this case identified hundreds of instances over several years as from 2009.

2.123. Japan rejects Argentina's insinuation that the Panel did not cite sufficient evidence in finding that the TRRs measure applies prospectively. In particular, Argentina states: "[T]he Panel only cited a single piece of evidence, Panel Exhibit JE-759, in support of its conclusion that the alleged TRRs measure implements a 'deliberate policy'."<sup>169</sup> Japan considers that, in making this argument, Argentina is asking the Appellate Body to second-guess the Panel's weighing of factual evidence. Moreover, according to Japan, Argentina's carefully worded criticism ignores the Panel's description of Exhibit JE-759 as an "example" of the available evidence showing the prospective character of the measure, and the Panel's cross-references to paragraphs 6.230, 6.334, and 6.335 of its Reports, which in turn discuss other evidence and cross-refer to still further evidence regarding the deliberate and therefore prospective character of the TRRs measure.

2.124. Japan also points out that Argentina fell short with respect to its duty to cooperate under Article 13 of the DSU and cannot be allowed to hold that against the complainants. Argentina itself has not at any point disputed the existence of the "managed trade" policy, provided any evidence that the TRRs are one-off individual requirements, or provided any evidence that the "managed trade" policy or the TRRs will not be applicable in the future. Alone or in combination with the arguments and evidence submitted by complainants, Japan considers this to be a more than adequate basis for the Panel's findings and for the Appellate Body to uphold them and reject Argentina's claims on appeal.

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<sup>165</sup> Japan's appellee's submission, para. 92 (quoting Panel Reports, para. 6.325).

<sup>166</sup> Japan's appellee's submission, para. 96 (quoting Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, p. 29).

<sup>167</sup> Japan's appellee's submission, para. 98 (quoting Panel Reports, para. 6.335).

<sup>168</sup> Japan's appellee's submission, para. 99 (referring to Panel Reports, para. 6.335).

<sup>169</sup> Japan's appellee's submission, para. 103 (quoting Argentina's appellant's submission, para. 197).

### 2.4.3 The DJAI procedure: Articles VIII and XI:1 of the GATT 1994

2.125. Japan requests the Appellate Body to reject Argentina's claims of error, and affirm all of the Panel's findings and reasoning in connection with the DJAI procedure. Japan submits that Argentina fails to identify any error in the Panel's reasoning, and that, even if Argentina's arguments were correct, they would not justify Argentina's requests, because the DJAI procedure is not a mere import formality, but rather a restriction under Article XI:1 of the GATT 1994.

#### 2.4.3.1 The scope of Article VIII of the GATT 1994

2.126. Japan submits that the Panel's finding that the DJAI procedure is "not a mere [customs] formality" was based on an objective assessment of undisputed facts and their legal relevance, in accordance with Article 11 of the DSU.<sup>170</sup> Japan contends that the inconsistency with Article XI:1 of the GATT 1994 results from the import-restricting nature of the DJAI procedure itself, rather than any finding as to whether customs formalities are covered by Article VIII of the GATT 1994.

#### 2.4.3.2 The relationship between Articles VIII and XI:1 of the GATT 1994

2.127. Japan points out that Argentina does not appear to have appealed the Panel's finding that Article XI:1 of the GATT 1994 applies to the DJAI procedure irrespective of Article VIII of the GATT 1994 – i.e. that these provisions "are *not* mutually exclusive".<sup>171</sup> Japan also asserts that Argentina's DJAI-related arguments assume that the DJAI procedure does not itself have trade-restricting effects inconsistent with Article XI:1 of the GATT 1994. If this unsupported factual assumption is dropped, the Panel's findings must be upheld. Japan emphasizes that the Panel's findings of inconsistency with Article XI:1 were based on the import-restricting nature of the DJAI procedure itself, and that Argentina has not appealed the Panel's factual findings to this effect.

2.128. In Japan's view, Argentina's argument concerning the status of import formalities and requirements under Article VIII of the GATT 1994 and its relationship to Article XI:1 of the GATT 1994 is without merit in these disputes, even assuming that import formalities and requirements are inherently WTO-consistent if they restrict trade as an "ordinary incident" of the formality or requirement itself. This is because the DJAI procedure, whether it is a customs formality or not, has trade-restricting effects beyond the level of any ordinary incident of restrictions associated with the formality or requirement itself.

2.129. With respect to Argentina's proposed framework, Japan submits that this has no textual basis in the GATT 1994, and would require reading words into the text of the Agreement which are simply not there. Even if Article VIII were an affirmative defence, the burden of proof should fall on the respondent, rather than on the complainant. Moreover, according to Japan, Argentina did not argue before the Panel that the DJAI procedure should have been separated into substantive rules or measures, on the one hand, and "mere formalities", on the other hand.

2.130. Japan considers that a harmonious interpretation can easily be achieved without reading unstated amendments into the text of Article XI:1 of the GATT 1994. First, Article VIII:1(a) of the GATT 1994 imposes an affirmative obligation not to impose formalities and requirements of a certain kind, rather than an affirmative defence or a carve-out from other WTO obligations. This interpretation is confirmed by the context of Article VIII, because, where the treaty drafters intended to insert carve-outs from other Articles of the GATT 1994, they did so explicitly. In addition, the negotiating history of Article VIII supports Japan's understanding, because, while the negotiators ensured that the coverage of Article VIII of the GATT 1994 would not overlap with that of Article III of the GATT 1994, they chose not to do the same with respect to Article XI of the GATT 1994.<sup>172</sup> The obligations under Article VIII:1(c) are hortatory, and do not recognize that formalities and requirements *per se* will necessarily have trade-restricting effects. Any trade-restricting effect of formalities or requirements is proscribed under Article XI:1. Second, Article XX(d) of the GATT 1994 already serves as the appropriate affirmative defence for import formalities with legitimate trade-restricting effects. Thus, Japan considers that it would, in fact, be

<sup>170</sup> Japan's appellee's submission, para. 134 (referring to Panel Reports, paras. 6.460-6.474).

<sup>171</sup> Japan's appellee's submission, para. 106 (referring to Panel Reports, para. 6.474). (emphasis original)

<sup>172</sup> Japan's appellee's submission, para. 120 (referring to Havana Reports, p. 76, para. 35 (Panel Exhibit JE-772)).

inconsistent with the very structure of the GATT 1994 if Article VIII were interpreted to provide for additional exceptions or carve-outs.

2.131. Finally, Japan considers that the panel reports in *Korea – Various Measures on Beef* and *China – Raw Materials*, relied on by Argentina, stand only for the proposition that, to be inconsistent with Article XI:1 of the GATT 1994, a challenged measure must itself have trade-restricting effects, and the effects caused by other measures, including an underlying measure (if any), should not be attributed to that measure at issue. In Japan's view, the fact pattern in *India – Quantitative Restrictions* is more similar to the current disputes, because, in that dispute, the discretionary licensing system constituted the restriction on imports, and, in the current disputes, the DJAI procedure itself (rather than an additional or independent measure) constitutes the restriction on imports.<sup>173</sup>

#### 2.4.3.3 The application of Article XI:1 of the GATT 1994 to the DJAI procedure

2.132. Japan considers that, even under the legal framework advanced by Argentina, Argentina's arguments in relation to the DJAI procedure are insufficient to justify Argentina's request that the Appellate Body reverse the Panel's findings at paragraph 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report.<sup>174</sup>

2.133. Japan submits that Argentina fails to show that the Panel erred in citing the DJAI procedure's non-automatic character as one of four independent bases for finding it to be inconsistent with Article XI:1 of the GATT 1994 for the following reasons.

2.134. First, Japan considers that the Panel's ultimate findings could still be upheld on the basis of the other three independent bases for the Panel's finding of inconsistency that are not challenged by Argentina on appeal.

2.135. Second, in Japan's view, non-automaticity alone, if understood not just as a "delay", but as the possibility that imports may never occur is, by definition, enough for a finding of inconsistency with Article XI:1 of the GATT 1994. The non-automaticity of the DJAI procedure lies in the fact that, in order to transition to "exit" status, a DJAI must have either no observation, or, if one is entered, it must be lifted by the Argentine agency concerned. Unlike with automatic import licences, there is no *pro forma* step or set of steps to ensure that the licence will be granted. Accordingly, Japan submits that the Panel's finding that non-automaticity contributes to the DJAI procedure's WTO-inconsistency does not imply that all licences causing a delay in importation are necessarily inconsistent with Article XI:1.

2.136. Third, Japan considers that Argentina incorrectly conflates inconsistency with Article XI:1 of the GATT 1994 with inconsistency with WTO law as a whole. The Panel's finding that non-automaticity contributes to an inconsistency with Article XI:1 does not somehow imply that non-automatic import licences are necessarily WTO-inconsistent. Japan notes, for example, that a non-automatic import licensing procedure can be inconsistent with Article XI:1, but fall under an exception, such as Article XX of the GATT 1994, and therefore be GATT-consistent.

2.137. Finally, Japan notes that Argentina's references to the Agreement on Trade Facilitation cannot serve as an interpretative tool, because this agreement was under negotiation as of the establishment of the Panel. In any event, Japan considers that Argentina has failed to demonstrate that the negotiating text is inconsistent with Japan's interpretation of the relationship between Articles VIII and XI of the GATT 1994, or should change the findings of the Panel in this regard.

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<sup>173</sup> Japan's appellee's submission, paras. 126 and 127 (referring to Panel Report, *Korea – Various Measures on Beef*, para. 782).

<sup>174</sup> Japan's appellee's submission, para. 111 (referring to Argentina's appellant's submission, para. 243).

## 2.5 Claims of error by the European Union – Other appellant

### 2.5.1 The Panel's terms of reference

2.138. The European Union appeals the Panel's finding that the 23 measures described by the European Union in its first written submission to the Panel as "specific instances" of application of the TRRs were not clearly identified in the EU Panel Request and did not, therefore, fall within the Panel's terms of reference. The European Union requests the Appellate Body to reverse the Panel's finding in paragraph 7.1.c of the EU Panel Report, and to find instead that the 23 measures in question fell within the Panel's terms of reference as "measures at issue".<sup>175</sup>

2.139. The European Union recalls that, in order to ensure compliance with both the letter and the spirit of Article 6.2 of the DSU, a panel must determine whether a panel request is sufficiently clear on the basis of an objective examination of the request as a whole, as it existed at the time of filing, on the basis of the language used therein, and in the light of attendant circumstances.<sup>176</sup> A measure may be identified either by its form or by its substance, and "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>177</sup> The European Union further highlights the Appellate Body's finding that, "so long as each measure is discernable in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU".<sup>178</sup>

2.140. The European Union argues that the Panel erred in finding that the 23 specific instances of application of the TRRs described in section 4.2.4 of the European Union's first written submission to the Panel were not precisely identified and did not constitute "measures at issue". The language of the EU Panel Request shows that the European Union was not only challenging the existence of an overarching measure, but also challenging separately several actions taken by Argentina that are of the same nature as those described under the overarching measure. Annex III to the EU Panel Request lists 29 instances when Argentina imposed certain TRRs that share the same characteristics as the five requirements described as part of the overarching measure. For each of these 29 instances of application, Annex III to the EU Panel Request contains a reference to the relevant press release, which describes the measures at issue in terms of the entity or entities concerned, the date and the nature of the requirements imposed by the Argentine Government, and the commitments that the entity or entities undertook. The European Union asserts that the Panel erred in concluding that it was not possible to identify the specific measures at issue from the information contained in the title of the press release as well as its content.

2.141. In this regard, the European Union gives the example of Case 4, the article with the title "*La comercializadora de Porsche acordó compensar importaciones con exportaciones de vinos y aceites*" ("Porsche importer agrees to offset imports with exports of wine and oil"), and explains that this press release clearly describes the one-to-one requirement imposed by Argentina on Porsche, as announced on 30 March 2011. The one-to-one requirement shown in Case 4 corresponds to the requirement to balance imports with exports described in the first paragraph of section 3 of its panel request. Thus, the European Union contends that, on the basis of an objective examination of the EU Panel Request, the 23 specific instances of application of TRRs were identified with sufficient particularity to make each measure at issue discernible from its panel request.

2.142. The European Union also raises a conditional appeal. If the Appellate Body were to reverse or otherwise declare moot and of no legal effect any of the Panel's findings that, first, the TRRs measure exists, and, second, the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994, then the European Union requests the Appellate Body to complete the legal

<sup>175</sup> European Union's other appellant's submission, para. 23.

<sup>176</sup> European Union's other appellant's submission, para. 11 (referring to Appellate Body Reports, *Korea – Dairy*, paras. 124-127; *US – Carbon Steel*, para. 127; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8).

<sup>177</sup> European Union's other appellant's submission, para. 12 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 169).

<sup>178</sup> European Union's other appellant's submission, para. 12 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 170).

analysis and find that Argentina violated Article XI:1 and/or Article III:4 of the GATT 1994 in each of the 23 specific instances described in the European Union's first written submission to the Panel. To this end, the European Union states that there are sufficient factual findings by the Panel and uncontested facts on the record to allow the Appellate Body to complete the legal analysis.

## 2.6 Arguments of Argentina – Appellee

### 2.6.1 The Panel's terms of reference

2.143. Argentina does not take a position on the merits of the European Union's other appeal concerning the 23 specific instances of application of TRRs in its first written submission to the Panel. However, Argentina requested the Appellate Body to explore the merits of the European Union's arguments during the oral hearing. Nevertheless, Argentina recalls that, before the Panel, Argentina argued that the 29 separate measures included in the EU Panel Request were outside the Panel's terms of reference, because those separate measures had not been identified in the European Union's consultations request. The Panel, however, did not address this argument. If the Appellate Body were to reverse the Panel's ultimate finding in paragraph 7.1.c of the EU Panel Report, then Argentina requests the Appellate Body to find that the 23 measures described in the European Union's first written submission were outside the Panel's terms of reference, because the addition of these 23 specific instances of application impermissibly expanded the scope of the dispute.

2.144. Argentina points to the Appellate Body's explanation of the requirements of Article 6.2 of the DSU, in particular: that, in determining whether a panel request is sufficiently precise under Article 6.2, a panel must "scrutinize carefully the panel request, read as a whole, on the basis of the language used"; that a panel's terms of reference must be determined on the basis of a panel request as it existed at the time of filing; and that "a party's submissions during panel proceedings cannot cure a defect in a panel request."<sup>179</sup>

2.145. According to Argentina, the European Union's sole argument in support of its assertion that the EU Panel Request identified the 23 measures described in the European Union's first written submission to the Panel with sufficient particularity rests on an appendix to its other appellant's submission. In this appendix, the European Union links each of the 23 instances of application of the TRRs listed in Annex III to the EU Panel Request to information contained in the European Union's first written submission. Argentina argues that, regardless of whether this appendix is admissible at the appellate stage, the European Union appears to be belatedly supplementing the description of the measures at issue set out in its panel request by providing further explanation in its first written submission. In Argentina's view, this appendix appears to support the Panel's finding that the panel request was deficient on its face, considering that the identification of these 23 specific instances of application of the TRRs as measures was discernable only from the information appearing in the European Union's first written submission.

2.146. Despite not taking a position on the merits of the European Union's other appeal, Argentina maintains that the addition in the EU Panel Request of the specific instances of application of the alleged TRRs as separate measures at issue impermissibly expanded the scope of the dispute on the ground that these measures were not identified in the European Union's consultations request. The European Union's consultations request identified only the DJAI and the CIs as measures. The consultations request did not contain any reference to unwritten measures or legal instruments that secured compliance with the alleged "commitments" on which the issuance of DJAIs and CIs are conditioned. Argentina contends that the non-identification of these specific instances in the European Union's consultations request would have been an independent basis for the Panel to find that these measures fell outside its terms of reference. Thus, Argentina states that, even if the Appellate Body were to reverse the Panel's finding in paragraph 7.1.c of the EU Panel Report, and find that the 23 instances of application of the TRRs are "specific measures at issue" under Article 6.2 of the DSU, the addition of these 29 specific instances impermissibly

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<sup>179</sup> Argentina's appellee's submission, para. 14 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 641 and 642, and referring to Appellate Body Reports, *EC – Bananas III*, paras. 142 and 143; *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

expanded the scope of the dispute for not having been properly identified by the European Union in its request for consultations.

## 2.7 Claims of error by Japan – Other appellant

### 2.7.1 The Panel's exercise of judicial economy on Japan's claim under Article X:1 of the GATT 1994

2.147. Japan requests the Appellate Body to reverse the Panel's decision to apply judicial economy with respect to Japan's claim that the TRRs measure is inconsistent with Article X:1 of the GATT 1994. According to Japan, the Panel acted inconsistently with Articles 3.4, 3.7, 7.2, and/or 11 of the DSU by exercising judicial economy on this claim because the scope and content of Article X:1 is distinct from the scope and content of Articles III:4 and XI:1 of the GATT 1994, and compliance with a finding under the latter provisions would not necessarily result in compliance with a finding under Article X:1. Japan further requests the Appellate Body to complete the legal analysis and find that the TRRs measure is inconsistent with Argentina's obligations under Article X:1 of the GATT 1994.

2.148. Japan argues that panels must address all claims on which a finding is necessary in order to ensure the effective resolution of disputes. In particular, panels must not exercise judicial economy with respect to provisions whose "scope and content" are different from those under which findings are made, because doing so prevents an effective resolution of the dispute.<sup>180</sup> In this dispute, the "scope and content" of Article X:1, which relates to the administration of measures, is different from the "scope and content" of Articles III:4 and XI:1 of the GATT 1994, which relate to the substantive content of measures. It follows for Japan that it was necessary for the Panel to have addressed Japan's Article X:1 claim against the TRRs measure.<sup>181</sup>

2.149. In addition, according to Japan, the use of judicial economy would fail to ensure effective resolution of disputes where actions that would result in compliance with one finding would not necessarily result in compliance with another finding. Argentina's compliance obligations under Article X:1 of the GATT 1994 require Argentina to achieve a greater degree of transparency with respect to the measure and, by extension, Argentina's compliance steps. Article X:1 transparency obligations are particularly important in the circumstances of this dispute. Japan submits that, given the opaque and non-transparent nature of the current TRRs measure, without its publication, it may be unclear to economic operators whether, when, and how the TRRs measure has been fully removed or rectified.<sup>182</sup>

2.150. Finally, Japan contends that the Appellate Body is able to complete the legal analysis and find that the TRRs measure is inconsistent with Article X:1 of the GATT 1994, on the basis of undisputed facts and the Panel's findings. In particular, Japan refers to the Panel's findings that the TRRs measure is unwritten, has general application, and constitutes an import restriction on goods.

## 2.8 Arguments of Argentina – Appellee

### 2.8.1 The Panel's exercise of judicial economy on Japan's claim under Article X:1 of the GATT 1994

2.151. Argentina requests the Appellate Body to reject Japan's appeal of the Panel's decision to exercise judicial economy with respect to its claim that the alleged TRRs measure is inconsistent with Article X:1 of the GATT 1994. Japan fails to explain why the Panel's findings under Article XI:1 led to a partial resolution of this dispute and fails to demonstrate that the Panel exceeded the bounds of its discretion in exercising judicial economy in relation to this claim. Japan appears to rely on the Appellate Body's finding in *EC – Poultry* that Article X of the GATT 1994 "relates to the publication and administration" of measures, rather than to their "substantive content". Yet, Argentina submits that this was precisely the jurisprudence reviewed by the Panel in reaching the

<sup>180</sup> Japan's other appellant's submission, para. 12 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 405).

<sup>181</sup> Japan's other appellant's submission, paras. 4, 9, and 13 (referring to Appellate Body Report, *EC – Poultry*, para. 115).

<sup>182</sup> Japan's opening statement at the oral hearing; Japan's response to questioning at the oral hearing.



conclusion that additional findings under Article X:1 were neither necessary nor useful to resolve the matter at issue.<sup>183</sup>

2.152. Argentina also considers that Japan's reliance on the Appellate Body's findings in *US – Tuna II (Mexico)* is misplaced because all "laws, regulations, judicial decisions and administrative rulings" subject to Article X:1 of the GATT 1994 fall within the scope of "other measures" covered by Article XI:1 of the GATT 1994, and the contents of these provisions overlap substantively. Moreover, Japan is incorrect in arguing that a panel will exercise false judicial economy whenever the "scope and content" of the relevant legal provisions is not the same. Finally, Argentina submits that Japan fails to explain why the Panel's decision to exercise judicial economy amounted to an inconsistency with Article 11 of the DSU, and how this claim is distinct from Japan's claims under Articles 3.4, 3.7, and 7.2 of the DSU.<sup>184</sup>

## 2.9 Arguments of the third participants

### 2.9.1 Australia

2.153. Australia supports the Panel's finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994. In Australia's view, as the Panel found that Articles VIII and XI of the GATT 1994 are not mutually exclusive, the Panel was not required to focus on the factual issue of whether the DJAI procedure falls within the scope of Article VIII, because it would not exclude *per se* the applicability of Article XI:1 to the measure at issue.

2.154. In addition, Australia disagrees with Argentina's contention that the Panel found that any import procedure that is a necessary pre-requisite for importing goods or by which a Member determines the right to import would be outside the scope of Article VIII of the GATT 1994. Australia submits that the Panel: (i) did not treat the issue of whether the DJAI procedure fell within Article VIII as being a determinative issue; (ii) found that the DJAI procedure was not merely an import formality under Article VIII; and (iii) did not make a general statement referring to any import procedure, as suggested by Argentina, but rather limited its findings to the DJAI procedure.

2.155. Finally, Australia disagrees with Argentina's argument that Article VIII of the GATT 1994 expressly acknowledges the right of Members or the necessity to maintain import formalities and requirements. Although Article VIII:1(c) refers to government imposition of fees and formalities, this provision recognizes, for example, the need for minimizing their incidence and complexity. In conclusion, Australia disagrees with Argentina's argument that Article VIII can be invoked to prevent a measure from being assessed under Article XI of the GATT 1994.

### 2.9.2 Canada

2.156. At the oral hearing, Canada argued that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because it has a limiting effect on imports, due to the broad discretion that agencies have to enter and lift observations, as well as the uncertainty created by conditioning the right to import on the fulfilment of unidentified requirements. It is the element of discretion that makes the DJAI non-automatic. For Canada, Argentina is incorrect in suggesting that the appropriate legal test to determine whether the DJAI procedure is a restriction under Article XI:1 is whether it restricts trade independent of, and in addition to, the restriction of the underlying measure. This is because, unlike in *China – Raw Materials* and *Korea – Various Measures on Beef*, the DJAI procedure is not used to administer quotas; rather, the restriction is the DJAI procedure itself. Canada considers that the Panel was correct to analyse the DJAI procedure on its own and conclude that this measure is a discretionary non-automatic restriction that does not implement a separate underlying WTO-consistent restrictive measure.

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<sup>183</sup> Argentina's appellee's submission, para. 22 (referring to Panel Reports, para. 6.303, in turn quoting Appellate Body Report, *EC – Poultry*, para. 115).

<sup>184</sup> Argentina's appellee's submission, paras. 24-26 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

### 2.9.3 Korea

2.157. At the oral hearing, Korea expressed concern over the recent increase in requests for preliminary rulings in panel proceedings and, in particular, that such requests may be initiated as a litigation tactic with the purpose of delaying the proceedings. Clear guidance by the Appellate Body on the meaning of the term "measure" – including with respect to unwritten measures – is timely and necessary. Korea submitted that the term "measure" in the DSU has a scope that is broader than particular laws or regulations of a Member and encompasses any conduct by a Member that has caused or will cause impairment of another Member's benefits. Article 6.2 of the DSU provides a safeguard to prevent complainants from abusing this broad understanding of "measures" when it requires identification of the specific measures at issue and a brief summary of the legal basis sufficient to present the problem clearly. In these disputes, although the TRRs are unwritten, they constitute a single overarching measure that falls within the Panel's terms of reference. Finally, Korea noted that, given the limited and prospective effects of WTO remedies, "as such" rulings can result in particularly effective remedies where the respondent attempts to adopt revisions of its original measures over the course of dispute settlement proceedings.

### 2.9.4 Norway

2.158. At the oral hearing, Norway agreed with the Panel's finding that Article XI:1 of the GATT 1994 cannot be read as *a priori* excluding import formalities and procedures from its scope, as this would read into provisions words that are not there. Rather than assuming that Articles VIII and XI:1 of the GATT 1994 are mutually exclusive, it should be assumed that they apply in a cumulative and harmonious manner. Moreover, Article VIII does not impose any specific obligations with respect to measures other than fees and charges, and some penalties; and Article VIII:1(c) of the GATT 1994 is of hortatory character. Thus, if Articles VIII and XI:1 were considered as mutually exclusive, there would be no WTO discipline for import formalities and requirements with a trade-restrictive effect. In addition, Argentina's proposed analytical framework has no basis in the text of Article XI:1, as this provision does not distinguish between different categories of import and export prohibitions and restrictions, but applies generally to prohibitions or restrictions other than duties, taxes, and other charges. Norway also contended that the proposed framework does not find support in WTO jurisprudence, because the panel reports relied on by Argentina simply confirm that the challenged measure itself must have trade-restricting effects, and that effects caused by other measures, including underlying measures, should not necessarily be attributed to such a measure.

### 2.9.5 Saudi Arabia

2.159. Saudi Arabia takes no position either on the merits of the claims by the parties to these disputes or on the WTO-consistency of the measures at issue. With respect to the interpretation of Article XI of the GATT 1994, Saudi Arabia submits that, in contrast to Articles I and III of the GATT 1994, Article XI does not address discrimination and thus does not contemplate any broader legal standard that may relate to protection of "competitive opportunities". Rather, the scope of Article XI is limited to those prohibitions and restrictions that have a limiting effect on the quantity of a product being imported or exported. Saudi Arabia argues that the title of Article XI informs its content. Disregarding the express "quantitative" element of Article XI would be contrary to the rule that an interpreter may not reduce any part of a treaty text to redundancy or inutility.<sup>185</sup>

2.160. Additionally, Saudi Arabia submits that automatic licensing systems are permitted by Article XI:1 of the GATT 1994 because they do not impose any quantitative import or export restrictions. Non-automatic licensing systems themselves are not *per se* inconsistent with Article XI:1. In particular, non-automatic licensing systems are consistent with Article XI so long as they "make effective" permitted restrictions including duties, taxes or other charges and do not create limiting effects on import or export quantities that are additional to those caused by the imposition of the permissible restriction and beyond what is necessary to administer the underlying measure. Article 3 of the Import Licensing Agreement supports the permissibility of non-automatic licensing systems under Article XI:1 of the GATT 1994. In Saudi Arabia's view, if non-automatic licensing were *per se* inconsistent with Article XI of the GATT 1994, there would be no reason to

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<sup>185</sup> Saudi Arabia's third participant's submission, para. 9 (referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, paras. 11 and 12; and *US – Gasoline*, para. 23).

establish specific standards for non-automatic import licensing under the Import Licensing Agreement.

2.161. With respect to the evidentiary burden for unwritten measures, Saudi Arabia submits that a complainant must satisfy both the evidentiary and the legal burden of proof with respect to each element of each claim regardless of whether the measure is written or unwritten. The evidence necessary to demonstrate that a measure is inconsistent with a WTO provision must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. Saudi Arabia submits that the complexity of a measure, or its combination with other measures, does not diminish the complainant's burden of proof.

### 2.9.6 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

2.162. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu concurs with the Panel's finding that the TRRs identified by the complainants as a measure at issue in their requests for consultations are within the Panel's terms of reference. The descriptions of the TRRs measure in the complainants' panel requests are substantially similar to the descriptions of the actions in the complainants' requests for consultations because they bear the same "essence" in terms of their purpose, application and effect. Additionally, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contends that the explicit reference to a specific "overarching" TRRs measure in the panel requests would not have altered Argentina's understanding of the complainants' challenges to its import requirements.

2.163. Moreover, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with the Panel's finding that Article XI:1 of the GATT 1994 refers to import and export prohibitions or restrictions in general. The DJAI procedure, whether characterized as "procedural" or "substantive", still imposes a prohibition and restriction on trade, and cannot *a priori* be excluded from examination under Article XI:1. Thus, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees that Article XI:1 applies only to "substantive" rules of importation.

### 2.9.7 Turkey

2.164. At the oral hearing, Turkey stated that there is no evidence in the Panel Reports indicating that the Panel considered the DJAI procedure to fall outside the scope of Article VIII of the GATT 1994. Rather, the Panel underlined that even if it is assumed that Article VIII applies to the DJAI procedure, there is nothing that excludes *per se* the applicability of Article XI of the GATT 1994. For Turkey, it is natural that every Member has the right to adopt some formalities or requirements to ensure that certain policy objectives are met, and that every formality and requirement has some level of restrictive effect. However, a systemic restriction on the essence of the right to import cannot be considered within this category. It is not incorrect to focus on Article XI to examine the trade restrictiveness of measures such as the DJAI procedure. Furthermore, Articles VIII and XI cannot be viewed as mutually exclusive, and the fact that the DJAI procedure is "permitted" under Article VIII does not prevent its evaluation under Article XI. Finally, Turkey considers that, in the current disputes, the DJAI procedure has restrictive aspects of its own, independent of the TRRs measure.

## 3 ISSUES RAISED IN THIS APPEAL

3.1. The following issues are raised in this appeal:

- a. with respect to the Panel's terms of reference:
  - i. whether the Panel erred in finding that the identification of the single or "overarching" trade-related requirements (TRRs) measure in the complainants' panel requests did not expand the scope of the dispute or change its essence, and that, consequently, the single or "overarching" TRRs measure was within the Panel's terms of reference (raised by Argentina); and
  - ii. with respect to DS438 only, whether the Panel erred in finding that the 23 specific instances of application of the TRRs identified in section 4.2.4 of the

European Union's first written submission were not identified in the EU Panel Request as measures at issue and, thus, do not constitute measures at issue in this dispute (raised by the European Union);

- b. with respect to the single TRRs measure:
- i. whether, in addressing the three complainants' "joint claims"<sup>186</sup> against the TRRs measure, the Panel applied an incorrect legal standard in assessing whether the TRRs measure exists and, for that reason, erred in finding that the Argentine authorities' imposition of TRRs on economic operators as a condition to import or receive certain benefits operates as a single measure (the TRRs measure) attributable to Argentina (raised by Argentina);
  - ii. whether, as a consequence of the above, the Panel erred in finding that the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994 (raised by Argentina);
  - iii. with respect to DS445 only, whether, in addressing Japan's "as such" claims against the alleged single TRRs measure, the Panel acted inconsistently with Article 11 of the DSU in finding that Japan had established the precise content and the general and prospective application of that measure and, if so, whether, as a consequence, the Panel erred in finding that the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994 (raised by Argentina); and
  - iv. with respect to DS445 only, whether the Panel erred in exercising judicial economy with respect to Japan's claim under Article X:1 of the GATT 1994 (raised by Japan); and
- c. with respect to the Advanced Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*) (DJAI) procedure:
- i. whether the Panel erred in its interpretation of Article XI:1, as well as of Article VIII, of the GATT 1994 and, more specifically, whether the Panel erred:
    - in failing to distinguish between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and Article XI:1 of the GATT 1994, on the other hand (raised by Argentina); and
    - in its assessment of the scope of application of Article VIII of the GATT 1994 (raised by Argentina);
  - ii. whether the Panel erred in its application of Article XI:1 of the GATT 1994 to the DJAI procedure and, more specifically, in concluding that, because obtaining a DJAI in "exit" status is not "automatic", the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 (raised by Argentina); and
  - iii. whether, as a consequence of the above, the Panel erred in finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 (raised by Argentina).

#### 4 BACKGROUND AND OVERVIEW OF THE MEASURES AT ISSUE

4.1. Before turning to the issues of law and legal interpretation raised in this appeal, and without prejudice to their merits, we provide an overview of the measures at issue in these disputes, as identified in the Panel Reports. We begin with the trade-related requirements (TRRs) and their application and operation as the TRRs measure. Then, we identify how the Panel described the

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<sup>186</sup> See para. 5.97 of these Reports.

DJAI procedure.<sup>187</sup> For a more complete description of the Panel's understanding of the scope and content of these measures, reference should be had to the Panel Reports.

#### 4.1 The trade-related requirements (TRRs) and the TRRs measure

4.2. In certain instances, economic operators in Argentina are not allowed to import goods unless they achieve either a trade balance or an export surplus. To achieve these objectives, economic operators must commit to undertaking certain actions, which the Panel referred to as TRRs.<sup>188</sup>

4.3. The TRRs are not stipulated in any published law, regulation, or administrative act<sup>189</sup>; rather, they are, in some cases, reflected in agreements signed between specific economic operators and the Argentine Government, and, in other cases, contained in letters addressed by economic operators to the Argentine Government.<sup>190</sup> The Panel requested that the parties provide copies of specific agreements and letters identified by the complainants, however, the complainants provided the Panel with copies of only a few letters addressed to the Argentine Government by economic operators<sup>191</sup>, as well as a certification by a notary public attesting to having been shown four agreements signed between Argentine Government officials and private entities.<sup>192</sup> Argentina did not dispute the existence of the specific agreements identified by the complainants.<sup>193</sup> Rather, Argentina responded to the Panel's request by explaining that it was under no obligation to make the case for the complainants and that the agreements were unnecessary for the resolution of the disputes.<sup>194</sup> The Panel rejected Argentina's explanation, considering that it was incumbent upon Argentina to provide copies of the requested agreements and letters pursuant to Article 13 of the DSU. Moreover, the Panel considered that Argentina was in the best position to provide copies of the requested evidence.<sup>195</sup> Thus, the Panel drew inferences from Argentina's refusal to provide copies of the agreements and letters in its possession.<sup>196</sup>

4.4. In addition to these inferences, the Panel reached its conclusions as to the existence and nature of the TRRs imposed by the Argentine Government on the basis of extensive evidence on

<sup>187</sup> The Panel observed that the DJAI procedure has served to implement certain TRRs in some cases. (Panel Reports, paras. 6.154, 6.163, and 6.395) Nevertheless, the complainants challenged the DJAI procedure and the TRRs measure as separate measures. (Ibid., para. 6.154 (referring to European Union's response to Panel question No. 10; United States' responses to Panel questions Nos. 9 and 10; and Japan's response to Panel question No. 10)) The European Union, the United States, and Japan originally identified a third measure, the imposition of non-automatic import licences (*Licencias No Automáticas de Importación*) by requiring import certificates (*Certificados de Importación*) (CIs) as a condition for the importation of goods. (EU Panel Request, pp. 2-3; US Panel Request, pp. 3-4; Japan Panel Request, pp. 2-3) However, in their first written submissions to the Panel, the complainants indicated that they were no longer pursuing their claims against the CI requirement because, on 25 January 2013, the Argentine Government had repealed the various resolutions containing the CI regime. (European Union's first written submission to the Panel, paras. 15 and 16; United States' first written submission to the Panel, fn 6 to para. 7, and para. 17; Japan's first written submission to the Panel, fn 34 to para. 15)

<sup>188</sup> Panel Reports, para. 6.255 and fn 253 to para. 6.119.

<sup>189</sup> Panel Reports, para. 6.157.

<sup>190</sup> Panel Reports, paras. 6.119 and 6.156. There is evidence on the record of the existence of at least 29 agreements signed between the Argentine Government and the following economic operators: (i) the Asociación de Fábricas Argentinas Terminales de Electrónica (Afarte) and the Cámara Argentina de Industrias Electrónicas, Electromecánicas y Luminotécnicas (Cadieel); (ii) General Motors; (iii) AGCO; (iv) Renault Trucks Argentina; (v) Claas; (vi) Mercedes Benz; (vii) Volkswagen; (viii) Alfa Romeo; (ix) Porsche; (x) Peugeot-Citroën; (xi) Fiat; (xii) Hyundai; (xiii) Ford; (xiv) KIA; (xv) Nissan; (xvi) Renault; (xvii) Chery; (xviii) Alfacar (Mitsubishi); (xix) Ditecar (Volvo, Jaguar, and Land Rover); (xx) Volvo Trucks; (xxi) Tatsa; (xxii) Indumotora Argentina (Subaru); (xxiii) BMW; (xxiv) Pirelli; (xxv) Thermodyne Vial; (xxvi) supermarkets; (xxvii) the Cámara Argentina de Publicaciones; (xxviii) the Cámara Argentina del Libro; and (xxix) representatives of the automobile and autoparts industry.

<sup>191</sup> Panel Reports, para. 6.57 (referring to: (i) the letter from Company X to the Secretary of Domestic Trade, 3 April 2012 (Panel Exhibit JE-304); (ii) the e-mail communication from Company X to the Secretary of Domestic Trade, 11 April 2012 (Panel Exhibit JE-305); and (iii) the letter from the Argentine meat and pork industry to the Secretary of Domestic Trade, 7 May 2012 (Panel Exhibits JE-441 and EU-127)). See also fn 344 to para. 6.164.

<sup>192</sup> Panel Reports, para. 6.57 (referring to Brechbul & Rodriguez Notaires, Notarial certification, 13 June 2013 (Panel Exhibits JE-328 and EU-14)).

<sup>193</sup> Panel Reports, para. 6.164 (referring to Argentina's responses to Panel questions Nos. 63-92, para. 20).

<sup>194</sup> Panel Reports, para. 6.48.

<sup>195</sup> Panel Reports, paras. 6.58 and 6.59.

<sup>196</sup> Panel Reports, paras. 6.155 and 6.165.

the record.<sup>197</sup> This evidence includes copies of domestic laws, regulations, and policy documents; communications addressed to Argentine officials by private companies; statements by Argentine officials and notes posted on government websites; articles in newspapers and magazines, published mostly in Argentina; statements by company officials; and data from industry surveys.<sup>198</sup>

4.5. The Panel found that the evidence on the record demonstrates the existence of the following five types of actions that the Argentine Government requires of economic operators (individual TRRs): (i) to export goods from Argentina of a value equivalent to or greater than the value of the operator's imports (one-to-one requirement); (ii) to limit the volume of imports and/or reduce their price (import reduction requirement); (iii) to incorporate a minimum level of local content into goods produced in Argentina (local content requirement); (iv) to make or increase investments in Argentina, including in production facilities (investment requirement); and/or (v) to refrain from repatriating funds from Argentina to another country (non-repatriation requirement).<sup>199</sup>

4.6. First, under the one-to-one requirement, as a condition to import, the Argentine Government requires economic operators to compensate imports annually with exports of at least the same value. There are three main ways for an economic operator to increase its exports to comply with this requirement: (i) to use an exporter as an intermediary to sell products to a buyer in a third country (exportation "*por cuenta y orden*"); (ii) to export directly Argentine products that the economic operator (or any other company) produces; or (iii) to conclude an agreement with an exporter so that the exporter's transactions may be considered as the economic operator's own transactions.<sup>200</sup> In this context, the Panel referred to evidence showing that, to comply with the requirement to export, companies have engaged in activities unrelated to their respective business activities.<sup>201</sup> For example, the Panel referred to an agreement reached between the Argentine Government and the automobile manufacturer Hyundai in which the latter reportedly committed to exporting peanuts, wine, biodiesel, and soy flour from Argentina, valued collectively at more than US\$157 million.<sup>202</sup>

4.7. Second, under the import reduction requirement, economic operators are required to limit their imports, either in volume or in value. This requirement is often imposed in combination with other TRRs, such as the one-to-one requirement or the local content requirement.<sup>203</sup> In certain instances, compliance with these commitments constitutes a condition for operators to import goods into Argentina.<sup>204</sup> Supermarket chains, automobile and motorcycle producers and importers, producers of pork products, and producers of electronic and office equipment have all committed to restricting their imports into Argentina.<sup>205</sup> For example, the Panel referred to evidence showing that, in December 2013, electronic and office equipment producers reportedly signed an agreement with the Argentine Government to reduce their imports in the first quarter of 2014 by 20% as compared to the previous year.<sup>206</sup>

4.8. Third, under the local content requirement, the Argentine Government requires certain economic operators to reach a higher level of local content in their products by substituting

<sup>197</sup> Panel Reports, paras. 6.155 and 6.165.

<sup>198</sup> Panel Reports, paras. 6.64, 6.165, and 6.223.

<sup>199</sup> Panel Reports, para. 6.221.

<sup>200</sup> Panel Reports, para. 6.167. Typically, the Argentine Government gives economic operators a specified period, such as one year, to achieve a trade balance through compliance with the one-to-one requirement. If the economic operator does not achieve the required level of exports within the specified period, it can either limit its imports or, alternatively, make an irrevocable investment in the local operations of the firm, in the form of a contribution to its capital, to compensate for the value of imports. (Ibid., para. 6.172)

<sup>201</sup> Panel Reports, para. 6.262. For instance, companies from the motorcycle sector exported grape juice and wine; tyre producers exported honey; and clothing brands exported wool. (Ibid.)

<sup>202</sup> See Panel Reports, fn 357 to para. 6.169 (referring to News item: *Prensa Argentina*, "Car producer Hyundai agrees to offset its trade balance", 13 June 2011 (Panel Exhibit JE-86)). In this agreement, Hyundai also reportedly made an irrevocable capital contribution of US\$8 million to the local operations of the firm, to facilitate the export of biodiesel. (Ibid.)

<sup>203</sup> Panel Reports, para. 6.186.

<sup>204</sup> Panel Reports, para. 6.195.

<sup>205</sup> Panel Reports, para. 6.187.

<sup>206</sup> Panel Reports, para. 6.194 (referring to News item: *Prensa Argentina*, "Giorgi agreed with electronic and automotive industries to reduce foreign currency for exports by 20%", 11 December 2013 (Panel Exhibit JE-827)).

imports with products that are produced or could be produced in Argentina.<sup>207</sup> The Panel referred to evidence on the record showing that the Argentine Government has presented import substitution as a State policy that it is systematically implementing in order to reindustrialize the country. The Argentine Government has implemented this policy of import substitution by requiring importers to engage in import substitution plans and by granting tax incentives and soft loans to economic operators that achieve a certain level of local content.<sup>208</sup> For example, the Panel referred to evidence reporting that, since February 2011, the Argentine Government has asked producers of agricultural machinery to increase their local production and to submit import substitution plans to incorporate more domestically produced agro-parts into their final products. In undertaking these import substitution plans, producers of agricultural machinery have become eligible for soft loans granted, for example, by the Banco Nación.<sup>209</sup>

4.9. Fourth, under the investment requirement, the Argentine Government requires certain companies to make or increase investments in Argentina as a condition to import.<sup>210</sup> The investment requirement is typically imposed in combination with either the one-to-one requirement or the local content requirement, and not as a stand-alone requirement.<sup>211</sup> When used in combination with the one-to-one requirement, the Argentine Government requires economic operators to undertake investments in the form of irrevocable capital contributions when their level of imports exceeds that of their exports.<sup>212</sup> When used in combination with the local content requirement, the Argentine Government requires certain economic operators to undertake investments to commence manufacturing processes in Argentina, or to increase or improve manufacturing capacity.<sup>213</sup> For instance, the Panel referred to evidence on the record reporting that the automobile manufacturer Renault committed to make a capital contribution to its plant in Córdoba to enable production of a new model of automobile destined primarily for export.<sup>214</sup>

4.10. Finally, under the non-repatriation requirement, the Argentine Government has requested companies to refrain from transferring profits abroad.<sup>215</sup> According to the Panel, while there was no evidence on the record to suggest that the non-repatriation requirement is imposed by the Argentine Government in and of itself as a condition to import, there was evidence to suggest that a commitment to refrain from repatriating profits has been imposed in conjunction with either the one-to-one requirement or the local content requirement.<sup>216</sup> These combinations are found in agreements between the Argentine Government and several truck manufacturers, car

<sup>207</sup> Panel Reports, para. 6.196.

<sup>208</sup> Panel Reports, para. 6.279 (referring to Ministry of Industry of Argentina, Argentina's Industrial Strategic Plan 2020 (*Plan Estratégico Industrial 2020*), 4 October 2011 (Panel Exhibits ARG-51 and JE-749) (PEI 2020), p. 33; Argentina's responses to Panel questions Nos. 57 and 58; News item: *Prensa Argentina*, "Agricultural machinery manufactured in the country must have 40-50% of national parts", 23 May 2013 (Panel Exhibits JE-550 and EU-236); and Office of the President, "Inauguration of a new plant of Fiat Argentina in Córdoba: Speech by the President of Argentina", 4 June 2013 (Panel Exhibits JE-794 and EU-444)). The Argentine Government has referred to its policy of import substitution in speeches made by high-level Argentine officials, including the President of Argentina, as well as in Argentina's PEI 2020. (Ibid., para. 6.197) According to the President, the final objective of the Government is to substitute domestically around 45% of imports. (Ibid., para. 6.197 (referring to Office of the President, Presentation of the Strategic Industrial Plan 2020, Speech by the President, 4 October 2011 (Panel Exhibits JE-517 and EU-203); and PEI 2020, p. 38))

<sup>209</sup> Panel Reports, para. 6.202. For agricultural machinery, the goal was to achieve integration of local content of 55-60% in 2013. (Ibid.)

<sup>210</sup> Panel Reports, para. 6.208.

<sup>211</sup> Panel Reports, paras. 6.208 and 6.259.

<sup>212</sup> Panel Reports, para. 6.209 (referring to News items: *Página12*, "On the way to reinvest profits", 18 November 2011 (Panel Exhibits JE-620 and EU-306); *Prensa Argentina*, "An automobile company may compensate by exporting", 25 March 2011 (Panel Exhibits JE-1, JE-398, and EU-84); and *Prensa Argentina*, "Car manufacturer KIA also pledged to even out its trade balance", 15 June 2011 (Panel Exhibit JE-87)).

<sup>213</sup> Panel Reports, para. 6.209 (referring to News items: Ministry of Industry, "Argentina substituted imports amounting to US\$4 billion in the first semester of the year", 23 August 2011 (Panel Exhibit JE-252); *Prensa Argentina*, "Car producer Hyundai agrees to offset its trade balance", 13 June 2011 (Panel Exhibit JE-86); *Prensa Argentina*, "Fiat: Another automaker agrees to ensure trade balance", 5 May 2011 (Panel Exhibits JE-88, JE-528, and EU-214); and Office of the President, Announcement of New Investments in GM: Speech by the President, 15 November 2011 (Panel Exhibit JE-244)).

<sup>214</sup> See Panel Reports, fn 481 to para. 6.210 (referring to News item: *Prensa Argentina*, "Renault, Mitsubishi, Nissan, and Volvo also signed a plan to achieve a trade surplus in 2012", 5 August 2011 (Panel Exhibit JE-90)). Renault undertook to make a capital contribution of US\$175 million, and by way of its capital contribution and the production of the new model of automobile, Renault pledged to achieve a trade surplus of US\$231 million by 2012. (Ibid.)

<sup>215</sup> Panel Reports, paras. 6.214 and 6.215.

<sup>216</sup> Panel Reports, paras. 6.214 and 6.259.

manufacturers, agricultural machinery manufacturers, and mining companies.<sup>217</sup> For instance, the Panel referred to evidence of an agreement between the agricultural machinery manufacturer Claas and the Argentine Government in which the former pledged not to transfer profits abroad between 2011 and 2014.<sup>218</sup> This commitment was reportedly made together with commitments to invest US\$60 million to expand two of its manufacturing plants, to increase local content in combine harvester models to 55% by 2013, and to increase production of harvesters to 800 units by 2015, of which 600 would be exported.<sup>219</sup>

4.11. The Argentine Government informs economic operators individually of the trade-related commitment or commitments they should undertake, depending upon the specific circumstances of each operator.<sup>220</sup> Moreover, the Argentine Government has stated that it monitors the implementation of the commitments undertaken by economic operators.<sup>221</sup>

4.12. Before the Panel, the complainants explained that they did not seek separate determinations with regard to each TRR because, in their view, "there is only one measure at issue".<sup>222</sup> The complainants affirmed that the TRRs measure: (i) consists of "a combination of one or more of the five identified [TRRs]"; (ii) is an unwritten measure "not stipulated in any published law or regulation"; (iii) is "imposed on economic operators in Argentina as a condition to import or to obtain certain benefits"; (iv) is "enforced, *inter alia*, through the DJAI requirement"; and (v) is "imposed by the Argentine Government with the objective of eliminating trade deficits and increasing import substitution".<sup>223</sup> The complainants also affirmed that, to meet these TRRs, "economic operators normally either submit a statement or conclude an agreement with Argentina setting out the actions they will take."<sup>224</sup>

4.13. The Panel determined that, since at least 2009, the Argentine Government has required a variety of importers and other economic operators, irrespective of size or domicile<sup>225</sup>, to undertake one or more of the five TRRs as a condition to import goods or to obtain certain benefits.<sup>226</sup> The five TRRs operate in combination with one another, as part of the TRRs measure, such that more than one TRR often has been imposed at a given time on a specific economic operator.<sup>227</sup> Because the TRRs measure is unwritten, and the combination of requirements imposed by Argentina varies amongst economic operators without regard to any known criteria, there is no certainty as to: (i) which TRRs will be imposed; (ii) when an economic operator will be required to comply with them; or (iii) whether the TRRs will be imposed as a temporary or permanent measure.<sup>228</sup> The combination of requirements imposed on individual economic operators at a given time "seems to depend on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of ... substituting imports and reducing or eliminating trade deficits".<sup>229</sup>

4.14. High-ranking Argentine Government officials have announced in public statements and speeches a policy of "managed trade" (*comercio administrado*) with the objectives of, *inter alia*, substituting imports for domestically produced goods and reducing or eliminating trade deficits.<sup>230</sup> According to the Panel, the TRRs constitute different elements that contribute in different combinations and degrees toward the realization of the objectives that guide the "managed trade" policy.<sup>231</sup> The TRRs have been applied to a wide range of economic sectors<sup>232</sup>, such as foodstuffs,

<sup>217</sup> Panel Reports, para. 6.214.

<sup>218</sup> See Panel Reports, fn 504 to para. 6.214 (referring to News item: *Prensa Argentina*, "Three metallurgical companies committed investments and will not transfer profits", 28 December 2011 (Panel Exhibit JE-209)).

<sup>219</sup> *Ibid.*

<sup>220</sup> Panel Reports, para. 6.157.

<sup>221</sup> Panel Reports, para. 6.160.

<sup>222</sup> Panel Reports, para. 6.224. (fn omitted)

<sup>223</sup> Panel Reports, para. 6.125. (fns omitted)

<sup>224</sup> Panel Reports, para. 6.125. (fn omitted)

<sup>225</sup> Panel Reports, para. 6.159. See also para. 6.335.

<sup>226</sup> Panel Reports, paras. 6.155 and 6.221.

<sup>227</sup> Panel Reports, paras. 6.225 and 6.231.

<sup>228</sup> Panel Reports, para. 6.260.

<sup>229</sup> Panel Reports, para. 6.225. The Panel referred to statements made by Argentine officials that confirm that TRRs are imposed according to the particular situation of economic operators. (*Ibid.*, para. 6.226)

<sup>230</sup> Panel Reports, para. 6.119.

<sup>231</sup> Panel Reports, paras. 6.119 and 6.228.

<sup>232</sup> Panel Reports, para. 6.340.



automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing.<sup>233</sup> In the Panel's view, Argentina's imposition of the TRRs measure constitutes repeated actions, coordinated by the highest authorities of the Argentine Government, including the President, the Minister of Industry, and the Secretary of Trade.<sup>234</sup> These authorities have announced this policy in public statements and speeches, as well as on government websites<sup>235</sup>, which suggest that the TRRs will continue to be imposed until the "managed trade" policy is repealed or modified.<sup>236</sup>

## 4.2 Advanced Sworn Import Declaration (DJAI) procedure

4.15. We turn now to the Panel's identification of the second measure at issue in these disputes: the Advanced Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*) (DJAI) procedure. Argentina's Federal Public Revenue Administration (*Administración Federal de Ingresos Públicos*) (AFIP) implemented the DJAI procedure by means of AFIP General Resolution 3252/2012<sup>237</sup>, which entered into force on 1 February 2012.<sup>238</sup> The DJAI procedure requires almost all prospective importers of goods into Argentina to file a DJAI prior to importation.<sup>239</sup> As part of the DJAI, importers are required to submit specific information.<sup>240</sup> If the Argentine Government finds the information to be satisfactory, the DJAI may be approved.<sup>241</sup> In certain instances, however, agencies of the Argentine Government may require prospective importers to provide additional information and/or to undertake export commitments or other

<sup>233</sup> Panel Reports, para. 6.158. These sectors correspond to at least six of the 11 industrial sectors addressed in the PEI 2020, which was published in 2011. The 11 industrial sectors are: (i) foodstuffs; (ii) automobile and autoparts; (iii) capital goods; (iv) leather, shoes, and other leather goods; (v) agricultural machinery; (vi) construction material; (vii) medicines; (viii) forestry industry; (ix) chemical and petrochemical; (x) software; and (xi) textiles. (Ibid., fn 333 to para. 6.158 (referring to PEI 2020, pp. 42-43)) The PEI 2020 sets out the economic objectives, or "macroeconomic guidelines", to be achieved in Argentina's "managed trade" policy. (Ibid., paras. 6.161 and 6.162) The TRRs imposed by the Argentine Government appear to align with three of the five economic objectives set out in the PEI 2020: (i) protection of the domestic market and import substitution; (ii) increased exports; and (iii) promotion of productive investment. (Ibid., para. 6.161 (referring to PEI 2020, pp. 33-35))

<sup>234</sup> Panel Reports, para. 6.340.

<sup>235</sup> Panel Reports, paras. 6.230 and 6.340.

<sup>236</sup> Panel Reports, paras. 6.230 and 6.341. The Panel referred to a statement by the Argentine Secretary of Domestic Trade in late 2013 that the policy of "managed trade" would continue to be applied in the future as per the instructions of the President of Argentina. (Ibid., paras. 6.162, 6.230, and 6.341 (referring to News item: *Prensa Argentina*, "Moreno confirmed that policy of trade administration will continue as per presidential instructions", 3 November 2013 (Panel Exhibit JE-759)))

<sup>237</sup> Panel Reports, para. 6.365 (referring to AFIP General Resolution 3252/2012, 5 January 2012 (Panel Exhibits JE-15 and ARG-6)).

<sup>238</sup> Panel Reports, para. 6.365 (referring to Article 9 of AFIP General Resolution 3252/2012, 5 January 2012 (Panel Exhibits JE-15 and ARG-6)). On 5 January 2012, the AFIP implemented the DJAI procedure. (Ibid. (referring to Article 1 of AFIP General Resolution 3252/2012, 5 January 2012 (Panel Exhibits JE-15 and ARG-6)))

<sup>239</sup> Panel Reports, para. 6.364. The DJAI must be filed before the importation takes place and prior to the issuance of purchase orders or similar documents. (Ibid., paras. 6.364 and 6.368 (referring to Article 2 of AFIP General Resolution 3252/2012, 5 January 2012 (Panel Exhibits JE-15 and ARG-6); and Article 91(1), Law 22,415, Customs Code, 2 March 1981 (Panel Exhibit ARG-3))) Importers are not required to file a DJAI in the following cases: (i) imports under the re-importation regime; (ii) importation or exportation to compensate for deficient merchandise; (iii) donations; (iv) samples; (v) diplomatic exemptions; (vi) merchandise with duty and tax exemptions; (vii) postal shipments; (viii) courier shipments; and (ix) imports by the Secretary General of the Presidency. (Ibid., fn 721 to para. 6.364)

<sup>240</sup> Panel Reports, para. 6.364 (referring to Article 2 of AFIP General Resolution 3252/2012, 5 January 2012 (Panel Exhibits JE-15 and ARG-6); and Article 91(1), Law 22,415, Customs Code, 2 March 1981 (Panel Exhibit ARG-3)).

<sup>241</sup> See Panel Reports, para. 6.407.

commitments relating to the TRRs as a condition for obtaining approval of the DJAI.<sup>242</sup> Importation into Argentina of goods covered by a DJAI is not authorized until the DJAI is approved.<sup>243</sup>

4.16. The Panel's understanding of the DJAI procedure is set out in more detail below. The Panel inferred certain features of the DJAI procedure from the manner in which the measure operates in practice, and noted that not all such details are spelled out in the relevant laws and regulations.<sup>244</sup>

4.17. To initiate the DJAI procedure, a declarant must file a DJAI through AFIP's electronic portal, known as the MARIA information system (*Sistema Informático MARIA*) (SIM), or the SIM system. To be processed, the DJAI must contain the following information: (i) name and taxpayer identification code of the importer or customs broker, where applicable; (ii) customs office of registration; (iii) quantity, codes, capacity, and type of containers; (iv) total and per-item "free on board" (f.o.b.) value, and corresponding currency; (v) tariff classification; (vi) type and quantity of marketing units; (vii) condition of the merchandise; (viii) country of origin; (ix) approximate shipping and arrival dates; and (x) name of the declarant.<sup>245</sup> Once the DJAI has been formally entered into the SIM system, it attains "registered" (*oficializada*) status.<sup>246</sup> The DJAI may then pass through several of the following statuses (*estados*): (i) "observed" (*observada*); (ii) "exit" (*salida*); (iii) "cancelled" (*cancelada*); and (iv) "voided" (*anulada*).<sup>247</sup>

4.18. In principle, as from the date that the DJAI attains "registered" status, the importer has 180 days to complete the DJAI procedure successfully and import authorized goods into Argentina.<sup>248</sup> Once a DJAI is registered, the AFIP and a number of government agencies that have signed accession agreements with the AFIP<sup>249</sup> may review the information entered into the SIM system and enter "observations" on that specific DJAI.<sup>250</sup> The DJAI procedure does not permit importers to know which agency may review and enter observations on a DJAI.<sup>251</sup> Four agencies currently participate in the DJAI procedure.<sup>252</sup> A participating agency may enter an observation when it considers that the information provided by the prospective importer is "insufficient, faulty, or incomplete" to demonstrate compliance with the requirements under the domestic legislation that the agency administers, although no legal instruments contain the specific criteria that the relevant agency may apply in order to enter observations.<sup>253</sup> A participating agency has 72 hours after the registration of a DJAI to enter an observation, unless otherwise provided in its accession

<sup>242</sup> Panel Reports, paras. 6.163, 6.382, and 6.395.

<sup>243</sup> To import goods into Argentina, an importer must attain a DJAI in "exit" status. (Panel Reports, paras. 6.364 and 6.407) As explained below, a DJAI attains "exit" status if: (i) no government agency requests that an importer provide supplementary information and/or undertake a trade-related commitment within the specified time period; or (ii) in the event that a government agency makes such a request, the importer provides the requested information and/or undertakes the trade-related commitment. (See *ibid.*, paras. 6.382, 6.395, and 6.407) Once a DJAI attains "exit" status, it can be converted automatically into a customs clearance procedure, and the goods covered by the DJAI may clear customs. (*Ibid.*, para. 6.408) For additional details in this regard, see paras. 4.19-4.21 of these Reports.

<sup>244</sup> Panel Reports, para. 6.367.

<sup>245</sup> Panel Reports, para. 6.368. A declarant may provide additional information concerning the means of transport, the identity of the seller, the value of freight and insurance, and any adjustments to be included or deducted from the customs value. (*Ibid.*, para. 6.369)

<sup>246</sup> Panel Reports, para. 6.372.

<sup>247</sup> Panel Reports, para. 6.370.

<sup>248</sup> Panel Reports, para. 6.372 (referring to Argentina's response to Panel question No. 119).

<sup>249</sup> The accession agreements signed between the AFIP and the participating agencies have not been published or otherwise made available to traders. The model accession agreement set out by AFIP General Resolution 3256/2012 does not specify the scope of the operations that can be reviewed and observed by the relevant agency, the additional information that the agency may request from importers, or the timeframe for the acceding agency to enter observations on a DJAI application. (Panel Reports, paras. 6.373 and 6.382)

<sup>250</sup> Panel Reports, para. 6.373.

<sup>251</sup> Panel Reports, para. 6.377.

<sup>252</sup> The following agencies participate in the DJAI procedure: (i) the Federal Public Revenue Administration (AFIP); (ii) the Secretariat of Domestic Trade (*Secretaría de Comercio Interior*) (SCI); (iii) the National Drugs, Food, and Medical Technology Administration (*Administración Nacional de Medicamentos, Alimentos, y Tecnología Médica*) (ANMAT); and (iv) the Planning Secretariat for the Prevention of Drug Addiction and the Fight Against Drug Trafficking (*Secretaría de Programación para la Prevención de la Drogadicción y la Lucha contra el Narcotráfico*) (SEDRONAR). (Panel Reports, para. 6.374)

<sup>253</sup> Panel Reports, para. 6.379. (fn omitted)

agreement or by statute.<sup>254</sup> In the case of observations made by the AFIP's Directorate-General of Revenue, the reason for an observation is communicated through the SIM system. In the case of observations made by other agencies, the precise reason for an observation and the additional documents or information required to lift the observation are not communicated through the SIM system.<sup>255</sup>

4.19. If a government agency enters an observation, the DJAI will move to "observed" status. Goods covered by a DJAI in "observed" status cannot be imported into Argentina.<sup>256</sup> If a DJAI moves to "observed" status, prospective importers must: (i) identify the agency that entered the observation; (ii) contact such agency in order to be informed of the supplementary documents or information that must be provided; and (iii) provide the supplementary documents or information.<sup>257</sup> A single DJAI may be "observed" by any of the participating agencies, and where multiple agencies enter observations, the importer must consult with each agency separately. A DJAI will leave "observed" status, and proceed to "exit" status, only after all observations have been lifted by the relevant agency or agencies.<sup>258</sup>

4.20. Of the four agencies that currently participate in the DJAI procedure, the Secretariat of Domestic Trade (*Secretaría de Comercio Interior*) (SCI) is of particular relevance to these disputes.<sup>259</sup> According to the preamble of SCI Resolution 1/2012, it is "necessary" for the SCI to have access to the information provided in the DJAI procedure "[to perform] analyses aimed at preventing negative effects on the domestic market, since the qualitative and/or quantitative importance of imports to be made has the effect of impacting domestic trade".<sup>260</sup> To this extent, the SCI is entitled to enter observations relating to the importation of any type of product to verify *a priori* whether the importer or declarant has complied with specified Argentine laws.<sup>261</sup> Moreover, the SCI has 15 working days following registration of the DJAI to enter observations.<sup>262</sup> The SCI "systematically"<sup>263</sup> imposes on importers requirements that are neither set out in any laws nor

<sup>254</sup> The 72-hour period may be extended up to ten calendar days where the specific jurisdiction of the implementing agency justifies it. (Panel Reports, para. 6.381 (referring to Article 2 of AFIP General Resolution 3255/2012, 20 January 2012 (Panel Exhibits JE-16 and ARG-7))) As explained below, longer periods are accorded to the Secretariat of Domestic Trade.

<sup>255</sup> Panel Reports, para. 6.383. Before the Panel, Argentina stated that "[o]nce the importer/customs broker contacts the agency, he is informed of the reasons for the observation and given details of the supplementary information needed to conduct the risk assessment". (Ibid., fn 777 to para. 6.383; Argentina's response to Panel question No. 22 (emphasis omitted))

<sup>256</sup> Panel Reports, para. 6.382.

<sup>257</sup> Panel Reports, para. 6.382.

<sup>258</sup> Panel Reports, para. 6.380.

<sup>259</sup> While the SCI has not signed an accession agreement with the AFIP, the SCI participates in the DJAI procedure on the basis of SCI Resolution 1/2012, which predates AFIP General Resolution 3256/2012. (Panel Reports, para. 6.375) By Decree 2136/2013 of 12 December 2013, the SCI has been replaced by the Secretariat of Trade (*Secretaría de Comercio*). The competence to intervene in the DJAI procedure previously held by the SCI is now exercised by the Secretariat of Trade. (Ibid., fn 791 to heading 6.3.2.4.3 (referring to Argentina's response to Panel questions after the second Panel meeting, 14 January 2014))

<sup>260</sup> Panel Reports, para. 6.389 (quoting third recital at preamble, SCI Resolution 1/2012, 11 January 2012 (Panel Exhibits JE-41 and ARG-15)). These negative effects include "breaches of the law governing domestic trade", for which the SCI is the implementing authority. (Ibid., para. 6.391)

<sup>261</sup> Panel Reports, paras. 6.390 and 6.391 (referring to Article 2 of SCI Resolution 1/2012, 11 January 2012 (Panel Exhibits JE-41 and ARG-15); Argentina's response to Panel question No. 23 (including Annex 4); and Argentina's response to Panel question No. 3.4 posed orally at the first Panel meeting).

<sup>262</sup> Panel Reports, para. 6.381 (referring to Article 2 of SCI Resolution 1/2012, 11 January 2012 (Panel Exhibits JE-41 and ARG-15)).

<sup>263</sup> The Panel referred to evidence on the record to this effect, including: (i) reports prepared by market intelligence entities or by an export promotion office to inform their clients or affiliated members of the information and requirements imposed by the SCI; (ii) letters of companies addressed to the SCI; (iii) company reports; (iv) press articles; (v) interviews and public statements by the Secretary of Domestic Trade; (vi) news items; (vii) a debate; (viii) information notes; (ix) industry newsletters; (x) slides from the Argentine Chamber of Commerce; (xi) a newspaper article; (xii) a market study; (xiii) reports, one of which was issued by the Argentine Chamber of Commerce; and (xiv) a letter and an e-mail communication from Company X to the Secretary of Domestic Trade. (Panel Reports, fn 803 to para. 6.393 and fn 806 to para. 6.395)

indicated in official publications explaining the operation of the DJAI procedure.<sup>264</sup> As a condition to lift observations on DJAIs, in certain instances, the SCI has also required prospective importers to increase exports, to begin exporting, or to commit to other TRRs<sup>265</sup> so as to achieve a trade balance.<sup>266</sup>

4.21. A DJAI will proceed to "exit" status if no government agency enters an observation within the prescribed time period, or if all observations made by agencies are lifted within 180 calendar days from registration.<sup>267</sup> A DJAI in "exit" status can be converted automatically into a customs clearance procedure.<sup>268</sup> To initiate the customs clearance procedure, an importer must re-access the SIM system and formally request the importation of goods. The DJAI will proceed to "voided" status if an importer withdraws its DJAI, an observation is not lifted, or a DJAI in "exit" status is not used either within 180 calendar days from registration or after the extension period.<sup>269</sup> Once the DJAI has been used – i.e. the goods have cleared customs – the DJAI will enter into "cancelled" status.<sup>270</sup>

4.22. The Panel made no specific findings regarding the extent to which private companies in Argentina are subject to observations and affected by TRRs in the DJAI procedure.<sup>271</sup> The Panel did note, however, that some prospective importers have successfully challenged the entry of observations by the SCI in certain DJAI procedures before Argentine courts.<sup>272</sup>

<sup>264</sup> Panel Reports, para. 6.393. Such requirements include, but are not limited to, providing the following: (i) a formal letter addressed to the Secretary of Domestic Trade, bearing the company's letterhead and signed by the highest authority of the company or a legal representative, and reporting the company's estimates of total imports and exports, in US dollars, for the ongoing year; (ii) a price list of all goods traded in the domestic market (not only of those to be imported), which shall be provided in hard copy and CD; and (iii) a spread sheet (also called "request note" or *nota de pedido*) containing the following data per item: (a) description of the product; (b) quantity; (c) unit of measure; (d) price per unit; (e) total price; (f) origin; (g) tariff classification; (h) expected date of shipping from exporting country; and (i) expected date of arrival in Argentina. (Ibid.) The complainants submitted documents prepared by market intelligence entities or by an export promotion office informing clients or affiliated members of the information and requirements imposed by the SCI whenever this agency enters observations on DJAIs. (Ibid., para. 6.104)

<sup>265</sup> Panel Reports, para. 6.163.

<sup>266</sup> Panel Reports, para. 6.395. The evidence cited by the Panel in support of this statement is listed in fn 806 to para. 6.395 of the Panel Reports, as well as fn 263 of these Reports.

<sup>267</sup> See Panel Reports, para. 6.407. This 180-day period may be extended for an additional 180 calendar days. (Ibid.)

<sup>268</sup> Panel Reports, para. 6.408. To clear customs, an importer must provide, *inter alia*, the clearance declaration (confirming the data provided through the DJAI). (Ibid.)

<sup>269</sup> Panel Reports, para. 6.410.

<sup>270</sup> Panel Reports, para. 6.411.

<sup>271</sup> Before the Panel, the complainants produced data from surveys to serve as evidence of the extent to which private companies in Argentina are subjected to the TRRs and observations in the DJAI procedure. (Panel Reports, paras. 6.93) For example, the European Union referred to a survey, dated August 2012 and commissioned by the American Chamber of Commerce in Argentina (AmCham Argentina). The European Union argued that this survey showed that 44% of companies subject to SCI observations had presented commitments of "compensation" to the Argentine Government. (Ibid., para. 6.94 (referring to European Union's first written submission to the Panel, para. 63)) For its part, Japan referred to a survey, dated March 2012, and also commissioned by AmCham Argentina, of "more than 100 companies members of AmCham Argentina" in different manufacturing sectors. In Japan's view, this survey confirms that DJAIs are regularly not approved: only 42.8% of DJAIs transitioned to "exit" or "cancelled" status. (Ibid., paras. 6.93 and 6.95 (referring to Japan's first written submission to the Panel, para. 30)) The Panel noted, however, that the data from these surveys "are not, and do not purport to be, scientific" and were not used to try to demonstrate that a certain percentage of firms in Argentina are affected by TRRs or by delays or rejections of their DJAIs. The Panel considered that the surveys "serve as background information illustrating the impact of the DJAI requirement and the alleged TRRs on specific companies", but that they have "limited value" for reaching general conclusions about the operation of the measure. (Ibid.)

<sup>272</sup> Prospective importers have challenged, in Argentine courts, DJAI procedures in which observations made by the SCI impeded import operations. The domestic courts concluded that the challenged DJAI procedures had: (i) unreasonably delayed the approval of DJAIs beyond the time-limits in the legislation; (ii) made it impossible for applicants to move the procedure forward inasmuch as observations are neither produced in hard copy nor communicated through the website portal; and (iii) affected the applicants' right of defence inasmuch as the circumstances give rise to a prohibition on the import operation, without valid legal grounds. (Panel Reports, para. 6.384)

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 The Panel's terms of reference

#### 5.1.1 Argentina's appeal

5.1. Argentina appeals the Panel's ruling that the single or "overarching" TRRs measure fell within the Panel's terms of reference. Argentina claims that, in so ruling, the Panel acted inconsistently with Articles 6.2 and 7.1 of the DSU. According to Argentina, the complainants' requests for consultations did not identify a single or "overarching" TRRs measure.<sup>273</sup> Therefore, the addition of a single TRRs measure as a measure at issue in their panel requests expanded the scope of the dispute or changed its essence.<sup>274</sup> Thus, Argentina requests us to reverse the Panel's conclusion, in paragraph 4.1.b of its First Preliminary Ruling, and in paragraph 7.1.b of the EU Panel Report, paragraph 7.5.b of the US Panel Report, and paragraph 7.9.b of the Japan Panel Report, that the characterization of the TRRs measure as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute, and was, therefore, within the Panel's terms of reference.<sup>275</sup>

##### 5.1.1.1 Background

5.2. In its first written submission to the Panel, Argentina requested a preliminary ruling on the following issues: (i) whether the TRRs were identified by the complainants as measures at issue in their requests for consultations; (ii) whether the reference to the alleged TRRs as a broad unwritten "overarching" measure in the complainants' panel requests "expanded the scope" or "changed the essence" of the dispute; and (iii) whether the complainants identified, either in their requests for consultations or in their panel requests, the measures subject to their claims against the alleged TRRs "as applied".<sup>276</sup>

5.3. The Panel issued two preliminary rulings.<sup>277</sup> In its First Preliminary Ruling, the Panel ruled that: (i) the complainants' requests for consultations identified the TRRs as measures at issue; therefore, the inclusion of the TRRs in their panel requests was not inappropriate and these measures fell within the Panel's terms of reference; and (ii) the characterization of the TRRs as a single "overarching" measure in the complainants' panel requests did not expand the scope or change the essence of the dispute.<sup>278</sup> The Panel did not consider it necessary or appropriate to issue a ruling with respect to whether the complainants' "as applied" claims were outside its terms of reference at that time, and instead decided to address this issue during the course of the proceedings.<sup>279</sup>

5.4. During the first Panel meeting, Argentina expressed regret at what it considered to be the Panel's "hasty decision" in the First Preliminary Ruling, and concern over the Panel's decision to defer a ruling on some of the jurisdictional objections.<sup>280</sup> Argentina requested the Panel to resolve the outstanding issues concerning the Panel's terms of reference.<sup>281</sup> The Panel subsequently issued its Second Preliminary Ruling, in which it ruled that: (i) the complainants' panel requests properly identified the TRRs as measures at issue, and that the TRRs, therefore, formed part of the Panel's terms of reference; and (ii) the 23 measures described by the European Union in section 4.2.4 of its first written submission to the Panel as "specific instances" of application of the TRRs do not constitute "measures at issue".<sup>282</sup> With respect to Japan's claims, the Panel noted that Japan had clarified that the same measure is the object of both its "as applied" and its "as such" claims, and explained that the complainants would have the burden of presenting arguments and evidence in

<sup>273</sup> For purposes of our analysis in this section of the Reports, we use the terms "single TRRs measure" and "single or 'overarching' TRRs measure" interchangeably, in order to distinguish the TRRs measure from the individual TRRs.

<sup>274</sup> Argentina's appellant's submission, para. 22.

<sup>275</sup> Argentina's appellant's submission, paras. 15 and 58.

<sup>276</sup> Panel Reports, para. 6.12.

<sup>277</sup> The Panel's First and Second Preliminary Rulings are attached as Annexes D-1 and D-2, respectively, to the Panel Reports.

<sup>278</sup> First Preliminary Ruling, para. 4.1.

<sup>279</sup> First Preliminary Ruling, para. 3.42.

<sup>280</sup> Second Preliminary Ruling, para. 1.8.

<sup>281</sup> Second Preliminary Ruling, para. 1.8.

<sup>282</sup> Second Preliminary Ruling, para. 5.1.

the course of the proceedings to show the nature and characteristics of the challenged measure.<sup>283</sup> The Panel found it sufficient at that stage to find that the complainants' identification of the TRRs met the requirements of Article 6.2 of the DSU.<sup>284</sup> In so finding, the Panel also observed that there was no indication either that Argentina's ability to defend itself had been prejudiced, or that any other Member's ability to understand the nature of the dispute had been impaired by the manner in which the TRRs were described in the panel requests.<sup>285</sup>

#### 5.1.1.2 Articles 4.4 and 6.2 of the DSU

5.5. We begin by discussing the language and functions of Articles 4.4 and 6.2 of the DSU. Next, we compare the texts of the consultations requests and the panel requests. Thereafter, we examine whether the identification of the TRRs measure as a single or "overarching" measure in the complainants' panel requests expanded the scope of the dispute or changed its essence, as compared to their consultations requests.

5.6. The Appellate Body held in *Brazil – Aircraft* that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."<sup>286</sup> Each of these provisions requires a complainant to identify the measure(s) that it is challenging. However, the requirement that applies to consultations requests is not phrased in identical terms to the requirement that applies to panel requests.

5.7. Article 4.4 of the DSU reads:

All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5.8. Article 6.2 of the DSU provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.9. Thus, while a consultations request must identify the "measure at issue", a panel request must identify the "*specific* measure at issue". This difference in the language between Articles 4.4 and 6.2 makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request.

5.10. This difference in the degree of specificity with which a measure at issue must be identified reflects, and is in keeping with, the underlying distinction between the consultations process and the panel process themselves. The request for consultations must provide the reasons why consultations are sought, including the identification of the measure at issue and an indication of the legal basis of the complaint. The consultations process is "the first step in the WTO dispute settlement process", and provides parties the opportunity to "define and delimit the scope of the dispute".<sup>287</sup> Parties to consultations "exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution"<sup>288</sup>, or otherwise refine the contours of the dispute to be subsequently set out in the panel request.<sup>289</sup> Consultations may lead to the narrowing or reformulation of a complaint to the extent that the "measure at issue" and the "legal basis"

<sup>283</sup> Second Preliminary Ruling, para. 4.25.

<sup>284</sup> Second Preliminary Ruling, paras. 4.25 and 4.26.

<sup>285</sup> Second Preliminary Ruling, para. 4.27.

<sup>286</sup> Appellate Body Report, *Brazil – Aircraft*, para. 131.

<sup>287</sup> Appellate Body Report, *US – Upland Cotton*, para. 293 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54).

<sup>288</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

<sup>289</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

identified in the panel request may be "expected to be shaped by, and thereby constitute a natural evolution of, the consultations process".<sup>290</sup>

5.11. According to Article 7 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel, unless the parties agree otherwise. Under Article 6.2, the request for the establishment of a panel must identify the "specific measure at issue", which, together with the "legal basis of the complaint", constitutes the "matter referred to the DSB" that forms the basis of the panel's terms of reference.<sup>291</sup> The panel request thus defines the scope of the dispute and serves to establish and delimit the panel's jurisdiction.<sup>292</sup> Not only does Article 6.2 serve this "crucial function" of establishing and defining a panel's jurisdiction, but it also fulfils a due process objective by providing the respondent and potential third parties notice regarding the complainant's case in order to enable them to respond accordingly.<sup>293</sup>

5.12. While it is the panel request, and not the consultations request, that governs a panel's terms of reference, consultations – as well as the request that triggers and precedes them – nevertheless play an important role in defining the scope of the dispute.<sup>294</sup> The conduct of consultations, as well as the ability of the parties to engage fully therein, is directly affected by the content of the consultations request. It is this document that informs the respondent, and the WTO membership, of the nature and object of the challenge raised by the complainant, and enables the respondent to prepare for the consultations themselves. The effectiveness of consultations and the opportunity provided for the parties to reach a mutually agreeable solution to the dispute will be compromised if the consultations request fails to identify the measures at issue, as required by Article 4.4 of the DSU. At the same time, the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings. This is because "the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of the subsequent panel proceedings."<sup>295</sup> The contribution that consultations can make to the refinement of the dispute, in turn, makes it "especially necessary" for parties to be fully forthcoming during this phase of the WTO dispute settlement process.<sup>296</sup> We also consider that, as is the case with panel requests, the determination of whether a consultations request meets the requirements of the DSU is one that must be made "on a case-by-case basis, considering the particular context in which the measures exist and operate."<sup>297</sup>

5.13. Given the relationship between, and the difference in the language and functions of, Articles 4.4 and 6.2 of the DSU, the Appellate Body has explained that a "*precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel" is not required.<sup>298</sup> Indeed, the Appellate Body has cautioned against imposing "too rigid a standard" of identity between the scope of the request for consultations and the request for the establishment of a panel, as this would substitute the consultations request for the panel request.<sup>299</sup> This would also undermine the stipulation in Article 7 of the DSU that, unless the parties agree otherwise, it is the request for the establishment of a panel that governs the panel's terms of reference. Thus, provided that a complainant does not "expand the scope"<sup>300</sup> or change the "essence" of the dispute<sup>301</sup> in its panel request as compared to its consultations request, the contents of that panel request will determine the panel's terms of reference. In this connection, it is well established that a WTO dispute consists of "the matter referred to the DSB", which in turn comprises the specific measure(s) at

<sup>290</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

<sup>291</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>292</sup> See e.g. Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.6; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>293</sup> Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.6 and 4.10; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7. As the Appellate Body held in *EC and certain member States – Large Civil Aircraft*, "[t]his due process objective is not constitutive of, but rather flows from, the proper establishment of a panel's jurisdiction." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640)

<sup>294</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

<sup>295</sup> Appellate Body Report, *India – Patents (US)*, para. 94.

<sup>296</sup> Appellate Body Report, *India – Patents (US)*, para. 94.

<sup>297</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>298</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis original)

<sup>299</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>300</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>301</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137 and 138.

issue and the legal basis of the complaint (or the claims).<sup>302</sup> Accordingly, when a party alleges that a panel request has impermissibly expanded the scope of the dispute or changed its essence, ascertaining whether this is so involves scrutinizing the extent to which the identified measure at issue and/or the legal claims have evolved or changed from the consultations request to the panel request. With respect to the measure at issue, in particular, even if such measure is identified with sufficient precision in a panel request, it may nevertheless fall outside the panel's terms of reference if that measure was not referred to in the request for consultations, and is separate and legally distinct from the measures that were identified therein.<sup>303</sup>

5.14. In *US – Upland Cotton*, for example, the United States argued that the panel's terms of reference did not encompass export credit guarantees to any products *other than* upland cotton. According to the United States, since the reference to export credit guarantees in Brazil's request for consultations pertained to upland cotton, this limited the scope of the products in respect of which the United States' export credit guarantee programmes could be challenged to upland cotton alone.<sup>304</sup> The panel and the Appellate Body, however, disagreed. They observed that, while one paragraph of the consultations request referred to export credit guarantees to upland cotton without explicitly mentioning *all* eligible agricultural commodities, when viewed as a whole, the language of the consultations request provided a sufficient basis for considering that the request covered export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton.<sup>305</sup> Therefore, the Appellate Body upheld the Panel's ruling that "export credit guarantees to facilitate the export of United States upland cotton, *and other eligible agricultural commodities* ... [were] within its terms of reference".<sup>306</sup>

5.15. In comparison, in *US – Shrimp (Thailand) / US – Customs Bond Directive*, India's request for consultations referred to a number of legal instruments constituting the Amended Customs Bond Directive (CBD), while its panel request identified these, along with additional statutory (Section 1623 of the US Tariff Act of 1930) and regulatory (Section 113.13 of the US Code of Federal Regulations) provisions, as measures at issue. India claimed that, although its consultations request did not refer to these additional statutory and regulatory provisions, they were nevertheless within the panel's terms of reference, as it is the panel request that defines the panel's mandate.<sup>307</sup> The panel disagreed and held that "[a] panel's terms of reference will include the specific measure identified in the panel request, but that measure should have been identified in the consultations request 'to some degree that is less than "specific"'.<sup>308</sup> Comparing the request for consultations with the panel request, the panel concluded that the Amended CBD, on the one hand, and Section 1623 of the US Tariff Act of 1930 and Section 113.13 of the US Code of Federal Regulations, on the other hand, were separate and legally distinct measures.<sup>309</sup> Because the latter two provisions were not identified in India's request for consultations, they could not form part of the panel's terms of reference. The Appellate Body upheld the panel's ruling that, since the two additional provisions identified by India in its panel request were "separate and legally distinct" from the Amended CBD identified in India's consultations request, the scope of the dispute would have been expanded by their inclusion in the panel's terms of reference.<sup>310</sup>

5.16. Having examined the language and functions of Article 4.4 and 6.2 of the DSU, as well as the relevant jurisprudence, we reiterate that both provisions require the identification of the measure at issue, albeit with a higher degree of specificity in a panel request than in a consultations request. Considering that consultations facilitate the exchange of information among the parties to allow them to either reach a mutually agreed solution or refine the contours of the dispute, the measures and claims identified in a panel request may constitute a natural evolution of the consultations process. Thus, there is no need for a "precise and exact identity" between the

<sup>302</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>303</sup> See Appellate Body Reports, *US – Certain EC Products*, paras. 69-78 and 82; and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 295.

<sup>304</sup> Appellate Body Report, *US – Upland Cotton*, para. 290.

<sup>305</sup> Appellate Body Report, *US – Upland Cotton*, para. 291.

<sup>306</sup> Appellate Body Report, *US – Upland Cotton*, para. 294. (emphasis added)

<sup>307</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 287.

<sup>308</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 288 (quoting Panel Report, *US – Customs Bond Directive*, para. 7.181).

<sup>309</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 288, 289, and 294.

<sup>310</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 295 and 296. See also Appellate Body Report, *US – Certain EC Products*, para. 82.



measures identified in the consultations request and the specific measure identified in the panel request, provided that the latter does not expand the scope of the dispute or change its essence. The determination of whether the identification of the "specific measure at issue" in the panel request expanded the scope or changed the essence of the dispute must be made on a case-by-case basis.

### 5.1.1.3 Identification of the single TRRs measure as a "measure at issue"

5.17. Argentina appeals the Panel's conclusion in its First Preliminary Ruling that the unwritten "overarching" TRRs measure was within its terms of reference.<sup>311</sup> While Argentina does not dispute that the language used to describe the "commitments" in the complainants' consultations requests is the same as that used to describe the individual TRRs in their panel requests<sup>312</sup>, Argentina nevertheless argues that the "commitments" do not refer to any measures that might be subject to challenge, as these pertain only to the DJAI and the *Certificados de Importación* (CIs).<sup>313</sup> Further, Argentina contends that, despite the similarity in the language between the "commitments" and the individual TRRs, the distinction it draws is between the individual "commitments" mentioned in the complainants' consultations requests and the single or "overarching" TRRs measure identified in their panel requests.<sup>314</sup> In Argentina's view, the "overarching" measure is in the nature of a new measure that impermissibly expanded the scope of the dispute.<sup>315</sup>

5.18. In response, the complainants argue that they were not required to identify the TRRs measure in their consultations requests with the same degree of specificity as in their panel requests, owing to the fact that Articles 4.4 and 6.2 of the DSU do not require a "precise and exact identity" between the two requests.<sup>316</sup> The complainants add that the "close identity"<sup>317</sup> or "nearly identical" language<sup>318</sup> of, or substantial similarity<sup>319</sup> between, the consultations requests and the panel requests show that there was neither an expansion in the scope of the dispute nor a change in its essence.<sup>320</sup>

5.19. As the Panel indicated, the complainants identified the measures at issue in their requests for consultations "in almost identical terms".<sup>321</sup> We reproduce below the relevant portions of the complainants' consultations requests. Square brackets indicate where the language of the three consultations requests differs:

Argentina often requires the importers of goods to undertake certain commitments, including, *inter alia*, to limit their imports, to balance them with exports, to make or increase their investments in production facilities in Argentina, to increase the local content of [*European Union*: the products they manufacture] [*United States and Japan*: products manufactured in Argentina] [*United States*: (and thereby discriminate against imported products), to refrain from transferring revenue or other funds abroad and/or to control the price of imported goods.] [*European Union and Japan*: , not to transfer benefits abroad and/or to control their prices.]

[*European Union*: The issuance of LAPIs, CIs and CLCs and the approval of DJAIs is being systematically delayed or refused by the Argentinean authorities on non-transparent grounds. Often the Argentinean authorities make the issuance of

<sup>311</sup> Argentina's appellant's submission, para. 9.

<sup>312</sup> Argentina's response to questioning at the oral hearing.

<sup>313</sup> Argentina's appellant's submission, paras. 27 and 30.

<sup>314</sup> Argentina's response to questioning at the oral hearing; Argentina's appellant's submission, paras. 43 and 44.

<sup>315</sup> Argentina's appellant's submission, para. 12.

<sup>316</sup> European Union's appellee's submission, para. 64; United States' appellee's submission, paras. 28, 41, 43, 45, and 46; Japan's appellee's submission, paras. 18, 20, 21, and 37.

<sup>317</sup> European Union's appellee's submission, para. 63 (quoting First Preliminary Ruling, paras. 3.20-3.24).

<sup>318</sup> Japan's appellee's submission, para. 32.

<sup>319</sup> United States' appellee's submission, paras. 6, 24, 29, 31, and 39-41.

<sup>320</sup> European Union's appellee's submission, heading 2.4.2 and paras. 63, 92, 93, and 94; United States' appellee's submission, paras. 6, 24, 29, and 47; Japan's appellee's submission, para. 32.

<sup>321</sup> First Preliminary Ruling, para. 3.18.

LAPIs, CIs and CLC and the approval of DJIA conditional upon the importers undertaking to comply with the trade restrictive commitments mentioned above.]

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

These measures restrict imports of goods and discriminate between imported and domestic goods. They do not appear to be related to the implementation of any measure justified under the WTO Agreement, but instead [*Japan*: are] [*United States*: appear to be] aimed at advancing [*European Union and Japan*: the Argentinean Government's] [*United States*: Argentina's] stated policies of re-industrialization, import substitution and elimination of trade balance deficits.

The legal [*United States and Japan*: instruments] [*European Union*: measures] through which Argentina [*European Union and Japan*: imposes these restrictions] [*United States*: maintains these measures] include, but are not limited to, the legal instruments listed in the Annexes, as well as any amendments, replacements, extensions, implementing measures or related measures.<sup>322</sup>

5.20. The complainants' panel requests have similar content. In all three panel requests, section I identifies the DJAI procedure as a measure at issue, section II identifies the CIs as a measure at issue, and section III is entitled "Restrictive Trade-Related Requirements". The relevant parts of section III of the complainants' panel requests are set out below, indicating in square brackets where they differ:

Separately and/or in combination with the [*European Union and Japan*: above] measures described in Sections I and II, Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: (1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in productions facilities); and/or (5) incorporate local content into domestically produced goods.

These requirements are not stipulated in any published law or regulation. To satisfy these requirements, economic operators normally either submit a statement or conclude an agreement with Argentina setting out the actions they will take. Argentina enforces these [*United States and Japan*: commitments] [*European Union*: requirements] by withholding permission to import, *inter alia*, by withholding the issuance of DJAI or CI approvals.

[*European Union*: The European Union considers that these requirements, when viewed as an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products, as well as when viewed as separate measures in each of the instances listed in Annex III, and whether analysed separately or together with the measures described in Sections I and II, are inconsistent with the following ...]

[[The United States] [Japan] considers that whether analyzed separately or together with the measures described in Sections I and II, these requirements and any application thereof, are inconsistent with the following provisions ... .]<sup>323</sup>

5.21. Comparing the language of the complainants' requests for consultations and their panel requests, we consider the following to be evident from both sets of documents. Each consultations

<sup>322</sup> European Union's request for consultations, pp. 1-2. See also United States' request for consultations, pp. 1-2; and Japan's request for consultations, pp. 1-2.

<sup>323</sup> EU Panel Request, pp. 3-4. See also US Panel Request, p. 4; and Japan Panel Request, pp. 3-4.

request, and each panel request, identifies three categories of measures: the DJAI procedure, the CIs, and the TRRs. With respect to the TRRs, the consultations requests and the panel requests identify the same five "commitments" or "requirements". Specifically, Argentina requires the importers of goods to undertake certain "commitments" (consultations requests) or "requires economic operators to undertake certain actions" (panel requests) including: (i) to limit imports; (ii) to balance imports with exports by exporting a certain value of goods related to the value of imports; (iii) to refrain from repatriating funds or benefits abroad; (iv) to make or increase investments in Argentina; and/or (v) to increase local content of products manufactured in Argentina.<sup>324</sup>

5.22. Both sets of requests describe these five "commitments" or "requirements" as being "trade restrictive". While the consultations requests use the term "trade restrictive commitments"<sup>325</sup>, the panel requests each contain a separate heading entitled "Restrictive Trade Related Requirements".<sup>326</sup>

5.23. All of the requests describe these "commitments" or "requirements" as being imposed pursuant to Argentina's "stated policies" or "policy objectives" of "import substitution" and the "elimination of trade deficits". The consultations requests state that these "commitments", along with the DJAI and non-automatic licences, such as the CIs, are "aimed at advancing the Argentinean Government's<sup>327</sup> stated policies of re-industrialization, import substitution and elimination of trade balance deficits".<sup>328</sup> The panel requests, meanwhile, explain that Argentina imposes these "requirements" with a view to pursuing its "stated policy objectives of elimination of trade balance deficits and import substitution".<sup>329</sup>

5.24. Both sets of requests identify a relationship between the "commitments" or "requirements", on the one hand, and the CIs and the DJAI, on the other hand. The consultations requests provide that the issuance of the CIs and the approval of the DJAI are made "conditional upon the importers undertaking to comply" with these "commitments".<sup>330</sup> The panel requests state that "Argentina enforces these [requirements<sup>331</sup>] by withholding permission to import, *inter alia*, by withholding the issuance of DJAI or CI approvals."<sup>332</sup>

5.25. Aside from the similarities shared by the complainants' consultations requests and panel requests, we also note some apparent differences. Whereas all the complainants' consultations requests refer to individual "commitments", the EU Panel Request uses the description "when viewed as an overarching measure ... as well as when viewed as separate measures in each of the instances listed in Annex III"<sup>333</sup>, and the US Panel Request and Japan Panel Request use the phrase "whether analyzed separately or together with [the DJAI procedure and the CIs], these requirements, and any application thereof".<sup>334</sup>

5.26. Like the Panel<sup>335</sup>, we see a high degree of similarity in the language and content of the consultations requests and the panel requests. There is no dispute that the complainants' consultations requests contain no explicit reference to a single or "overarching" TRRs measure. However, as we have previously explained, there is no need for a "precise and exact identity" between the consultations request and the panel request, provided that there is no expansion in the scope of the dispute or a change in its essence. A panel request must identify the "*specific*

<sup>324</sup> European Union's request for consultations, p. 1; EU Panel Request, p. 3; United States' request for consultations, p. 1; US Panel Request, p. 4; Japan's request for consultations, p. 1; Japan Panel Request, p. 3.

<sup>325</sup> European Union's request for consultations, p. 1; United States' request for consultations, p. 1; Japan's request for consultations, p. 1.

<sup>326</sup> EU Panel Request, p. 3; US Panel Request, p. 4; Japan Panel Request, p. 3.

<sup>327</sup> The United States' request for consultations states: "aimed at advancing Argentina's stated policies ...".

<sup>328</sup> European Union's request for consultations, p. 2; United States' request for consultations, p. 2; Japan's request for consultations, p. 1.

<sup>329</sup> EU Panel Request, p. 3; US Panel Request, p. 4; Japan Panel Request, p. 3.

<sup>330</sup> European Union's request for consultations, p. 1; United States' request for consultations, p. 1; Japan's request for consultations, p. 1.

<sup>331</sup> The EU Panel Request uses the term "requirements", while the US Panel Request and the Japan Panel Request use the term "commitments".

<sup>332</sup> EU Panel Request, p. 3; US Panel Request, p. 4; Japan Panel Request, p. 4.

<sup>333</sup> EU Panel Request, p. 4.

<sup>334</sup> US Panel Request, p. 4; Japan Panel Request, p. 4.

<sup>335</sup> First Preliminary Ruling, paras. 3.19-3.24 and 3.28.

measure at issue"<sup>336</sup> in a manner that is sufficiently precise, as required by Article 6.2 of the DSU, and that does not expand the scope or change the essence of the dispute. In our view, the language identifying the single TRRs measure in the panel requests can be considered to have evolved from, and to be a more elaborate version of, the language identifying the "commitments" in the consultations requests. We, therefore, agree with the Panel that the description of the TRRs as a single or "overarching" measure is only an "enunciation in different terms" of the same measures identified in the complainants' consultations requests, and that "nothing in this reformulation ... *per se* expands that scope or changes the essence of the dispute".<sup>337</sup>

5.27. Argentina argues that the similarity in the language of the consultations requests and the panel requests, specifically in the identification of "commitments" in the former and "requirements" in the latter, has "no bearing" on whether the consultations requests identified a measure "with its own distinct normative content".<sup>338</sup> In Argentina's opinion, instead of suggesting the existence of an "overarching" measure, the reference to "commitments" in the complainants' consultations requests could, at most, be understood as a challenge, on an "as applied" basis, against specific "statements" or "agreements" between the Argentine Government and importers.<sup>339</sup> We disagree with Argentina.

5.28. Comparing the consultations requests and the panel requests, we consider it true that the panel requests contain additional language not appearing in the consultations requests, i.e. the EU Panel Request's "overarching measure" and "when viewed as separate measures in each of the instances listed in Annex III"<sup>340</sup>, and the US Panel Request's and Japan Panel Request's "whether analyzed separately or together with [the DJAI procedure and the CIs], these requirements, and any application thereof".<sup>341</sup> Yet, the mere existence of this additional language, alone, does not mean that the language identifying the single TRRs measure in the panel requests cannot be considered to have evolved from the language identifying the "commitments" in the consultations requests. We see nothing in the language of the consultations requests that precludes the identification of a single or "overarching" TRRs measure in the panel requests or suggests that only specific applications thereof may be identified as specific measures at issue. To the contrary, there is language in the consultations requests that suggests that the challenge raised is not limited to specific instances of application of the TRRs. Specifically, the complainants' consultations requests state that Argentina "*often requires*" importers to undertake five "commitments", which are the same five "requirements" identified in the panel requests.<sup>342</sup> Further, the consultations requests state that the measures identified therein (i.e. the DJAI procedure, the CIs, and the "commitments") are aimed at advancing Argentina's "stated policies" of "import substitution" and "elimination of trade balance deficits".<sup>343</sup> Lastly, the consultations requests state that the "legal measures through which Argentina imposes these restrictions include, but are *not limited to*, the legal instruments listed in the Annexes".<sup>344</sup> To us, rather than limiting the measures at issue identified in the panel requests to those that are challenged "as applied", the foregoing language of the consultations requests may reasonably be read as establishing a basis from which the complainants could legitimately elaborate their description of the measure at issue as the single or "overarching" TRRs measure in their panel requests.

5.29. In our view, describing the TRRs as a single or "overarching" measure in the panel requests reflects a more precise enunciation of the measure than in the consultations requests. This is consistent with the more exacting requirement in Article 6.2 of the DSU to identify the "specific measure at issue". We consider that the identification in the panel requests of the single or "overarching" TRRs measure may reasonably be considered to be an evolution or a further

<sup>336</sup> Emphasis added.

<sup>337</sup> First Preliminary Ruling, para. 3.33.

<sup>338</sup> Argentina's appellant's submission, para. 43.

<sup>339</sup> Argentina's appellant's submission, para. 28.

<sup>340</sup> EU Panel Request, p. 4.

<sup>341</sup> US Panel Request, p. 4; Japan Panel Request, p. 4.

<sup>342</sup> European Union's request for consultations, p. 1; United States' request for consultations, p. 1; Japan's request for consultations, p. 1. (emphasis added)

<sup>343</sup> European Union's request for consultations, p. 2; United States' request for consultations, p. 2; Japan's request for consultations, p. 1. The panel requests use the phrase "stated policy objectives". (EU Panel Request, p. 3; US Panel Request, p. 4; Japan Panel Request, p. 3)

<sup>344</sup> European Union's request for consultations, p. 2. (emphasis added) See also United States' request for consultations, p. 2; and Japan's request for consultations, p. 2.

elaboration of the language of the consultations requests, possibly achieved through and shaped by the consultations process.<sup>345</sup>

5.30. Our examination of the language of the complainants' consultations requests and panel requests shows that, while the panel requests identified the TRRs measure with a greater degree of specificity than the consultations requests, the manner in which this was done did not expand the scope of the dispute or change its essence. Rather, the essence of the TRRs measure was identified in the consultations requests, and the additional language of the panel requests, including the identification of the single or "overarching" TRRs measure, can be said to have evolved from the language of the consultations requests. We thus agree with the Panel that the complainants' panel requests reflect a permissible reformulation of the measure at issue that did not expand the scope or change the essence of the dispute.<sup>346</sup> Therefore, we see no error in the Panel's finding, in paragraphs 3.33 and 4.1.b of the First Preliminary Ruling<sup>347</sup>, that the characterization of the TRRs measure as a single or "overarching" measure in the complainants' panel requests did not expand the scope or change the essence of the dispute.

5.31. For the reasons stated above, we uphold the Panel's finding, in paragraph 7.1.b of the EU Panel Report, paragraph 7.5.b of the US Panel Report, and paragraph 7.9.b of the Japan Panel Report, that "[t]he characterization of the [TRRs] as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute".<sup>348</sup> Consequently, we find that the single or "overarching" TRRs measure was within the Panel's terms of reference.

### 5.1.2 The European Union's other appeal

5.32. The European Union appeals the Panel's finding that the 23 measures described by the European Union in its first written submission to the Panel as "specific instances" of application of the TRRs were not clearly identified in the EU Panel Request and did not, therefore, fall within the Panel's terms of reference. According to the European Union, its panel request identified these measures with "sufficient particularity" in conformity with Article 6.2 of the DSU<sup>349</sup>, and the Panel erred in finding otherwise. The European Union thus requests us to reverse the Panel's finding in paragraph 7.1.c of the EU Panel Report, and to find instead that the 23 measures in question fell within the Panel's terms of reference as "measures at issue".<sup>350</sup> The European Union also makes a conditional request for completion of the analysis. Should we reverse or otherwise declare moot the Panel's findings as to the existence of the TRRs measure and its inconsistency with Articles XI:1 and III:4 of the GATT 1994, the European Union requests us to complete the legal analysis and find that Argentina acted inconsistently with Articles XI:1 and/or III:4 of the GATT 1994 in each of these 23 specific instances.<sup>351</sup>

#### 5.1.2.1 Background

5.33. In its request for consultations, the European Union alleged that Argentina "often requires" importers to undertake "certain commitments", including: (i) to limit their imports; (ii) to balance them with exports; (iii) to make or increase their investments in production facilities in Argentina; (iv) to increase the local content of the products they manufacture in Argentina; and/or (v) not to transfer benefits abroad and/or control their prices.<sup>352</sup> Subsequently, in its panel request, the European Union identified as specific measures at issue "Restrictive Trade Related Requirements", which consist of the same "commitments" it referred to in its consultations request. The European Union stated that its challenge is with respect to these requirements "when viewed as an overarching measure".<sup>353</sup> The European Union also challenged as separate measures each of the instances of application of the TRRs listed in Annex III to its panel request.<sup>354</sup> Annex III lists 29 "Instances of restrictive trade-related requirements affecting products originating in the

<sup>345</sup> First Preliminary Ruling, paras. 3.31 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138) and 3.33.

<sup>346</sup> First Preliminary Ruling, para. 3.33.

<sup>347</sup> See also Second Preliminary Ruling, para. 4.32.

<sup>348</sup> See also First Preliminary Ruling, para. 4.1.b.

<sup>349</sup> European Union's other appellant's submission, para. 21.

<sup>350</sup> European Union's other appellant's submission, para. 23.

<sup>351</sup> European Union's other appellant's submission, para. 24.

<sup>352</sup> European Union's request for consultations, p. 1.

<sup>353</sup> EU Panel Request, p. 4.

<sup>354</sup> EU Panel Request, p. 4.

European Union". For each item on the list, Annex III provides the title of a press release or news article, the date of its publication, and the website where it may be accessed. The European Union later narrowed down these 29 instances to only 23 cases in section 4.2.4 of its first written submission to the Panel, and explained that it is challenging as separate measures these 23 specific instances where Argentina has applied one or more of the TRRs to particular economic operators.<sup>355</sup>

5.34. As we have previously discussed, the Panel issued two preliminary rulings.<sup>356</sup> In its First Preliminary Ruling, the Panel declined to rule on whether the complainants' claims that Argentina alleged to be "as applied" were included in its terms of reference, and decided instead to consider these in the course of the proceedings.<sup>357</sup> During the Panel's first substantive meeting with the parties, Argentina requested the Panel to resolve immediately two outstanding issues concerning its terms of reference, including the European Union's identification as separate measures of 23 specific instances of application of the TRRs.<sup>358</sup> In its Second Preliminary Ruling, the Panel addressed this request and ruled that the 23 "specific instances" of application of the TRRs described in the European Union's first written submission do not constitute "measures at issue" in DS438 (complaint by the European Union).<sup>359</sup> According to the Panel, a reader of the EU Panel Request would have had to visit the websites identified in Annex III, read the 29 articles or press releases, deduce from each what the European Union challenges as specific measures at issue, and thereafter resort to the European Union's first written submission to discern the "specific instances of application of the [TRRs]" being challenged as 23 individual measures.<sup>360</sup> In the Panel's view, a panel request that requires a reader to access information from a website and deduce what the challenged measures are from that information cannot be said to be "sufficiently precise" in conformity with Article 6.2 of the DSU.<sup>361</sup> Thus, the Panel found that, on its face, Annex III to the EU Panel Request did not identify any "specific measures at issue".<sup>362</sup>

5.35. The European Union appeals the findings of the Panel that the 23 specific instances of application of the TRRs were not precisely identified and do not constitute measures at issue in this dispute. The European Union argues that the language of its panel request shows that it is not only challenging the existence of an overarching measure, but also challenging separately several actions taken by Argentina that are of the same nature as those described under the overarching measure.<sup>363</sup> Specifically, the European Union explains that Annex III to the EU Panel Request lists 29 instances where Argentina imposed certain TRRs that share the same characteristics as the five requirements described as part of the overarching measure.<sup>364</sup> For each of these 29 instances, Annex III provides the title of, and the website link containing, the relevant press release that describes the measure at issue in terms of the entity or entities concerned, the date and the nature of the requirements imposed by the Argentine Government, and the commitments that the entity or entities undertook.<sup>365</sup> Thus, the European Union asserts that the Panel erred in concluding that it was not possible to identify the specific measures at issue from the information contained in the title of each press release, as well as its content.<sup>366</sup>

5.36. In response, Argentina refrains from taking a position on the merits of the European Union's other appeal.<sup>367</sup> Instead, Argentina contends that the identification of the 29 specific instances of application of the TRRs in Annex III to the EU Panel Request impermissibly expanded the scope of the dispute since the measures were not identified in the European Union's request for consultations.<sup>368</sup> Thus, should we reverse the Panel's findings and rule that the specific instances of application of the TRRs were identified as "specific measures at issue" in the EU Panel Request,

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<sup>355</sup> European Union's first written submission to the Panel, section 4.2.4 and para. 385.

<sup>356</sup> The First and Second Preliminary Rulings are attached as Annexes D-1 and D-2, respectively, to the Panel Reports.

<sup>357</sup> First Preliminary Ruling, para. 3.42.

<sup>358</sup> Second Preliminary Ruling, paras. 2.3 and 2.5.

<sup>359</sup> Second Preliminary Ruling, para. 5.1.b.

<sup>360</sup> Second Preliminary Ruling, paras. 4.35 and 4.36.

<sup>361</sup> Second Preliminary Ruling, para. 4.37.

<sup>362</sup> Second Preliminary Ruling, para. 4.37.

<sup>363</sup> European Union's other appellant's submission, para. 15.

<sup>364</sup> European Union's other appellant's submission, para. 16.

<sup>365</sup> European Union's other appellant's submission, para. 17.

<sup>366</sup> European Union's other appellant's submission, para. 18.

<sup>367</sup> Argentina's appellee's submission, paras. 14 and 16.

<sup>368</sup> Argentina's appellee's submission, para. 13.

then Argentina requests us to find that the addition of these "new measures" impermissibly expanded the scope of the dispute, and that they were, for this reason, outside the Panel's terms of reference.<sup>369</sup>

5.37. We begin by recalling the jurisprudence on Article 6.2 of the DSU as regards the identification of the specific measures at issue. Next, we examine whether the 23 specific instances of application of the TRRs were identified as measures at issue in the EU Panel Request. Thereafter, we address the issue of whether the identification of the 23 measures in the EU Panel Request expanded the scope of the dispute, as compared to its consultations request. Finally, we discuss the European Union's conditional request for completion of the legal analysis.

### 5.1.2.2 Article 6.2 of the DSU

5.38. The relevant portion of Article 6.2 of the DSU reads:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.39. Article 6.2 has two distinct requirements, namely: (i) the identification of *the specific measures at issue*; and (ii) the provision of *a brief summary of the legal basis of the complaint*. As the Appellate Body has held in previous disputes, these two requirements constitute the "matter referred to the DSB", which forms the basis of a panel's terms of reference under Article 7.1 of the DSU.<sup>370</sup> Article 6.2 defines the scope of the dispute between the parties, thereby establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent and third parties of the nature of the case.<sup>371</sup> Moreover, in order to "present the problem clearly", within the meaning of Article 6.2, a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can "know what case it has to answer, and ... begin preparing its defence".<sup>372</sup>

5.40. With respect to the requirement under Article 6.2 to identify the specific measure at issue, the Appellate Body explained in *EC – Selected Customs Matters* that the "specific measure" is the "object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement".<sup>373</sup> Thus, the "measure at issue" referred to in Article 6.2 is "*what is being challenged by the complaining Member*".<sup>374</sup>

5.41. Further, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that the determination of whether a panel request is "sufficiently precise" requires scrutiny of the panel request "as a whole, and on the basis of the language used".<sup>375</sup> The issue of whether the panel request identifies the "specific measure at issue" may depend on the particular context in which those measures exist and operate, and may require examining the extent to which those measures are capable of being precisely identified.<sup>376</sup>

5.42. A panel request's compliance with the requirements of Article 6.2 of the DSU must be demonstrated on its face as it existed at the time of its filing. Consequently, any defects in the panel request cannot be "cured" by the subsequent submissions of the parties.<sup>377</sup> Nevertheless, subsequent submissions, such as the complaining party's first written submission, may be

<sup>369</sup> Argentina's appellee's submission, para. 17.

<sup>370</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>371</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.6 and 4.7.

<sup>372</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>373</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

<sup>374</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)

<sup>375</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641. (fns omitted)

<sup>376</sup> Appellate Body Reports, *China – Raw Materials*, para. 220.

<sup>377</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>378</sup>

### 5.1.2.3 Identification of the measures at issue

5.43. In its panel request, the European Union challenges the TRRs not only as an "overarching" measure, but also "when viewed as separate measures in each of the instances listed in Annex III".<sup>379</sup> Annex III to the EU Panel Request bears the heading "Instances of restrictive trade related requirements affecting products originating in the European Union", and lists the titles of 29 news articles and press releases, including the date of their publication and the website addresses where they may be accessed.

5.44. For example, the first two of the 29 instances of application listed in Annex III read as follows:

1. "GOVERNMENT SEEKS TO REDUCE VEHICLE IMPORTS FROM THIRD COUNTRIES BY 20%", MINISTRY OF INDUSTRY, 10 DECEMBER 2010

<http://www.prensa.argentina.ar/2010/12/10/14694-el-gobierno-busca-reducir-en-un-20-la-importacion-de-vehiculos-de-terceros-paises.php>

2. "RENAULT TRUCKS TELLS GOVERNMENT IT WILL INCREASE ITS EXPORTS", MINISTRY OF INDUSTRY, 7 FEBRUARY 2011

<http://www.prensa.argentina.ar/2012/02/07/27966-renault-trucks-anuncio-al-gobierno-que-aumentara-sus-exportaciones.php>

5.45. Footnote 1 to Annex III states that the list of measures set out in the Annex "has the exclusive purpose of identifying measures ... and should not be understood as an exhaustive list of evidence available with respect to the specific instances of restrictive trade related requirements".<sup>380</sup>

5.46. In ruling that the EU Panel Request does not identify the 23 instances of application of the TRRs as "measures at issue" in accordance with Article 6.2 of the DSU, the Panel explained:

A panel request that requires a reader to access information from a website and deduce from that information what the challenged measures are, cannot be said to be "sufficiently precise" in identifying the specific measures at issue for the purpose of Article 6.2 of the DSU: it is not sufficient for the panel to ascertain its terms of reference; it does not serve the due process objective of notifying the respondent of the nature of the complainant's case with respect to the specific measure; and it may impair the ability of any other WTO Member to understand the nature of the dispute and determine whether it has any substantial interest in the matter. The list provided by the European Union in Annex III of its panel request may contain information that may become relevant in the course of the proceedings in order to demonstrate the nature and existence of the measures described by the European Union. However, on its face, the list provided by the European Union in Annex III of its panel request does not identify any "specific measures at issue".<sup>381</sup>

5.47. Nothing in the above reasoning suggests that the Panel itself took account of the contents of the information found at the websites identified in Annex III to the EU Panel Request. Rather, in finding that the EU Panel Request, "on its face", does not identify any specific instance of application of TRRs as a measure, the Panel seemed to have considered that accessing the websites listed in Annex III and seeking to deduce what the challenged measures are from the information found at such sites would necessarily involve going beyond an examination of the panel request "on its face", and that this would be improper.

<sup>378</sup> Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>379</sup> EU Panel Request, p. 4; European Union's other appellant's submission, para. 15.

<sup>380</sup> EU Panel Request, fn 1 to Annex III.

<sup>381</sup> Second Preliminary Ruling, para. 4.37. (fns omitted)



5.48. We recall that the determination of whether a panel request satisfies the requirements of Articles 6.2 of the DSU must be based on an examination of the panel request on its face as it existed at the time of its filing.<sup>382</sup> The term "on its face", however, must not be so strictly construed as to preclude automatically reference to sources that are identified in its text, but the contents of which are accessible outside the panel request document itself.

5.49. It is common practice, for example, for panel requests identifying legislation, regulations, or other similar instruments as measures at issue to provide information that enables the respondent and potential third parties to access the text of the measures themselves, rather than to copy the entire text of these instruments into the body of the panel requests, or to attach them as annexes. Such information may consist of the title, date of enactment or entry into force, the official number of the law or regulation, and the citation to the government regulatory bulletin in which it was published.

5.50. Indeed, this is the approach followed in Annex I to the EU Panel Request, which lists, in a brief fashion, the legal instruments that make up the DJAI procedure. In our view, this method of identifying the measure at issue is not materially different from succinctly identifying various pieces of legislation by providing links to the government websites where such legislation could be accessed. This manner of identification would not necessarily mean that these pieces of legislation were not identified as specific measures at issue in accordance with Article 6.2 of the DSU. By providing a reference to a website in the panel request, the contents of such website may be permissibly examined in order to ascertain whether the measure at issue is identified with sufficient precision in the panel request.

5.51. Understanding the need to scrutinize a panel request "on its face" as limiting the examination of that request to the words appearing in the document would, in our view, be too formalistic an approach. It could, moreover, encourage complainants to incorporate entire texts of identified measures into the body of their panel requests. So long as a panel request seeks to identify the specific measure at issue through reference to a source where that measure's contents may readily be found and accessed, such contents may be the subject of scrutiny in assessing whether that request identifies the specific measures at issue within the meaning of, and in conformity with, Article 6.2 of the DSU.

5.52. At the same time, we do not mean to suggest that the identification of measures at issue by simple reference to external sources will always suffice to meet the requirements of Article 6.2 of the DSU. This is something that must be determined on a case-by-case basis, bearing in mind whether the specific measures at issue can be discerned from the panel request. A complainant whose panel request simply refers to external sources runs the risk that such request may fall short of the requirements of Article 6.2.<sup>383</sup> We observe, in this connection, that the contents of webpages may not always be static. Moreover, a complainant may encounter more difficulty complying with Article 6.2 where its panel request refers to press releases or news articles about measures, rather than to the contents of the measures themselves. Yet, in circumstances where a complainant is confronted with measures that are, for example, unwritten, unpublished, or otherwise publicly inaccessible, reference to such secondary sources may be the only available means of identifying the measure at issue.

5.53. In this dispute, in addition to providing the titles of the press releases and news articles, their dates of publication, and the websites where they may be accessed, it might have been more prudent for the European Union to also have provided a brief summary of the main elements of the measure discussed in each press release or news article, for example, by referring to the specific TRRs imposed, and the particular economic operators concerned. Nevertheless, as we have explained, the fact that the European Union opted merely to refer to the titles of the press releases or news articles, and to the websites where they may be found does not automatically take their contents outside the ambit of the examination required for determining whether the panel request identified the 23 instances of application of the TRRs as specific measures at issue. We also note that, in this dispute, Argentina did not contest the contents of the websites listed in Annex III to the EU Panel Request, raise any concern as to the accessibility of the individual website links, or question whether the contents of these websites may have changed.

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<sup>382</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>383</sup> See Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.31.

5.54. We recall that the Panel found that the EU Panel Request does not identify any of the 23 specific instances of application of the TRRs as specific measure at issue simply on the grounds that a reader of that panel request would have had to access information from a website and to deduce therefrom the challenged measures. In the circumstances of this dispute, and for the reasons set out above, we are of the view that the Panel could not properly have reached such a finding without first examining these press releases and news articles and explaining why their contents, read in conjunction with the main text of the EU Panel Request, did not identify the 23 measures in a manner that is sufficiently precise.

5.55. Accordingly, we find that the Panel erred in finding that the EU Panel Request does not satisfy the requirements of Article 6.2 of the DSU with respect to the 23 specific instances of application of the TRRs. We, therefore, reverse the Panel's finding, in paragraph 7.1.c of the EU Panel Report, that "[t]he 23 measures described by the European Union in section 4.2.4 of its first written submission as 'specific instances' of application of alleged [TRRs] were not precisely identified in the European Union's panel request as measures at issue", and that "accordingly, those 23 measures do not constitute 'measures at issue' in the present dispute".<sup>384</sup>

#### 5.1.2.4 The 23 specific instances of application of the TRRs as measures at issue

5.56. Having found that the Panel erred in finding that the 23 instances of application of the TRRs do not constitute measures at issue in this dispute, we now turn to assess whether the EU Panel Request identified each of the specific instances of application of the TRRs as measures at issue in conformity with Article 6.2 of the DSU. We recall that, in its first written submission, the European Union chose to pursue only 23 of the 29 instances originally identified in its panel request. Hence, we will focus on these 23 instances of application of the TRRs by examining the contents of the relevant press releases and news reports.

5.57. In reviewing each press release and news report, we must determine whether the relevant contents, when read together with the narrative of the EU Panel Request, identify the specific instance of application of the TRRs to particular economic operators, that is, whether the specific measure at issue subject to challenge by the European Union is discernible from such content. Our task is to ascertain whether these 23 measures were identified with sufficient precision by the European Union in its panel request as to satisfy the requirements of Article 6.2 of the DSU and, therefore, formed part of the Panel's terms of reference.<sup>385</sup> In our determination, we will consider the contents of each press release and news article listed in Annex III to the EU Panel Request to ascertain whether it specifically identifies the involvement of the Argentine Government, the economic operator, sector, or industry concerned, and the particular TRR(s) imposed. In doing so, we bear in mind the narrative of the EU Panel Request, which reads in relevant part:

Separately and/or in combination with the above measures described in Sections I and II, Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: (1) export a certain value of goods from Argentina related to the value of imports; (2) limit the volume of imports and/or reduce their price; (3) refrain from repatriating funds from Argentina to another country; (4) make or increase investments in Argentina (including in production facilities); and/or (5) incorporate local content into domestically produced goods.

...

The European Union considers that these requirements, ... when viewed as separate measures in each of the instances listed in Annex III, ... are inconsistent with the following

<sup>384</sup> See also Second Preliminary Ruling, para. 5.1.b.

<sup>385</sup> We note that, during the Panel proceedings, Argentina stated that it "has not denied or called into question the existence" of the specific agreements between the Argentine Government and the economic operators, of which the Panel requested copies. (Panel Reports, paras. 6.46, 6.64, and 6.164 (quoting Argentina's responses to Panel questions Nos. 63-92, para. 20); see also paras. 6.155 and 6.165)

- Article III:4 of GATT 1994, to the extent that Argentina requires domestic producers to increase local content and/or limit imports to an amount related to the volume or value of local products that they export.
- ...
- Article XI:1 of the GATT 1994, because the measure prohibits or restricts the importation of goods.<sup>386</sup>

**Case 1: "Renault Trucks tells Government it will increase its exports"<sup>387</sup>**

5.58. This press release, dated 7 February 2011, states that the Argentine Government concluded an agreement on the same date with Renault Trucks Argentina, whereby the latter undertook to reverse its trade deficit and increase its exports by US\$47 million to achieve a trade balance of US\$0.7 million. Renault also pledged to invest up to US\$4 million, including a commitment to make investments in car parts manufacturers Dana and Tassarolli, allowing them to develop new products not only to supply Renault, but also to increase their own exports. According to the Minister of Industry, the investments by Renault would "reinforce local car parts manufacturers so that a large number of parts made here are produced and integrated into the vehicles manufactured in Argentina". This press release further states that Fate Argentina was to start supplying tyres, previously imported from Brazil, for Renault trucks sold in Argentina and Uruguay. In our view, these statements, read in conjunction with the narrative of the EU Panel Request, show the imposition of the one-to-one, investment, and import substitution requirements on Renault Trucks Argentina.

**Case 2: "Boudou speaks of success of import substitution policy"<sup>388</sup>**

5.59. This press release, dated 18 March 2011, quotes Argentina's Minister of the Economy as saying that a commitment by Volkswagen to reduce its trade deficit "demonstrates the success of the policy of import substitution". The press release explains that the Minister of the Economy, Minister of Industry, and the Secretary of Domestic Trade approved and endorsed Volkswagen's business plan providing for an increase in exports to achieve a trade surplus of US\$538 million. The reduction of Volkswagen's trade deficit and achievement of the goal to keep a trade surplus are said to "work on the basis of incorporating small and medium local suppliers in the auto part chain". Volkswagen's business plan is reported to have "a strong export bias" since the company promised to eliminate its US\$816 million trade deficit and committed to achieving a surplus of US\$538 million. The company also undertook to meet the requirement imposed by the Argentine Government to achieve a one-to-one ratio within one year. In our view, these statements, read in conjunction with the narrative of the EU Panel Request, show the imposition of the import substitution and one-to-one requirements on Volkswagen.

**Case 3: "Porsche importer agrees to offset imports with exports of wine and oil"<sup>389</sup>**

5.60. This press release, dated 30 March 2011, states that the Minister of Industry, Minister of the Economy, and the Secretary of Domestic Trade approved an agreement with the firm that imports Porsche vehicles into Argentina to balance its trade. This export plan would offset the firm's imports with exports of non-automotive products "linked with other activities that the group is developing in Argentina", such as wine and olive products. Argentina's vehicle importers and manufacturers are also said to be allowed to import the same amount as they export, and to have been given a year to achieve this one-to-one ratio. In our view, this press release, read together with the narrative of the EU Panel Request, demonstrates the imposition of the one-to-one requirement on Argentina's importer of Porsche vehicles.

<sup>386</sup> EU Panel Request, pp. 3-4.

<sup>387</sup> Listed as Item 2 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-103.

<sup>388</sup> Listed as Item 3 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-80.

<sup>389</sup> Listed as Item 4 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-81.

**Case 4: "Automaker pledges to balance its trade"<sup>390</sup>**

5.61. This press release, dated 6 April 2011, states that the Argentine Government and Mercedes Benz entered into an agreement on the same date for the latter to even out its trade balance by committing to increase its exports and substitute locally produced auto parts for imports. The press release also states that, according to the Minister of Industry, Argentina's vehicle importers and manufacturers would be able to import the same amount as they export, and were given one year within which to achieve this one-to-one ratio. Finally, the press release explains that Mercedes Benz would resume the production of trucks in Argentina by making an investment of US\$53 million. In our view, these statements, read in conjunction with the narrative of the EU Panel Request, show the imposition of the import substitution, one-to-one, and investment requirements on Mercedes Benz.

**Case 5: "Peugeot agrees with the government to improve its trade balance"<sup>391</sup>**

5.62. This press release, dated 17 November 2011, states that PSA Peugeot-Citroën signed on the same date an agreement with the Argentine Government aimed at improving the company's trade balance from a deficit of US\$290 million to a surplus of US\$85 million. This agreement between Argentina and Peugeot includes an undertaking for the latter not to transfer any dividends abroad. The press release also reports the launch of the new model Peugeot 308, which required a US\$55 million investment, has local parts and components equivalent to 60% of its value, and has a local plant as its exclusive platform throughout the region. Peugeot is also said to be developing a new project for a completely new model with a total investment of US\$110 million. In our view, these statements, read in conjunction with the narrative of the EU Panel Request, demonstrate the imposition on Peugeot of the one-to-one, investment, and import substitution requirements.

**Case 6: "Five car producers have signed agreements with the Government to contribute US\$2.2 billion to the balance of trade"<sup>392</sup>**

5.63. This press release, dated 20 April 2011, reports that the Argentine Government signed agreements on the same date with Peugeot-Citroën and Centro Milano, the importer of Alfa Romeo, for these companies to increase their exports. These agreements follow those already concluded with Volkswagen, Mercedes Benz, and Porsche. The agreements are in the nature of an import-export programme to enable the two companies to reverse their trade deficit. Specifically, the agreements will result in Peugeot increasing its automobile exports by more than US\$600 million and in Alfa Romeo's exports exceeding US\$11 million for the first time. The representatives of Alfa Romeo stated that the company would make a new investment of US\$2.5 million to install a new biodiesel plant that would generate exports worth approximately US\$11.5 million in 2012 and would create a trade surplus. In our view, this press release, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on Peugeot and Alfa Romeo.

**Case 7: "General Motors committed to evening out its trade in 2012"<sup>393</sup>**

5.64. This press release, dated 2 May 2011, states that the Argentine Government signed on the same date an agreement with General Motors Argentina, pursuant to which the latter undertook to even out its trade in 2012. First, General Motors committed to improve its trade balance by substituting domestic products for imports in the amount of more than US\$150 million, and continuing to work out local sourcing strategies with its Argentine suppliers. Second, General Motors undertook to invest US\$154 million in order to increase the output of some of its vehicle models, increase its exports, generate 600 new jobs in Argentina, and develop local suppliers by continuing with its local inputs plan. Third, the press release reports that the agreement signed with General Motors is the sixth of those concluded with vehicle manufacturers.

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<sup>390</sup> Listed as Item 5 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-5.

<sup>391</sup> Listed as Item 14 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-245.

<sup>392</sup> Listed as Item 6 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-85.

<sup>393</sup> Listed as Item 7 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-86.

All these firms committed to increasing their investments and exports in response to the one-to-one requirement imposed by the Minister of Industry and the Secretary of Domestic Trade at the beginning of 2011. In our view, it is evident from these statements, read together with the narrative of the EU Panel Request, that import substitution, investment, and one-to-one requirements were imposed on General Motors.

**Case 8: "Fiat, another car manufacturer to sign an undertaking with the government to balance its trade"<sup>394</sup>**

5.65. This press release, dated 5 May 2011, states that the Argentine Government signed an agreement with Fiat Argentina to even out the company's trade balance. First, Fiat is said to have agreed to invest more than US\$1.2 billion to produce a new car model and agricultural machinery. The launch of the new car model involves a US\$813 million investment. Second, the Ministry of Industry is quoted as saying that Fiat is responding to the commitment required by the Argentine Government to even out the company's trade balance by significantly increasing its exports and maintaining its 2010 import levels by having local content in its new model, substituting imports by producing harvesters, tractors, and engines through Case New Holland, and increasing exports of trucks made by Iveco. Fiat's 2012 model is said to have 50% local content in Argentina. Third, Fiat undertook to export US\$1.5 billion in 2010 and US\$2 billion in 2012, resulting in replacing the previous year's deficit of US\$500 million with a surplus of US\$340 million the following year. In our view, this press release, read in conjunction with the narrative of the EU Panel Request, demonstrates the imposition of the investment, import substitution, and one-to-one requirements on Fiat.

**Case 9: "Ford will export more and import less"<sup>395</sup>**

5.66. This press release, dated 23 May 2011, details the agreement signed on the same date between the Argentine Government and Ford, in which the latter committed to exporting more and importing less in order to eliminate the trade deficit that it had in the previous year in the amount of US\$250 million. Specifically, Ford undertook to increase its exports by 70%, and not to increase imports by more than 30% to reverse its trade balance deficit. Further, according to the representatives of Ford, the company will achieve a trade balance surplus of US\$90 million as a result of, among other factors, the generation of more added value through the local assembly of engines that have previously been imported in the finished state. In our view, the press release, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one and import substitution requirements on Ford.

**Case 10: "Renault, Mitsubishi, Nissan and Volvo have also signed a plan to achieve a trade surplus in 2012"<sup>396</sup>**

5.67. This press release, dated 5 August 2011, indicates that the Argentine Government signed agreements on the same date with four automotive companies, i.e. Renault Argentina, Alfacar (importer of Mitsubishi), Ditecar (importer of Volvo, Jaguar, and Land Rover), and Nissan. In these agreements, the companies committed to offsetting their imports in 2011 and reducing the deficits they had in 2010 to achieve a trade balance surplus in 2012. Renault undertook to inject capital and produce a new economy car model intended mainly for export. Nissan is reported to have also committed to inject capital and export soya meal, soya oil, and biodiesel through third companies, and to incorporate gradually manufactured products from regional economies to even out its trade balance. Mitsubishi is said to have committed to export animal feed, peanuts, and premium mineral water, while Ditecar is to export to Chile through third-company intermediaries. In our view, these statements in the press release, read together with the narrative of the EU Panel Request, demonstrate the imposition of the one-to-one, investment, and import substitution requirements on Renault, Alfacar, Ditecar, and Nissan.

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<sup>394</sup> Listed as Item 8 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-88.

<sup>395</sup> Listed as Item 9 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-95.

<sup>396</sup> Listed as Item 10 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-90.

**Case 11: "Ministry of Industry announces that BMW will balance imports and exports in 2012"<sup>397</sup>**

5.68. This press release, dated 13 October 2011, states that the Argentine Government and BMW Group Argentina signed on the same date an import substitution plan whereby the latter committed to balance its exports and imports in 2012. BMW is also said to have undertaken to develop in Argentina automotive components for export, as well as leather upholstery for its cars, and milled rice. Thus, in our view, this press release, read in conjunction with the narrative of the EU Panel Request, demonstrates the imposition of the one-to-one requirement on BMW.

**Case 12: "Publishing companies agree to restore trade balance"<sup>398</sup>**

5.69. This press release, dated 31 October 2011, reports the signing of an agreement between the Argentine Government and the Cámara Argentina de Publicaciones, which consists of 46 publishers. This agreement is said to provide that each of these publishing companies will have to achieve a balance in their imports and exports. In our view, this press release, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on the publishing industry.

**Case 13: "Giorgi and Moreno sign agreement with booksellers to offset their imports"<sup>399</sup>**

5.70. This press release, dated 11 November 2011, states that the Argentine Government concluded an agreement with representatives of the Cámara Argentina del Libro, which is composed of 550 small and medium-sized enterprises (SMEs) involved in printing, publishing, and bookselling. Under this agreement, the members of the Cámara Argentina del Libro undertook to even out their trade balances by the end of 2012 by offsetting imports with exports, and promoting domestic printing. In our view, this press release, read together with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on the printing, publishing, and bookselling industry.

**Case 14: "Scania tells the President it will invest US\$40 million in Argentina"<sup>400</sup>**

5.71. This press release, dated 21 November 2011, reports that Scania met with the Argentine President and the Minister of Industry on the same date and that Scania expressed its planned investment in the amount of US\$40 million for its truck gearbox plant in Tucumán, Argentina, and its undertaking to capitalize its profits for 2010. According to the Ministry of Industry, Scania's commitments to capitalize its profits in the amount of US\$56.8 million and reinvest them are within the context of the Argentine Government's demand for auto manufacturers to even out their trade balances. Scania is reported to have also committed to increase its production capacity and exports, generate jobs, and develop and increase purchases from local suppliers, as well as reinvest its profits in Argentina. Through these and its US\$40 million investment, Scania is to aim for a reversal of its trade balance and the achievement of a trade surplus of US\$40 million in 2012. In our view, it is evident from these statements, read in conjunction with the narrative of the EU Panel Request, that the one-to-one and investment requirements were imposed on Scania.

**Case 15: "Radio: 'Pirelli to export an additional US\$100 million in honey'"<sup>401</sup>**

5.72. This news article, dated 10 March 2012, reports an announcement by the Minister of Agriculture that Pirelli, which imports tyres valued at US\$100 million, undertook to export an additional US\$100 million worth of honey in order to be allowed to import US\$110 million, or 10%

<sup>397</sup> Listed as Item 11 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-92.

<sup>398</sup> Listed as Item 12 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-129.

<sup>399</sup> Listed as Item 13 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-133.

<sup>400</sup> Listed as Item 15 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-101.

<sup>401</sup> Listed as Item 20 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-364.

more of its usual imports. This statement, in our view, read together with the narrative of the EU Panel Request, suffices to show the imposition of the one-to-one requirement on Pirelli.

**Case 16: "No more imports of ham from Spain and Italy"<sup>402</sup>**

5.73. This news article, dated 9 May 2012, reports that the Secretary of Domestic Trade approved an agreement with pork meat producers, including the Argentine Pork Producers Association and the Argentine Council of Producers, limiting the importation into Argentina of finished ham products, including those from Spain and Italy. Pursuant to the agreement, the relevant companies would not import more than 80% of the amount of pork "pulp" and bacon they imported in 2011, and would not import finished pork products like Spanish ham so as to promote Argentinean ham. The member companies of these chambers also committed not to import more cow tripe, and instead to give priority to local tripe. Companies in the pork meat sector also committed to export the equivalent of what they import and to present a list of prices of their products. This news article, read in conjunction with the narrative of the EU Panel Request, demonstrates the imposition of the import reduction and one-to-one requirements on pork producers.

**Case 17: "Go pray to 'Saint Moreno': in an unprecedented drive, Moreno blocks the entry of Bibles into Argentina"<sup>403</sup>**

5.74. This news article, dated 22 November 2011, reports that around 100,000 bibles and other religious materials were held up in Argentine customs by the Secretary of Domestic Trade. The Argentine Government is said to have acknowledged setting up a barrier to limit entry of literature produced abroad in order to discourage imports and promote domestic printing. Subsequently, the Argentine Government concluded an agreement with the Cámara Argentina de Publicaciones and the Cámara Argentina del Libro, which undertook to even out their trade balances. By the end of 2012, the companies in the publishing sector are required to export local products to be able to import materials from abroad. In our view, this news article, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on companies in the publishing sector.

**Case 18: "More controls over the entry of medicines and demands to even out the trade balance"<sup>404</sup>**

5.75. This news article, dated 12 October 2012, reports the differing lengths of time it takes to obtain authorization for the importation of medicines into Argentina depending on whether or not the laboratory seeking to import has achieved a trade balance. The time period to obtain this authorization is usually 48 hours. However, if the laboratory imports more than it exports, then this time period can extend up to 60 days. If the laboratory's trade is in balance or it seeks to import raw materials for processing in Argentina, then the 48-hour period is observed. The Secretariat of Domestic Trade requires laboratories to submit a balance sheet every six months, and it is on this basis that the agency determines the procedures to be followed for importing medicines. The Ministry of Industry and the Secretariat of Domestic Trade are said to impose these measures in order to discourage the importation of finished products. In our view, it is evident from this news article, read together with the narrative of the EU Panel Request, that the one-to-one requirement is imposed on laboratories and/or producers of medicines.

**Case 19: "Airoldi to start up a biodiesel plant so it can go on importing"<sup>405</sup>**

5.76. This news article, dated 7 March 2012, discusses how Airoldi/Air Computers, whose business relies on the importation of parts for assembling information technology devices, decided to accelerate the bringing into operation of its biodiesel, crushing, and refining plants in Alvear,

<sup>402</sup> Listed as Item 23 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-189.

<sup>403</sup> Listed as Item 16 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-375.

<sup>404</sup> Listed as Item 18 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-379.

<sup>405</sup> Listed as Item 19 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-124.

Argentina, so as to balance its trade. The article reports that Air Computers was forced to seek alternatives, and thus decided to bring these plants into operation in order to comply with the requirement of the Secretariat of Domestic Trade to keep foreign purchases on an even level with shipments abroad. In order to offset its imports while awaiting the operation of these plants, Airoldi/Air Computers formed alliances with companies that produce food for humans and animals from the soya paste that it produces, with the intention of exporting these food products. This news article, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on Airoldi/Air Computers.

**Case 20: "Zanella plans to restore its balance by exporting food"<sup>406</sup>**

5.77. This news article, dated 5 April 2012, states that Zanella, which manufactures motorcycles and runs motorcycle and spare parts distribution centres, made an agreement with the Argentine Government to even out the company's trade balance. Similar to what has been done by various companies in different sectors, Zanella also made a commitment to the Ministry of Industry that it would offset the value of its imports with the export of value-added products. It is reported that Zanella plans to comply with this agreement by exporting food and wine. In our view, this news article, read in conjunction with the narrative of the EU Panel Request, demonstrates the imposition of the one-to-one requirement on Zanella.

**Case 21: "More multinationals form partnerships with wineries to be able to import"<sup>407</sup>**

5.78. This news article, dated 8 July 2012, reports that, for importers obliged to sign agreements to offset their imports with exports in equal proportions, this could translate to promising deals for Argentine wineries, which are the most sought-after partners of multinational companies operating in Argentina. Thus, new partnership agreements, which have been approved by the Secretary of Domestic Trade, have been concluded between Samsung and La Rural, and Indesit and Norton in order to offset, in equal proportions, the imports of Samsung and Indesit with exports of wine. La Rural and Norton are wineries in Argentina. This news article, in our view, read in conjunction with the narrative of the EU Panel Request, shows the imposition of the one-to-one requirement on Samsung and Indesit.

**Case 22: "SMEs on wheels"<sup>408</sup>**

5.79. This news article, dated 26 July 2012, reports that the Argentine Government held a meeting with tyre firm Michelin and a group of more than 100 SMEs to promote the export of various domestic products to Michelin's subsidiaries by organizing a trade mission to France. This is said to be a consequence of the requirement imposed by the Secretary of Domestic Trade to offset imports with exports. The Secretary of Domestic Trade is also reported to have sent a message to importing businessmen that they must contribute to the generation of foreign exchange, whether through association with domestic exporters, capital injections, or import substitution. Since Michelin does business in tyres, tourist guides, and various articles, including footwear, textiles, clothing and other accessories, the participants in the meeting ranged from domestic suppliers of raw materials for tyres and auto-part companies to toy and clothing manufacturers. Michelin is said to intend to preselect the Argentine suppliers that show promise of selling directly to its parent company. These statements, in our view, read together with the narrative of the EU Panel Request, demonstrate that Michelin committed to undertaking the one-to-one and import substitution requirements.

**Case 23: "Zegna helps to export wool and reopens"<sup>409</sup>**

5.80. This news article, dated 2 August 2012, reveals that Ermenegildo Zegna closed its flagship store in Buenos Aires for two months because of a shortage of merchandise. It was able to reopen

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<sup>406</sup> Listed as Item 21 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-401.

<sup>407</sup> Listed as Item 22 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-121.

<sup>408</sup> Listed as Item 24 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit EU-403.

<sup>409</sup> Listed as Item 25 of Annex III to the EU Panel Request; text subsequently submitted to the Panel as Exhibit JE-158.



its store after being authorized to import its garments again subsequent to its submission to the Argentine Government of an export project. The company concluded an agreement with an Argentine wool producer to facilitate its exports to companies in Switzerland and Italy, and thereby satisfy the Argentine Government's request to offset its imports with exports in order for Ermenegildo Zegna to obtain a licence to start importing again. In our view, this news article, read in conjunction with the narrative of the EU Panel Request, demonstrates the imposition of the one-to-one requirement on Ermenegildo Zegna.

### Summary of the analysis of the 23 specific instances of application

5.81. Based on the above observations, we consider the 23 specific instances of application of the TRRs that are the object of the European Union's claims to be discernible from the press releases and news articles. The contents of each press release and news article listed in Annex III provide the following information: (i) the involvement of the Argentine Government; (ii) the particular economic operator, sector, or industry concerned; and (iii) the specific TRR(s) allegedly imposed. The press releases and news articles, each of which consists of only one or two pages, read together with the narrative of the EU Panel Request, present these key details with sufficient clarity so as to enable a reader to discern the specific measures at issue. It follows that, unlike the Panel, we consider that the EU Panel Request did identify the specific measures at issue in this dispute consistently with the requirements of Article 6.2 of the DSU.

5.82. Moreover, we are satisfied that the EU Panel Request complies with the requirement of Article 6.2 of the DSU "to present the problem clearly" by plainly connecting<sup>410</sup> the 23 specific instances of application of the TRRs with its legal claims, i.e. Articles III:4 and XI:1 of the GATT 1994. We recall that, as set out above, the EU Panel Request includes the following narrative:

The European Union considers that these requirements, ... when viewed as separate measures in each of the instances listed in Annex III, ... are inconsistent with the following

- Article III:4 of GATT 1994, to the extent that Argentina requires domestic producers to increase local content and/or limit imports to an amount related to the volume or value of local products that they export.
- ...
- Article XI:1 of the GATT 1994, because the measure prohibits or restricts the importation of goods.<sup>411</sup>

5.83. While the EU Panel Request identifies the 23 specific instances as separate measures and indicates specific provisions of the GATT 1994 as the legal basis, we do not find it difficult to make a plain connection between the measures at issue and the claims in the light of the narrative provided in the EU Panel Request. In particular, the above narrative in the EU Panel Request provides context to the measures at issue and legal claims in a way that enables a reader to ascertain the connection between the two. The EU Panel Request identifies, as TRRs, requirements to export a certain value of goods related to the value of imports, to limit the volume of imports, to refrain from repatriating funds abroad, to make or increase investments in Argentina, or to incorporate local content into domestically produced goods. The information found on the websites listed in Annex III to the EU Panel Request identifies, *inter alia*, the particular TRR(s) imposed on specific economic operators. Furthermore, the narrative of the EU Panel Request states that the specific instances of application of the TRRs are inconsistent with Article III:4 of the GATT 1994 to the extent that Argentina requires domestic producers to increase local content and/or limit imports to the value of exports, and with Article XI:1 to the extent that the measures prohibit or restrict importation. Therefore, the EU Panel Request narrative is sufficiently clear to enable a

<sup>410</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *US – Gambling*, para. 141; *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

<sup>411</sup> EU Panel Request, p. 4.

reader to ascertain which of the specific instances of application of the TRRs the European Union alleged to be inconsistent with Article III:4 and/or Article XI:1 of the GATT 1994.

5.84. Based on the above reasons, we find that the EU Panel Request identifies as measures at issue the 23 specific instances of application of the TRRs in a manner that is sufficiently precise so as to conform to the requirements of Article 6.2 of the DSU.

#### 5.1.2.5 Whether the 23 measures expanded the scope of the dispute

5.85. We now turn to Argentina's argument that the European Union's inclusion of these 23 specific instances of application of the TRRs in its panel request impermissibly expanded the scope of the dispute, as these 23 specific instances were not identified in the European Union's request for consultations. In Argentina's view, this would have been an independent basis for the Panel to conclude that these 23 specific instances are outside its terms of reference.<sup>412</sup>

5.86. In its consultations request, the European Union stated that Argentina "often requires" importers to undertake "certain commitments".<sup>413</sup> Thereafter, in its panel request, the European Union identified as specific measures at issue "Restrictive Trade Related Requirements" that reflect the same "commitments" it previously referred to in its consultations request.<sup>414</sup> The EU Panel Request alleges that these requirements, "when viewed as an overarching measure ... as well as when viewed as separate measures in each of the instances listed in Annex III" are inconsistent with Argentina's WTO obligations.<sup>415</sup> Annex III to the EU Panel Request then lists "Instances of restrictive trade-related requirements affecting products originating in the European Union", providing the titles of 29 press releases and news articles, the dates on which they were published, and the websites where they may be accessed.

5.87. We recall our previous discussion that, based on the language and functions of Articles 4.4 and 6.2 of the DSU, greater specificity is required in identifying the measure at issue in a panel request than in a consultations request. Specifically, Article 4.4 requires the identification of the "measure at issue", while Article 6.2 requires the identification of the "*specific* measure at issue".<sup>416</sup> Thus, there is no need for a "*precise and exact identity*" between the consultations request and the panel request<sup>417</sup>, provided that the complainant does not expand the scope of the dispute<sup>418</sup> or change its essence.<sup>419</sup>

5.88. In assessing whether the European Union's identification in its panel request of the 23 specific instances of application of the TRRs impermissibly expanded the scope of the dispute, the Appellate Body's ruling in *US – Continued Zeroing* provides useful guidance. In that dispute, the European Communities' panel request identified 14 anti-dumping duty review determinations that were not specifically identified by name or case number in its consultations request. The United States argued that these 14 anti-dumping duty review determinations fell outside the panel's terms of reference because the consultations request did not refer to them.<sup>420</sup> The Appellate Body observed that, "in addition to the zeroing methodology, the European Communities challenge[d] the '*outcome* of the administrative reviews', the '*imposition of definitive duties*', and '*the continuation of the anti-dumping [duty]*' resulting from the proceedings listed in the annexes" to the request for consultations.<sup>421</sup> The Appellate Body ruled that "the measures subject to the European Communities' challenge encompass[ed] the anti-dumping duties resulting from the proceedings identified in the consultations request, in which the zeroing methodology was allegedly used".<sup>422</sup> Further, the Appellate Body noted that "the 14 additional measures identified in the panel request pertain[ed] to the same anti-dumping duties that [were] included in the consultations request". Since the 14 measures "relate[d] to the same duties identified in the

<sup>412</sup> Argentina's appellee's submission, para. 13.

<sup>413</sup> European Union's request for consultations, p. 1.

<sup>414</sup> EU Panel Request, p. 3.

<sup>415</sup> EU Panel Request, p. 4.

<sup>416</sup> Emphasis added.

<sup>417</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis original)

<sup>418</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>419</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137 and 138.

<sup>420</sup> Appellate Body Report, *US – Continued Zeroing*, para. 223. (fn omitted)

<sup>421</sup> Appellate Body Report, *US – Continued Zeroing*, para. 226. (emphasis original)

<sup>422</sup> Appellate Body Report, *US – Continued Zeroing*, para. 226.

consultations request"<sup>423</sup>, the Appellate Body held that they were within the panel's terms of reference.<sup>424</sup>

5.89. As explained in the previous subsection of these Reports<sup>425</sup>, the European Union's consultations request enumerates five "commitments" that Argentina "often requires" importers of goods to undertake. The instances listed by the European Union in Annex III to its panel request, in turn, appear to be specific instances of application of these "commitments". Thus, the language of the European Union's consultations request encompasses the specific instances of application identified in the EU Panel Request. Alternatively, these specific instances could reasonably be viewed as having evolved from these "commitments". Consequently, the identification of these 23 measures in the EU Panel Request did not amount to an expansion in the scope or a change in the essence of the dispute, but may rather be considered as a permissible refinement or reformulation of the complaint following the consultations process. Thus, we do not find any merit in Argentina's contention that the specific instances of application of the TRRs identified in Annex III to the EU Panel Request impermissibly expanded the scope of the dispute or changed its essence and were, therefore, outside the Panel's terms of reference.

#### 5.1.2.6 The European Union's conditional appeal

5.90. The European Union makes a conditional appeal, stating that its request for completion of the legal analysis depends on us reversing or otherwise declaring moot and with no legal effect the Panel's findings that: (i) the TRRs measure exists; and (ii) the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994. For reasons explained in the succeeding sections, we hold that the triggering conditions for the European Union's conditional request for the completion of the analysis are not met. Therefore, we refrain from completing the legal analysis with respect to the consistency or inconsistency of the 23 specific instances of application of the TRRs with Article XI:1 and/or Article III:4 of the GATT 1994.

#### 5.1.2.7 Overall conclusion on the European Union's other appeal

5.91. For all of the reasons set out above, we find that the Panel erred in failing to consider the information found in the sources listed in Annex III to the EU Panel Request in assessing whether the EU Panel Request satisfied the requirements of Article 6.2 of the DSU with respect to the 23 specific instances of application of the TRRs. In consequence, we reverse the Panel's finding, in paragraph 7.1.c of the EU Panel Report, that these specific instances "were not precisely identified in the European Union's panel request as measures at issue" and that, "accordingly, those 23 measures do not constitute 'measures at issue' in the present dispute".<sup>426</sup> Based on our own reading of the contents of the relevant press releases and news articles listed in Annex III to the EU Panel Request, when read in conjunction with the narrative provided in the text of the EU Panel Request itself, we find that the 23 instances of application of the TRRs were identified as "specific measures at issue" in a manner that is sufficiently precise as to conform to the requirements of Article 6.2 of the DSU, and were thus within the Panel's terms of reference. Finally, we find it unnecessary to rule on the European Union's request for completion of the legal analysis, as the conditions on which its request is premised are not met.

## 5.2 Identification of the single unwritten TRRs measure

### 5.2.1 Introduction

5.92. We now turn to Argentina's appeal of the Panel's findings that the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994.<sup>427</sup> Argentina claims that the Panel erred in finding that the complainants had established that a TRRs measure exists and that it is inconsistent with Articles XI:1 and III:4 of the GATT 1994. In particular, Argentina claims that the Panel failed to apply the correct legal standard in ascertaining the existence of the alleged TRRs measure in its evaluation of the claims by the three complainants against the TRRs measure that the Panel assessed jointly ("joint claims"), and that the Panel acted inconsistently with Article 11

<sup>423</sup> Appellate Body Report, *US – Continued Zeroing*, para. 228.

<sup>424</sup> Appellate Body Report, *US – Continued Zeroing*, para. 236.

<sup>425</sup> See e.g. para. 5.21 of these Reports.

<sup>426</sup> See also Second Preliminary Ruling, para. 5.1.b.

<sup>427</sup> The Panel's explanation of the TRRs measure is summarized above in section 4.1 of these Reports.

of the DSU in its evaluation of Japan's separate "as such" claims against the same alleged measure. Argentina, therefore, requests us to reverse the Panel's conclusions that the TRRs measure operates as a single measure and that it is inconsistent with Articles XI:1 and III:4 of the GATT 1994, as well as the Panel's finding that this measure is "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994.

5.93. We address, first, Argentina's claim that the Panel applied the incorrect legal standard in evaluating the complainants' joint claims against the TRRs measure. Second, we address Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in its evaluation of Japan's "as such" claims against that measure.

### 5.2.2 The joint claims against the TRRs measure

5.94. Argentina argues that the Panel erred in failing to apply the correct legal standard in evaluating whether the complainants had proven the existence of a single unwritten TRRs measure. For Argentina, it was evident that the complainants had, in effect, raised "as such" claims against the TRRs measure. Thus, the Panel should have applied the legal standard articulated by the Appellate Body in *US – Zeroing (EC)* in assessing these joint claims, and determined whether the measure is attributable to Argentina, as well as its precise content, and its general and prospective application. Instead, according to Argentina, having wrongly accepted the complainants' own characterization of the joint claims as not being "as such", the Panel presumed the existence of the TRRs measure and proceeded to apply an erroneous legal standard. This legal standard was the one articulated by the panel in *US – COOL* to ascertain whether multiple measures can be assessed for WTO-consistency as a single measure, rather than as individual measures.<sup>428</sup>

5.95. On appeal, the three complainants maintain that their claims, which the Panel addressed jointly, were not "as such" claims and that, therefore, the Panel did not err in not applying the legal standard formulated by the Appellate Body in *US – Zeroing (EC)*.<sup>429</sup>

5.96. As a preliminary matter, we note that none of the three complainants characterized its claims against the TRRs measure as being "as such" or "as applied" in its panel request. Moreover, both the European Union and the United States maintained throughout the proceedings before the Panel that their claims against the TRRs measure were not "as such" claims.<sup>430</sup> In the course of the Panel proceedings, Japan clarified that it was seeking findings from the Panel against the TRRs measure "as such", "as applied", and "as an unwritten practice or policy, as confirmed by the systematic application of the measure".<sup>431</sup>

5.97. The Panel divided its evaluation of the claims raised against the TRRs measure into two parts. In the first part of its analysis, the Panel decided to address the claims by the European Union and the United States together with Japan's claims against the TRRs measure "as an unwritten practice or policy, as confirmed by the systematic application of the measure".<sup>432</sup> Having grouped these claims together for the purpose of its analysis, the Panel assessed them separately from Japan's "as such" claims against the same measure. In subsequently addressing Japan's "as such" claims, the Panel referred to the claims by the three complainants that it had addressed earlier as the "joint claims". The Panel recognized that the joint claims were brought against an unwritten measure, but it did not affirmatively characterize the nature of the challenge that it considered these claims represented. The Panel did not treat the joint claims as falling in the category of "as such" claims challenging a rule or norm of general and prospective application, or in the category of "as applied" claims, challenging instances of specific application of the TRRs measure. The Panel reasoned that, because these claims were not "as such" claims, it would need to determine whether the measure is attributable to Argentina and its exact content, but not

<sup>428</sup> Argentina's appellant's submission, paras. 112 and 113.

<sup>429</sup> European Union's appellee's submission, para. 122; United States' appellee's submission, para. 133; Japan's appellee's submission, para. 45.

<sup>430</sup> The European Union made separate claims against 23 instances of application of the TRRs measure, which the Panel considered to be outside its terms of reference.

<sup>431</sup> Panel Reports, para. 6.136 (referring to Japan's second written submission to the Panel, para. 20).

<sup>432</sup> Panel Reports, para. 6.136 (referring to Japan's second written submission to the Panel, para. 20).

whether the measure has general and prospective application.<sup>433</sup> Moreover, because the complainants had challenged the TRRs as a single measure, the Panel stated that it would determine whether the individual TRRs applied and operated in a combined manner and as part of a single measure.<sup>434</sup>

5.98. The Panel then explained that, in respect of the joint claims, it would establish: (i) whether the five TRRs imposed by Argentina apply and operate as part of a single measure; (ii) the content of the single measure; and (iii) whether the measure is attributable to Argentina. The Panel stated that, in its separate assessment of Japan's "as such" claims, it would also determine whether the TRRs measure has general and prospective application.<sup>435</sup>

### 5.2.2.1 Ascertaining the existence of an unwritten measure

5.99. In raising its claim on appeal that the Panel applied the wrong legal standard, Argentina does not refer to any provision in the DSU or in other covered agreements, but, rather, to the legal standard articulated by the Appellate Body in *US – Zeroing (EC)* for the assessment of unwritten measures of general and prospective application.<sup>436</sup> In *US – Zeroing (EC)*, the Appellate Body considered whether the "zeroing methodology" constituted a "measure" within the meaning of Article 3.3 of the DSU that could be challenged in WTO dispute settlement.<sup>437</sup> Thus, we understand that, in invoking the ruling of the Appellate Body in *US – Zeroing (EC)*, Argentina is relying on the Appellate Body's interpretation of the concept of "measure" in Article 3.3 of the DSU in that dispute.

5.100. We recall that Article 3.3 of the DSU states that the dispute settlement system addresses "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member".<sup>438</sup> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that this phrase in Article 3.3 of the DSU "identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'".<sup>439</sup> In that dispute, the Appellate Body further noted that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings" and that "[t]he acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."<sup>440</sup>

5.101. It is well established that instruments of a Member containing rules or norms can be challenged "as such" in WTO dispute settlement, independently of whether or how those rules or norms are applied in particular instances.<sup>441</sup> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that allowing "as such" claims against measures embodying rules or norms serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated, thus avoiding a multiplicity of litigation against instances of application of measures.<sup>442</sup>

5.102. However, in *US – Continued Zeroing*, the Appellate Body considered that the distinction between "as such" and "as applied" claims neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures that are susceptible to challenge. Rather, this distinction was developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. A measure need

<sup>433</sup> Panel Reports, paras. 6.42 and 6.220. Nonetheless, as we consider further below, the Panel found, in addressing Japan's "as such" claims in a subsequent section of its Reports, that the TRRs measure has general and prospective application.

<sup>434</sup> Panel Reports, para. 6.219.

<sup>435</sup> Panel Reports, paras. 6.42, 6.219, and 6.220.

<sup>436</sup> Argentina's appellant's submission, para. 64.

<sup>437</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 187.

<sup>438</sup> Emphasis added.

<sup>439</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>440</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. (fns omitted) This, however, does not exclude that the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.

<sup>441</sup> Indeed, the case law articulating and applying the practice of allowing measures to be challenged "as such" forms part of the GATT acquis. (Appellate Body Report, *US – 1916 Act*, para. 61)

<sup>442</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual application of a rule or norm, in order to be susceptible to challenge in WTO dispute settlement.<sup>443</sup>

5.103. We observe that the distinction between "as such" and "as applied" claims is typically employed in conjunction with claims against norms or rules of general and prospective application, such as those contained in legislation. Legislation prescribing such rules or norms can be challenged "as such". Alternatively, or additionally, a complainant may raise an "as applied" claim against one or more instances of application of the same legislation. The same, however, may not be true for other types of "measures" that are also attributable to a Member, and can thus be challenged in WTO dispute settlement. Rules and norms of general and prospective application are only one category of "measures" that can be challenged in WTO dispute settlement, which, as explained above, include any act or omission that is attributable to a Member.

5.104. In *US – Zeroing (EC)*, the Appellate Body considered a challenge against the "zeroing methodology" as an unwritten "'rule or norm' that constitutes a measure of general and prospective application".<sup>444</sup> The Appellate Body stated that, when bringing an "as such" challenge against a "rule or norm", a complaining party must clearly establish that the alleged "rule or norm" is attributable to the responding Member, its precise content, and that it has general and prospective application.<sup>445</sup> We observe that, in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised. In *US – Zeroing (EC)*, the additional features of general and prospective application were relevant to the type of measure identified by the complainant, that is, the zeroing methodology as a rule or norm. Proving the existence of other measures that are also challengeable in WTO dispute settlement may require a complainant to demonstrate, in addition to attribution and precise content, other elements, depending on the particular characteristics or nature of the measure being challenged.

5.105. In another dispute related to zeroing, the Appellate Body considered that the measure at issue was neither the zeroing methodology as a rule or norm of general and prospective application, nor the discrete applications of the zeroing methodology in particular determinations.<sup>446</sup> Rather, the Appellate Body considered that the measure at issue was ongoing conduct that consisted of the continued use of the zeroing methodology in successive proceedings by which duties in each of 18 cases were maintained.<sup>447</sup> Therefore, in that dispute, establishing the measure at issue did not require evidence that it had general and prospective application, but, rather, evidence of the use of the zeroing methodology, as ongoing conduct, with respect to duties resulting from each of the 18 anti-dumping duty orders at issue.

5.106. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered a challenge against another type of measure that did not fit into the category of "rule or norm" or of "application" thereof. Specifically, the Appellate Body considered a challenge by the United States against a subsidy programme not as a rule or norm of general and prospective application and distinct from the individual grants provided under the programme.<sup>448</sup> While the Appellate Body ultimately considered that the measure challenged in that dispute fell outside the panel's terms of

<sup>443</sup> Appellate Body Report, *US – Continued Zeroing*, para. 179.

<sup>444</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>445</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>446</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

<sup>447</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

<sup>448</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794. In that dispute, the United States claimed that the "systematic and coordinated" provision of "launch aid" or "member State financing" (LA/MSF) by France, Germany, Spain, and the United Kingdom for the development of various models of Airbus large civil aircraft demonstrated the existence of an unwritten LA/MSF "Programme", distinct from the individual grants of LA/MSF, which constituted a specific subsidy within the meaning of Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). (Ibid., paras. 778 and 780) The United States did not challenge the unwritten LA/MSF Programme as a rule or norm of general and prospective application or an application thereof, but as "a concerted and coherent approach – that is, a 'program' or 'ongoing conduct' – designed to contribute to the long-term competitiveness of Airbus" and as "a repeated course of action by responding Members". (Ibid., para. 793 (quoting United States' other appellant's submission, paras. 70 and 71)) The Appellate Body found, however, that the alleged LA/MSF Programme was not within the Panel's terms of reference because it was not identified in the request for the establishment of a panel, as required by Article 6.2 of the DSU. (Ibid., para. 795)

reference, it recalled its ruling in *US – Corrosion-Resistant Steel Sunset Review* that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings", and noted that the scope of measures that can be challenged in WTO dispute settlement is broad. As a general proposition, the Appellate Body did not exclude the possibility that "concerted action or practice" could be susceptible to challenge in WTO dispute settlement, and considered that a complainant would not necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists.<sup>449</sup>

5.107. In the light of the above, we consider that the notion of measure of general and prospective application as reflected in the finding of the Appellate Body in *US – Zeroing (EC)* cannot be considered as setting forth a general legal standard for proving the existence of any unwritten measure that is challenged in WTO dispute settlement. Rather, in *US – Zeroing (EC)*, the Appellate Body set out certain criteria that should assist panels in determining whether a complainant has proven the existence of a measure consisting of a rule or norm of general and prospective application. When an unwritten measure that is not a rule or norm is challenged in WTO dispute settlement, a complainant need not demonstrate its existence based on the same criteria that apply when rules or norms of general and prospective application are challenged. For example, in *US – Continued Zeroing*, the Appellate Body saw "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement".<sup>450</sup>

5.108. In any event, the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant. Depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence. For instance, a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.<sup>451</sup> A complainant that is challenging a measure characterized as "ongoing conduct" would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue.<sup>452</sup>

5.109. As noted above, the distinction between "as such" and "as applied" claims does not govern the definition of the measures that can be challenged in WTO dispute settlement. We also emphasize that the distinction between rules or norms of general and prospective application and their individual applications does not define exhaustively the types of measure that are subject to WTO dispute settlement. These distinctions are not always useful or appropriate to define the elements that must be substantiated for purposes of proving the existence and nature of a measure at issue. In this respect, we recall that the "measures" that may be the object of WTO dispute settlement extend to any act or omission that is attributable to a WTO Member. This broad concept of measures is not limited merely to rules or norms of general and prospective application and their individual applications.

5.110. A complainant seeking to prove the existence of an unwritten measure is not required to categorize its challenge as either "as such" or "as applied". When tasked with assessing a challenge against an unwritten measure, a panel is also not always required to apply rigid legal standards or criteria that are based on the "as such" or the "as applied" nature of the challenge. Rather, the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged. A complainant seeking

<sup>449</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

<sup>450</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

<sup>451</sup> The Panel referred to the panel in *US – COOL*, which, in assessing whether to examine certain instruments as one single measure or individual separate measures, summarized the main factors considered by previous panels and the Appellate Body in relation to this question as follows:

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

(Panel Reports, para. 6.144 (quoting Panel Report, *US – COOL*, para. 7.50))

<sup>452</sup> Appellate Body Report, *US – Continued Zeroing*, para. 191.

to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.

5.111. In the light of the above, we do not consider, as Argentina argues, that the Panel committed an error simply because it did not apply the criteria formulated by the Appellate Body in *US – Zeroing (EC)* for purposes of proving the existence of an unwritten measure that is challenged "as such" in WTO dispute settlement. Whether the Panel committed an error in ascertaining the existence of the TRRs measure should be assessed on the basis of whether the complainants identified and substantiated the relevant constituent elements of the type of measure they were challenging.

#### 5.2.2.2 The complainants' characterization of the measure at issue

5.112. Bearing in mind that the elements a panel needs to review in ascertaining the existence of an unwritten measure will depend on the specific measure challenged and how it is described and characterized by the complainant, rather than on the type of challenge (i.e. "as such" or "as applied"), we now turn to consider how the complainants characterized the TRRs measure before the Panel. Thereafter, we consider how the Panel assessed the constituent elements of the measure at issue in order to evaluate whether such a measure exists.

5.113. The European Union considered that the TRRs "are not isolated cases, but an overarching measure applied to a wide range of situations, [which] has become the 'rule' for companies doing business in Argentina" and that "[s]uch a 'rule' will apply or will likely apply in the future in Argentina, insofar as Argentina continues pursuing its trade balancing and import substitution objectives."<sup>453</sup> According to the European Union, the imposition of TRRs on economic operators "is part of a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives".<sup>454</sup>

5.114. Japan considered that the TRRs measure "is not merely five independent requirements", but rather "a comprehensive and general measure and consistent practice that restricts imports by imposing a practical threshold on importers and limits competitive opportunities of imports vis-à-vis the situation in the absence of the [TRRs]".<sup>455</sup> According to Japan, instances of the application of the TRRs "are not one-off instances of WTO-inconsistent action, but rather instances of systematic application of a broader measure that applies both generally and prospectively".<sup>456</sup> Moreover, Japan maintains that the TRRs measure is "the product of a subset of Argentina's economic policies and one of the instruments that Argentina has been using to pursue such policies, but [it] is not identical to them".<sup>457</sup>

5.115. The United States described the TRRs measure as an "extant decision" by high-level Argentine officials "to require commitments of importers 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, as a prior condition for permission to import goods"<sup>458</sup>, which "applies until it is withdrawn".<sup>459</sup>

5.116. The above descriptions by the complainants of the TRRs measure point to a measure having certain attributes of generality and prospectiveness. Nevertheless, we observe that these descriptions fall short of characterizing the measure as a "norm or rule" of general and prospective application. The Panel also considered that, in their joint claims, the complainants were not challenging the TRRs measure "as such" as a rule or norm.<sup>460</sup> In this respect, we note the clarification made by the United States on appeal that the measure being challenged is not a "rule

<sup>453</sup> European Union's second written submission to the Panel, para. 114.

<sup>454</sup> European Union's second written submission to the Panel, para. 116.

<sup>455</sup> Japan's second written submission to the Panel, para. 113.

<sup>456</sup> Japan's second written submission to the Panel, para. 101.

<sup>457</sup> Japan's second written submission to the Panel, para. 112.

<sup>458</sup> United States' second written submission to the Panel, para. 111.

<sup>459</sup> United States' second written submission to the Panel, para. 116.

<sup>460</sup> Panel Reports, para. 6.153.



or norm" as that term was used by the Appellate Body in *US – Zeroing (EC)*.<sup>461</sup> These descriptions are thus consistent with the complainants' choice not to characterize their joint claims against the TRRs measure as "as such" claims challenging a "norm or rule" of general and prospective application.<sup>462</sup>

5.117. Nevertheless, the complainants' descriptions of the challenged TRRs measure reveal their understanding of the defining characteristics of that measure. Although the terminology each complainant used differs to some extent, in our view, the constituent elements of the TRRs measure as described by the complainants appear to be as follows: (i) an unwritten measure in the form of a decision by the Argentine authorities; (ii) a single measure that is composed of several individual elements imposed in pursuit of the objectives of import substitution and trade deficit reduction; (iii) a measure that has systematic application; and (iv) a measure that has present and continued application. All these constituent elements serve to define the type of measure that is the object of the complainants' joint challenge.

5.118. The Panel was required to assess whether the complainants were able to demonstrate the existence of the TRRs measure by reviewing whether the evidence and arguments they presented on the constituent elements of the alleged TRRs measure were sufficient to prove the existence of the measure at issue. The Panel was not required, as Argentina argues, to test the complainants' evidence and arguments on the TRRs measure against an assumed legal standard or to employ the criteria that are pertinent for purposes of establishing the existence of a measure that is challenged "as such". Thus, by reviewing the Panel's findings evaluating the evidence and arguments regarding the constituent elements of the alleged TRRs measure as challenged by the complainants, we will be able to determine whether the Panel erred in concluding that the complainants had demonstrated the existence of the TRRs measure.

### 5.2.2.3 The Panel's evaluation of the TRRs measure

5.119. Having considered how each of the complainants characterized the measure it was challenging, we now turn to consider how the Panel assessed the constituent elements of the alleged TRRs measure in the light of the evidence and arguments submitted by the complainants, and how it reached the conclusion that the complainants had demonstrated the existence of the TRRs measure. In doing so, we address those elements that, based on the complainants' descriptions, appear to be the constituent elements of the alleged TRRs measure. We address, first, the attribution of the measure to the Government of Argentina and the precise content of the TRRs. Second, we review the Panel's analysis of the TRRs measure's systematic, present, and continued application. In our analysis, we also consider the relationship between the TRRs measure and the objectives of import substitution and trade deficit reduction underlying Argentina's policy of "managed trade".

5.120. We observe that, on appeal, Argentina does not directly challenge the Panel's identification and explanation of the content of the individual TRRs. Argentina submits that, having uncritically accepted the complainants' description of the content of each alleged TRR, the Panel then sought to determine whether the alleged individual TRRs applied and operated in a combined manner and as part of a single measure. However, according to Argentina, none of the factors reviewed by the Panel says anything about whether the alleged TRRs measure was attributable to Argentina, its precise content, or, most importantly, whether it had general and prospective application.<sup>463</sup> Argentina claims that, as a result of this legal error, the Panel effectively presumed at the outset of its analysis that the alleged TRRs measure exists before having assessed whether the alleged TRRs measure is attributable to Argentina, its precise content, and whether it has general and prospective application.<sup>464</sup>

5.121. With respect to attribution, we observe that the Panel stated that Argentina did not dispute the attribution of the TRRs measure to Argentina.<sup>465</sup>

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<sup>461</sup> United States' appellee's submission, para. 133.

<sup>462</sup> As explained above, Japan alone did raise an "as such" claim against the TRRs measure, which the Panel assessed separately from its evaluation of the "joint claims".

<sup>463</sup> Argentina's appellant's submission, para. 128.

<sup>464</sup> Argentina's appellant's submission, para. 129.

<sup>465</sup> Panel Reports, para. 6.230.

5.122. Turning to the precise content of the TRRs measure, we understand that Argentina raises two related objections to the Panel's findings. First, Argentina claims that, having failed to apply the legal standard from *US – Zeroing (EC)* for the identification of an unwritten measure challenged "as such" in WTO dispute settlement, the Panel erred because it relied on the legal standard in *US – COOL* for a panel's collective assessment of challenges against multiple written measures and considered whether the individual TRRs operate together as a single measure – thus presuming that the TRRs measure existed – before analysing its content.<sup>466</sup> Second, Argentina claims that the Panel erred because it "asserted the single TRRs measure into existence" without any evidence that the different TRRs form a single measure with "different normative content" than each of its alleged constituent elements.<sup>467</sup>

5.123. The complainants respond that there is no separate legal standard applicable to the identification of an unwritten measure<sup>468</sup>, and that the Panel examined the precise content of the TRRs measure, even if it did not follow explicitly the analytical steps mentioned by the Appellate Body in *US – Zeroing (EC)*.<sup>469</sup> Moreover, in their view, Argentina is confusing separate and distinct standards. Japan submits that the Panel applied the legal standard under *US – COOL* to determine the existence of a single measure and not as an alternative to the *US – Zeroing (EC)* standard of whether a measure has general and prospective application.<sup>470</sup>

5.124. We recall that, before the Panel, the complainants challenged the existence of a single measure consisting of a combination of one or more of the five TRRs.<sup>471</sup> In our view, the Panel did not err in evaluating, as part of its analysis of the measure at issue, whether and how the individual TRRs operate together as part of a single measure. The allegation that the TRRs measure is composed of several different elements concerns a specific characteristic of the measure that the Panel was required to assess in order to come to a determination as to the existence of the TRRs measure. As part of its examination of the precise content of the TRRs measure, the Panel was also required to evaluate whether the individual TRRs apply and operate as part of a single measure.

5.125. The Panel started its analysis of the existence of the single measure stating that it would "first assess whether there is evidence of the existence of the TRRs". The Panel noted the importance of this step, considering that the measure was unwritten.<sup>472</sup> Accordingly, the Panel determined whether the evidence available demonstrated the existence of each of the five individual TRRs identified by the complainants.<sup>473</sup> The Panel considered that Argentina imposed a combination of these TRRs on economic operators and that more than one TRR had been imposed at a given time. Having found that there was evidence that Argentina imposed the five TRRs, the Panel considered whether these requirements apply and operate together as part of a single measure.

5.126. Having set out its understanding of the content and operation of the individual TRRs, the Panel then devoted the next subsection of its Reports to its analysis of the content of the TRRs measure. It is true that this subsection of the Panel Reports is brief.<sup>474</sup> Yet, the Panel analysed how the individual TRRs operate together in furtherance of an underlying policy of "managed trade" with the specific objectives of substituting imports and reducing trade deficits. Importantly, the Panel's analysis of the existence of the TRRs measure has to be understood as part of a holistic analysis, and cannot be read in isolation from other parts of its Reports, including the analysis that immediately preceded it. Significantly, the Panel summarized its understanding of the content of the TRRs measure in paragraph 6.119 of the Panel Reports. While this paragraph is included in the section of the Reports in which the Panel addressed the treatment of evidence, we consider that in it the Panel already provided a comprehensive explanation of its understanding of the TRRs measure. Moreover, the Panel explained that its "conclusions", as set out in paragraph 6.119, were based on, *inter alia*, the specific facts discussed in the section of its Reports dealing with the TRRs, and that "each of these conclusions [would] be described and developed" in that section of its

<sup>466</sup> Argentina's appellant's submission, paras. 126 and 130.

<sup>467</sup> Argentina's appellant's submission, para. 133.

<sup>468</sup> United States' appellee's submission, para. 138.

<sup>469</sup> European Union's appellee's submission, para. 137.

<sup>470</sup> Japan's appellee's submission, para. 66.

<sup>471</sup> Panel Reports, para. 6.139.

<sup>472</sup> Panel Reports, para. 6.138.

<sup>473</sup> Panel Reports, paras. 6.145 and 6.155-6.216.

<sup>474</sup> Panel Reports, paras. 6.217-6.231.

Reports.<sup>475</sup> The overall conclusions that the Panel outlined in paragraph 6.119, based on its holistic examination of all the evidence, are the following:

... First, high-ranking Argentine Government officials have announced in public statements and speeches a policy of so-called "managed trade" (*comercio administrado*), with the objectives of substituting imports for domestically-produced goods and reducing or eliminating trade deficits. Second, since at least 2009 the Argentine Government has imposed a combination of TRRs on prospective importers as a condition to import or to receive certain benefits. Third, these TRRs have been imposed on importers covering a broad range of sectors such as foodstuffs, automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing. Fourth, the TRRs are in some cases reflected in agreements signed between specific economic operators and the Argentine Government and in other cases contained in letters addressed by economic operators to the Argentine Government. Fifth, the Argentine Government has on occasion required compliance with TRRs as a condition for lifting observations entered into DJAI applications. Sixth, statements made by high-ranking Argentine Government officials, including the President, the Minister of Industry and the Secretary of Trade, suggest that the TRRs seek to implement the policy of so-called "managed trade" explained above.<sup>476</sup>

5.127. Subsequently, in turning to its analysis of the TRRs measure, the Panel summed up its analysis, starting with the section on the treatment of evidence and the subsection devoted to the individual TRRs, considering that the single measure "would consist of Argentina's imposition of one or more TRRs on economic operators as a condition to import goods or to obtain certain benefits".<sup>477</sup> The Panel had determined previously that various economic operators, irrespective of size and domicile, have been affected by the TRRs, and that the TRRs are not imposed equally on all economic operators or importers.<sup>478</sup> Rather, the combination of TRRs imposed on individual economic operators seems to depend on "the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits".<sup>479</sup> The Panel had also noted that statements made by Argentine officials confirm that the TRRs are imposed according to the particular situation of economic operators<sup>480</sup>, and that certain statements also confirm that the Argentine Government monitors the implementation of the commitments undertaken by economic operators.<sup>481</sup>

5.128. The Panel began its analysis of the content of the TRRs measure, in paragraph 6.221 of its Reports, by noting that in the preceding sections it had "found evidence ... that, at least since 2009, Argentina has required from importers and other economic operators to undertake one or more of [five] trade-related commitments, as a condition to import goods or to obtain certain benefits".<sup>482</sup> Moreover, in paragraph 6.223, the Panel clarified that "the determination of the existence and content of the individual TRRs was the first step in determining the existence and content of a single measure (the TRRs measure)".<sup>483</sup>

5.129. Subsequently, in paragraph 6.228 of the Panel Reports, the Panel outlined its understanding of how the TRRs apply and operate together as part of a single measure. The Panel found that the TRRs "constitute different elements that contribute in different combinations and degrees – as part of a single measure – towards the realization of common policy objectives that guide Argentina's 'managed trade' policy, i.e. substituting imports and reducing trade deficits".<sup>484</sup> The Panel had stated earlier in its Reports that the TRRs imposed by the Argentine Government seem to be in line with three of the five economic objectives or "macroeconomic guidelines" set

<sup>475</sup> Panel Reports, para. 6.120.

<sup>476</sup> Panel Reports, para. 6.119. (fn omitted)

<sup>477</sup> Panel Reports, para. 6.219.

<sup>478</sup> Panel Reports, para. 6.159.

<sup>479</sup> Panel Reports, para. 6.225.

<sup>480</sup> Panel Reports, para. 6.226.

<sup>481</sup> Panel Reports, para. 6.160.

<sup>482</sup> Panel Reports, para. 6.221.

<sup>483</sup> Panel Reports, para. 6.223.

<sup>484</sup> Panel Reports, para. 6.228.

out in Argentina's Industrial Strategic Plan 2020 (*Plan Estratégico Industrial 2020*)<sup>485</sup> (PEI 2020): (i) protection of the domestic market and import substitution; (ii) increase of exports; and (iii) promotion of productive investment.<sup>486</sup> In the Panel's view, it is within the context of these economic objectives that the Argentine Government has proclaimed its "managed trade" policy, elements of which appear to have been part of the productive model developed in Argentina since 2003.<sup>487</sup> Given the contribution of the TRRs toward the realization of common policy objectives, the Panel considered that an individual consideration of the TRRs would not capture some of the main features of the TRRs measure, namely, its flexibility and versatility.<sup>488</sup>

5.130. In our view, the Panel's analysis of the content of the TRRs measure, including the analysis of how the individual components of the single measure apply and operate together as part of that whole, cannot be separated and considered in isolation from the Panel's detailed analysis of the contents of the individual TRRs in the preceding subsection of its Reports. We understand the Panel to say that the combined application and operation of the individual TRRs is an important part of the TRRs measure with distinct content. In particular, we understand the Panel to conclude that the precise content of the TRRs measure coincides neither with the content of the individual TRRs nor with that of the "managed trade" policy or its underlying objectives (import substitution and deficit reduction). Rather, the content of the single measure consists of the combined operation of the individual TRRs as one of the tools that Argentina uses to implement the "managed trade" policy. This content is distinct both from that of each TRR – which, taken individually, may not be apt to implement the "managed trade" policy – and from the content of the "managed trade" policy itself. We further observe that Argentina's managed trade policy encompasses elements other than those objectives that the Panel identified as relevant to the TRRs measure, and, in any event, we do not understand the Panel to have treated Argentina's "managed trade" policy itself as a measure at issue in these disputes.

5.131. The Panel referred to extensive evidence on the Panel record showing that the TRRs measure implements the "managed trade" policy, and that this policy has been announced in public statements and speeches and on government websites by high-ranking Argentine Government officials, including the President, the Minister of Industry, and the Secretary of Trade. High-ranking Argentine officials have also referred to the imposition of TRRs on specific companies and sectors. As the Panel explained, this evidence suggests that these TRRs are interlinked and operate together as part of a single measure and will continue to be imposed in the future unless and until the policy is repealed or modified.<sup>489</sup>

5.132. In our view, more extensive reasoning would have enhanced the clarity of the Panel's approach to the determination of the content of the TRRs measure as distinct from the individual TRRs. In particular, the Panel could have explained more precisely why it was persuaded that the assessment of how the individual TRRs apply and operate together also revealed the content of the TRRs measure as an overarching measure whose constituent elements are connected or interlinked by virtue of the underlying policy of "managed trade" as distinct from the content of the individual TRRs. Nevertheless, we are persuaded that a thorough reading of all relevant parts of the Panel Reports taken together reveals the Panel's approach to establishing the existence and the precise content of the TRRs measure.

5.133. In the light of the above, we do not consider that the Panel committed an error in first assessing the content of the individual TRRs and then conducting an analysis of how the individual TRRs apply and operate together as part of a single measure and of the associated content of such a single measure. In particular, we are not persuaded, as Argentina contends, that the Panel presumed the existence of the TRRs measure because it determined first how the individual TRRs operate as part of a single measure before addressing the precise content and the question of attribution of such a single measure. Rather, we consider that the Panel conducted a holistic analysis of how the individual TRRs operate as part of a single measure and of the content of such

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<sup>485</sup> Ministry of Industry of Argentina, Argentina's Industrial Strategic Plan 2020 (*Plan Estratégico Industrial 2020*), 4 October 2011 (Panel Exhibits ARG-51 and JE-749).

<sup>486</sup> Panel Reports, para. 6.161.

<sup>487</sup> Panel Reports, para. 6.162.

<sup>488</sup> Panel Reports, para. 6.228.

<sup>489</sup> Panel Reports, para. 6.230. For example, in an official press release issued in late 2013, the Argentine Secretary of Domestic Trade remarked that the policy of "managed trade" would continue to be applied in the future as per the instructions from the President of Argentina. (*Ibid.*, paras. 6.162 and 6.230)

a single measure. As we see it, the combined operation of the individual TRRs is a defining element of the content of the TRRs measure.

5.134. Having determined that the Panel did not err in its assessment of the precise content of the TRRs measure and its attribution to the Argentine Government, we now turn to considering other elements of the alleged TRRs measure that the Panel was required to assess in order to establish whether it exists.

5.135. As explained, Argentina further contends that, under the relevant legal standard applied in *US – Zeroing (EC)*, the Panel should have established that the TRRs measure has general and prospective application. Yet, according to Argentina, "it is undisputed that the Panel did not examine the 'general and prospective' elements of this standard prior to concluding that the TRRs measure 'exists' in respect of the complainants' 'joint claims'". According to Argentina, "the Panel's failure in this regard irreparably taints its conclusion that the complainants had succeeded in demonstrating that the alleged TRRs measure is an unwritten rule or norm".<sup>490</sup> Before the Panel, Argentina had claimed that the most that the evidence of the TRRs presented by the complainants could possibly demonstrate is a series of discrete "one-off" actions relating to a limited number of individual "economic operators", in a limited number of sectors, whose particular content varied widely, and with nothing resembling the general and prospective application one would expect to find in a rule or norm.<sup>491</sup>

5.136. The complainants respond that, even if they had not characterized their joint claims as "as such" claims, the Panel did, in fact, also find that the TRRs measure has general and prospective application.<sup>492</sup> Moreover, the complainants contend that, even assuming *arguendo* that the Panel did not determine the general and prospective application of the TRRs measure in that section of its Reports containing the Panel's assessment of the joint claims, it explicitly did so in the section of the Panel Reports containing the Panel's assessment of the "as such" claims by Japan.<sup>493</sup>

5.137. We note that it is true that, in evaluating the joint claims, the Panel expressed the view that it was not required to make a finding regarding whether the TRRs measure has general and prospective application, considering that the complainants had not challenged this measure "as such" as a rule or norm.<sup>494</sup> Early in its analysis, the Panel distinguished the legal standard or criteria that apply in challenges against a measure "as such" from the same that applies when other challenges are raised. Before embarking on its analysis of the TRRs measure, the Panel clarified that, in order to prove the existence of an unwritten measure, the complainants would have had to prove that it is attributable to Argentina and its precise content. However, the Panel also pointed out that, only if the complainants had requested findings against the TRRs measure "as such", would they also have had to prove that it has general and prospective application.<sup>495</sup> In expressing this view, the Panel referred to the finding in *EC and certain member States – Large Civil Aircraft*. In that dispute, the Appellate Body stated that it did not "consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show" that a measure consisting in a concerted action or practice exists.<sup>496</sup>

5.138. We do not see that these statements by the Panel amount to legal error, as alleged by Argentina. We have already observed that, in their joint claims, the complainants are not challenging the TRRs measure as an unwritten rule or norm of general and prospective application, but as an unwritten measure that has certain characteristics, including systematic and continued application. In this respect, we also note the argument made by the United States on appeal that the measure being challenged is not a "rule or norm" as that term was used by the Appellate Body

<sup>490</sup> Argentina's appellant's submission, para. 119.

<sup>491</sup> Argentina's appellant's submission, para. 149 (referring to Argentina's second written submission to the Panel, para. 106).

<sup>492</sup> European Union's appellee's submission, para. 139.

<sup>493</sup> Japan's appellee's submission, para. 70; United States' appellee's submission, para. 141.

<sup>494</sup> Panel Reports, paras. 6.219 and 6.220. The Panel, however, addressed separately Japan's "as such" claims against the TRRs measure.

<sup>495</sup> Panel Reports, para. 6.42.

<sup>496</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

in *US – Zeroing (EC)*, but rather a measure taking the form of a decision by Argentina to impose the TRRs<sup>497</sup>, which "applies until it is withdrawn".<sup>498</sup>

5.139. As explained above, given the nature of the TRRs measure as challenged by the complainants with their joint claims, we are not persuaded that they were required to demonstrate the existence of the TRRs measure based on the criteria formulated by the Appellate Body in *US – Zeroing (EC)* and, in particular, that it has general and prospective application. Rather, the complainants had to provide evidence and arguments to demonstrate the existence of the measure challenged, and specifically a measure that, as they contended, is applied systematically and will continue to be applied in the future.

5.140. Moreover, although the Panel considered that it did not need to rule formally on whether the TRRs measure has general and prospective application as a rule or norm, the Panel nevertheless evaluated certain characteristics of the TRRs measure, such as its systematic application and its continued and future existence, as identified by the complainants in their submissions regarding the measure at issue.

5.141. Regarding the systematic application of the TRRs measure, the Panel found that the TRRs measure seeks to implement a policy announced by high-ranking Argentine Government officials<sup>499</sup>, and that the TRRs measure is not limited to a single import or a single importer, but is part of a policy implemented by the Argentine Government.<sup>500</sup> The Panel made these findings in its analysis of the individual TRRs. However, it relied on them by inserting cross-references to these findings in its later analysis of the content and operation of the TRRs measure. In its analysis of the TRRs measure, the Panel also found that, as part of a single measure, the TRRs are imposed in combination on economic operators in different sectors and that the TRRs measure nevertheless remains a single measure regardless of the number of TRRs imposed in a specific case because, in all instances of application, it implies the imposition of one or more requirements.<sup>501</sup> Finally, the Panel found that Argentina had not provided evidence to support its assertion that the TRRs can, at most, be characterized as "a series of individual one-off and isolated actions that concern a limited number of individual economic operators in a limited number of sectors, whose content varies considerably and lacks anything resembling general and specific application".<sup>502</sup>

5.142. As discussed further below, the Panel subsequently relied on these same findings to determine that the TRRs measure has "general" application as a rule or norm when it addressed Japan's "as such" claims. It seems to us that, in the context of the joint claims, the Panel's findings show that the TRRs measure has systematic application as opposed to sporadic, unrelated applications of individual TRRs. The systematic nature of the unwritten TRRs measure is evidenced by and manifested in the fact that TRRs are applied to economic operators in a broad variety of different sectors as part of an organized effort, coordinated and implemented at the highest levels of government, and aimed at achieving import substitution and reduction of trade deficit within the framework of the "managed trade" policy.

5.143. Regarding the present and continued application of the TRRs measure, the Panel found that the evidence suggests that the TRRs will continue to be imposed "until and unless the policy is repealed or modified", and cited a statement by the Argentine Secretary of Domestic Trade that the policy of "managed trade" will continue to be applied in the future as per the instructions from the President of Argentina.<sup>503</sup> As discussed further below, this same evidence and reasoning was used by the Panel to support its findings regarding the TRRs measure's prospective nature in its analysis of Japan's "as such" claims. It seems to us that the Panel's findings in the context of its analysis of the joint claims show that the TRRs measure has present and continued application, in the sense that it is currently applied and it will continue to be applied in the future until the underlying policy is modified or withdrawn.

<sup>497</sup> United States' appellee's submission, para. 133.

<sup>498</sup> United States' second written submission to the Panel, para. 116.

<sup>499</sup> See Panel Reports, para. 6.230.

<sup>500</sup> See Panel Reports, paras. 6.157 and 6.158.

<sup>501</sup> Panel Reports, paras. 6.225 and 6.227.

<sup>502</sup> Panel Reports, para. 6.116. See also paras. 6.229 and 6.334.

<sup>503</sup> Panel Reports, para. 6.230 (referring to Panel Exhibit JE-759).

5.144. With respect to the continued application of a measure, we recall that the panel in *US – Orange Juice (Brazil)* – which examined a challenge against zeroing as "on-going conduct", as opposed to a rule or norm of general and prospective application – found that "on-going conduct may be simply described as conduct that is currently taking place and is *likely to continue* in the future".<sup>504</sup> That panel interpreted the Appellate Body's definition of "on-going" conduct in *US – Continued Zeroing* as entailing the likely prospective operation of the measure at issue, but not necessarily as absolute certainty that the conduct would occur in the future.<sup>505</sup>

5.145. Given that, in the joint claims, the complainants did not challenge the TRRs measure as a rule or norm of general and prospective application, as noted above, the Panel was not required to examine the same criteria formulated by the Appellate Body in *US – Zeroing (EC)*. Instead, the Panel correctly examined the relevant constituent elements of the measure subject to the joint claims and determined, based on the evidence and arguments the complainants presented, that the TRRs measure has systematic application and will continue to be applied until it is modified or withdrawn by the Argentine authorities and the Government ceases to apply it. Finally, we observe that, while Argentina claims on appeal that, in the context of Japan's "as such" claims, the Panel acted inconsistently with Article 11 of the DSU in finding that the TRRs measure has general and prospective application, Argentina does not directly challenge the Panel's findings that the TRRs measure has systematic and continued application.

5.146. We consider, therefore, that, in assessing the joint claims, the Panel correctly found that the complainants had demonstrated the existence of a TRRs measure, which is composed, in particular, of several individual TRRs operating together in an interlinked fashion as part of a single measure in pursuit of the objectives of import substitution and trade deficit reduction. The Panel also found that the TRRs measure has systematic application, as it applies to economic operators in a broad variety of different sectors, and that it has present and continued application, in the sense that it currently applies and it will continue to be applied in the future until the underlying policy ceases to apply. We do not consider that, as Argentina contends, the Panel applied the wrong legal standard for determining the existence of the measure at issue.

#### 5.2.2.4 Conclusions

5.147. In the light of all of the above, we are not persuaded that, in addressing the joint claims against the TRRs measure, the Panel erred in its choice of the legal standard or criteria that it used to determine whether such measure exists.

5.148. Accordingly, we uphold the Panel's finding, in paragraph 6.231 of the Panel Reports, paragraph 7.1.d of the EU Panel Report, paragraph 7.5.c of the US Panel Report, and paragraph 7.9.d of the Japan Panel Report, in respect of the joint claims by the three complainants that the Argentine authorities' imposition on economic operators of one or more of the five requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina.

5.149. As a consequence, we also uphold the Panel's finding, in paragraph 6.265 of the Panel Reports, paragraph 7.1.e of the EU Panel Report, paragraph 7.5.d of the US Panel Report, and paragraph 7.9.e of the Japan Panel Report, that the TRRs measure, consisting of the Argentine authorities' imposition of one or more of the five requirements identified by the complainants as a condition to import, constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994; as well as the Panel's finding, in paragraph 6.295 of the Panel Reports, that "the TRRs measure, with respect to the local content requirement, is inconsistent with Article III:4 of the GATT 1994" because it "modifies the conditions of competition in the Argentine market to the detriment of imported products" so that "imported products are granted less favourable treatment than like domestic products".<sup>506</sup>

5.150. In reaching this conclusion, we would like to clarify that we do not understand the Panel to have ruled on individual TRRs beyond the five that were specifically identified as forming part of

<sup>504</sup> Panel Report, *US – Orange Juice (Brazil)*, para. 7.176. (emphasis original)

<sup>505</sup> Panel Report, *US – Orange Juice (Brazil)*, para. 7.175.

<sup>506</sup> EU Panel Report, para. 7.1.f; Japan Panel Report, para. 7.9.f.

the TRRs measure, or to have ruled on the individual TRRs in isolation<sup>507</sup>, that is, separately from their imposition as a condition to import or to receive certain benefits. We also endorse the Panel's statement that "nothing in the Panel's rulings calls into question the ability of WTO Members to pursue their development policies, such as those identified by Argentina, in a manner consistent with the overall objectives stated in the preamble of the WTO Agreement and their commitments under the WTO agreements".<sup>508</sup>

### 5.2.3 Article 11 of the DSU – Japan's "as such" claims

5.151. Argentina claims that, in addressing Japan's "as such" claims against the TRRs measure, the Panel acted inconsistently with its duties under Article 11 of the DSU because it found that Japan had established the existence of the TRRs measure without properly examining whether Japan had presented sufficient evidence of its "precise content" and of its "general and prospective application".<sup>509</sup> Argentina requests us to reverse the Panel's conclusion, in paragraph 7.9.h of the Japan Panel Report, that the alleged TRRs measure is "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994. The complainants<sup>510</sup> argue that Argentina fails to identify any legitimate basis to question the Panel's objectivity and instead simply attempts to recast the same arguments that it has made with respect to its claim of error against the Panel's findings on the joint claims<sup>511</sup>, and/or to second-guess the Panel's weighing of factual evidence.<sup>512</sup> The complainants also stress that Argentina refused to provide evidence to the Panel and failed to confront the evidence before the Panel and on appeal. Thus, they contend that Argentina should not be allowed to hold this against the complainants in a claim under Article 11 of the DSU.<sup>513</sup>

5.152. We recall that, having ruled in response to the joint claims by the three complainants that the TRRs measure exists and that it is inconsistent with Articles XI:1 and III:4 of the GATT 1994, the Panel turned to consider whether the same TRRs measure is also inconsistent "as such" with the same provisions. This approach by the Panel generates some confusion, considering that the Panel had previously made findings on the same TRRs measure, even if not as a rule or norm having general and prospective application, but as a measure with several constituent elements, including systematic and continued application. In reaching its "as such" findings, the Panel limited its analysis to an examination of whether the TRRs measure is a measure of general and prospective application that can be challenged "as such". In fact, the Panel had already found that the same TRRs measure as challenged in the joint claims is inconsistent with Articles XI:1 and III:4 of the GATT 1994.

5.153. Although the Panel made separate findings with respect to the joint claims and with respect to Japan's "as such" claims, we consider that its analysis of the TRRs measure and of its constituent elements must be understood in a holistic fashion. In reaching the conclusion that the TRRs measure is a norm of general and prospective application in its evaluation of Japan's "as such" claims, the Panel relied on virtually the same evidence that it had used in its evaluation of the joint claims to determine the existence of the TRRs measure as a measure with several

<sup>507</sup> In this regard, the Panel noted that the investment and the non-repatriation requirements have not been imposed on economic operators as stand-alone requirements, but only in combination with the one-to-one requirement and the local content requirement. (Panel Reports, paras. 6.208, 6.214, and 6.259)

<sup>508</sup> Panel Reports, para. 6.8.

<sup>509</sup> Argentina's appellant's submission, para. 138.

<sup>510</sup> We observe that, while the Panel's findings on the TRRs measure "as such" concern only Japan, the European Union and the United States have also submitted extensive arguments on appeal rejecting Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU. The European Union and the United States regard Argentina's appeal under Article 11 of the DSU as recasting its arguments before the Panel on the TRRs measure "under the guise of" an Article 11 claim. (European Union's appellee's submission, para. 144; United States' appellee's submission, para. 158) Moreover, both the European Union and the United States argue on appeal that, if the Appellate Body were to agree with Argentina that the Panel erred in deciding on the joint claims because it did not determine the general and prospective application of the measure, the Panel did make findings on the general and prospective application of the same measure for the purposes of Japan's "as such" claims and that these can be relied upon to preserve the findings that the TRRs measure exists and is inconsistent with Articles XI:1 and III:4 of the GATT 1994. (European Union's appellee's submission, para. 128; United States' appellee's submission, para. 141)

<sup>511</sup> European Union's appellee's submission, para. 144; United States' appellee's submission, para. 158; Japan's appellee's submission, para. 78.

<sup>512</sup> Japan's appellee's submission, para. 102; United States' appellee's submission, para. 159.

<sup>513</sup> European Union's appellee's submission, para. 144; United States' appellee's submission, para. 156; Japan's appellee's submission, para. 104.



constituent elements, including systematic and continued application. Moreover, the Panel's reasoning on the general and prospective application of the TRRs measure in addressing the "as such" claims does not add to its reasoning behind its earlier findings on the same measure as challenged in the joint claims. In other words, the Panel considered that virtually the same evidence and arguments that demonstrated that the TRRs measure exists as the single measure challenged under the joint claims were also sufficient to demonstrate that the same measure also exists as a rule or norm having general and prospective application.

5.154. In the light of the above, we are uncertain as to why the Panel considered additional and separate findings on Japan's "as such" claims against the TRRs measure to be useful or relevant, given that it had already found the same TRRs measure to exist and to be inconsistent with Articles XI:1 and III:4 of the GATT 1994 in response to the joint claims. We do not see what the findings entitled "as such" add in substance to the Panel's analysis that led it to reach its conclusions on the joint claims against the TRRs measure.

5.155. The present situation is, however, different from a situation in which a panel may need to make separate "as applied" and "as such" findings, if claims are brought against a rule or norm of general and prospective application "as such" and "as applied". We do not consider that, in this dispute, the joint claims by the three complainants could be regarded as falling into either categories of "as such" or "as applied" claims. Rather, the Panel approached the joint claims based on how the three complainants had described and characterized the TRRs measure in their challenges, that is, as a measure with specific constituent elements, rather than as a rule or norm of general and prospective application.

5.156. As noted above, both sets of Panel findings (in respect of the joint claims and in respect of Japan's "as such" claims) were made with respect to the same underlying TRRs measure, with the same constituent elements in substance. Both sets of findings were based on virtually the same evidence and supported by virtually the same reasoning. This raises the question of whether there would be any meaningful difference in the compliance obligations that would flow from these two sets of Panel findings, were they to be adopted by the DSB.

5.157. We thus consider the Panel's "as such" findings on the TRRs measure to amount in substance to no more than the findings the Panel had already made in respect of the TRRs measure as challenged under the joint claims. Nevertheless, bearing this in mind together with the fact that the Panel conducted a holistic analysis of the TRRs measure and of its constituent elements, we turn to address Argentina's claim under Article 11 of the DSU.

### 5.2.3.1 The evidentiary difficulties confronted by the Panel

5.158. Before turning to our consideration of Argentina's claims that the Panel's findings on the precise content and the general and prospective application of the TRRs measure lacked a sufficient evidentiary basis, we consider it necessary to recall the Panel's finding that Argentina refused to provide information, which the Panel explicitly requested, and which Argentina did not deny was in its possession. In particular, Argentina refused to provide any of the agreements between specific economic operators and the Government of Argentina, or letters by economic operators to the Government of Argentina, containing the trade-related commitments undertaken by such economic operators as a condition to import into Argentina.<sup>514</sup>

5.159. In previous disputes, the Appellate Body has held that "the refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU", and that, as part of its objective assessment of the facts under Article 11 of the DSU, a panel is entitled to draw adverse inferences from a party's refusal to provide information.<sup>515</sup> Therefore, "[w]here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn".<sup>516</sup>

<sup>514</sup> Panel Reports, paras. 6.43-6.55.

<sup>515</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 172 and 173.

<sup>516</sup> Appellate Body Report, *US – Wheat Gluten*, para. 174.

5.160. The Panel observed that Argentina did not deny that it was in possession of these documents, but refused to provide them to the Panel, notwithstanding an explicit request from the Panel that it do so.<sup>517</sup> We note that the TRRs are unwritten and that they are not contained in any law, regulation, or administrative act. Thus, the primary source of direct evidence of the content and nature of the TRRs would appear to be the agreements between the economic operators and the Argentine Government and the letters addressed by economic operators to the Government. The Panel acknowledged that it had limited direct evidence, due to the lack of cooperation or inability of the parties to provide documentation<sup>518</sup>, and also drew inferences from Argentina's refusal to provide evidence.<sup>519</sup> Had the Panel been provided with the documents it requested, it might have been able to rely upon a more robust evidentiary basis to support its findings regarding the content of the measure, and its general and prospective application. The Panel nevertheless supported its findings with the evidence available, together with the inferences that it drew from Argentina's refusal to provide the relevant agreements and letters. Argentina has not, on appeal, challenged either the Panel's finding that Argentina refused to provide evidence or the Panel's consequential decision to draw inferences from such refusal in reaching its findings.

5.161. In the light of the above, we are of the view that our consideration of Argentina's claims on appeal under Article 11 of the DSU cannot ignore that Argentina bore at least some responsibility for the evidentiary difficulties faced by the Panel.

### 5.2.3.2 The precise content of the TRRs measure

5.162. Regarding the "precise content" of the measure, Argentina contends that the Panel acted inconsistently with Article 11 of the DSU because it uncritically accepted the complainants' characterization of the content of the alleged TRRs measure and failed to ensure that its findings were based on the record evidence and supported by sufficient reasoning.<sup>520</sup> Argentina claims that the alleged "overarching" TRRs measure is invented by the complainants, is amorphous and ill-defined, and that its contents cannot be identified with the requisite degree of precision.<sup>521</sup> According to Argentina, the Panel made an "unsubstantiated assertion" that the available evidence provided it with sufficient elements to establish the existence and precise content of the TRRs measure, but in fact the Panel's analysis does not contain a single citation to the evidence on the panel record.<sup>522</sup>

5.163. The Panel's findings on the precise content of the TRRs measure that Argentina challenges under Article 11 of the DSU are those made with regard to Japan's "as such" claims against the TRRs measure in paragraphs 6.323 through 6.327 of the Panel Reports. However, the Panel had already made findings on the precise content of the same TRRs measure earlier as part of its analysis of the complainants' joint claims in paragraphs 6.221 through 6.231 of the Reports.<sup>523</sup> Thus, in stating that the Panel's analysis does not contain a single citation to record evidence, Argentina disregards that the Panel had already made findings on the precise content of the same TRRs measure in an earlier section of its Reports.

5.164. In the section of its Reports addressing the complainants' joint claims, the Panel reached its findings on the precise content of the individual TRRs and of the TRRs measure based on extensive evidence produced by the complainants, the substance of which Argentina did not dispute.<sup>524</sup> Such evidence concerns the content of the individual TRRs, as well as their operation as a single measure. The Panel made clear that its findings in the different subsections of its Reports should be understood as parts of a holistic approach when it summarized the main factual findings that underpin its subsequent analysis of the TRRs and the TRRs measure. The Panel stated that "it ha[d] examined the information available and ha[d] assessed all the evidence in a holistic manner

<sup>517</sup> Panel Reports, paras. 6.46 and 6.117.

<sup>518</sup> Panel Reports, para. 6.64.

<sup>519</sup> Panel Reports, para. 6.116. The Panel further observed that Argentina did not dispute the basic facts concerning the existence and operation of the TRRs, and failed to produce evidence to dispute the facts asserted by the complainants. (Ibid.)

<sup>520</sup> Argentina's appellant's submission, para. 184.

<sup>521</sup> Argentina's appellant's submission, para. 172.

<sup>522</sup> Argentina's appellant's submission, para. 181.

<sup>523</sup> Moreover, as we have considered above, the Panel's findings on the precise content of the single measure must be understood in the context and in reference to the Panel's earlier analysis of the evidence concerning the individual TRRs and the TRRs measure. (See paras. 5.126-5.130 of these Reports)

<sup>524</sup> Panel Reports, para. 6.116.

in order to reach its conclusions" and that, as a result, it "[was] persuaded on the basis of the totality of the evidence of the ... general facts, as well as of the specific facts that are discussed in sections 6.2 and 6.3 below".<sup>525</sup> Section 6.2 of the Panel Report contains the entirety of the Panel's findings on the TRRs measure, including those in response to the joint claims by the three complainants and those in response to the "as such" claims by Japan.

5.165. In addressing Argentina's appeal of the Panel's findings on the TRRs measure, we have explained the Panel's identification of the content of the TRRs measure that it found to exist in assessing the joint claims. In addressing the precise content of the TRRs measure in that part of its Reports, the Panel stated that its "examination of the existence, nature, and characteristics of the individual TRRs was based on evidence such as copies of domestic laws, regulations, and policy documents; communications addressed to Argentine officials by private companies; statements by Argentine officials and notes posted on websites of the Argentine Government; articles in newspapers and specialized publications; and statements by company officials".<sup>526</sup> Explaining why the individual TRRs constitute a single measure, the Panel considered "that the requirements constitute different elements that contribute in different combinations and degrees ... towards the realization of common policy objectives that guide Argentina's 'managed trade' policy, i.e. substituting imports and reducing or eliminating trade deficits".<sup>527</sup>

5.166. In its analysis of Japan's "as such" claims, the Panel did not reproduce the extensive analysis of the content of the individual TRRs and of the TRRs measure that it had performed in addressing the joint claims. Rather, the Panel added a few additional considerations concerning the content of the TRRs measure. The Panel cautioned that requesting an extremely high level of detail in the definition of the content of an unwritten measure would make it almost impossible to challenge such type of measure in practice. For the Panel, what is crucial is that, based on the available evidence, both a panel and the responding party have a clear understanding of the components and the operation of the challenged measure.<sup>528</sup> Moreover, the Panel considered that the fact that the list of TRRs provided by the European Union and Japan was non-exhaustive was not an obstacle to considering the measure as one composed of several requirements.<sup>529</sup> In our view, these are additional considerations, which the Panel made in its assessment of the precise content of the TRRs measure. They cannot be taken as a self-standing assessment of the precise content of the TRRs measure. Rather, it is clear that they must be read together with the Panel's earlier analysis of the precise content of the same TRRs measure.

5.167. As the European Union notes on appeal, the Panel's analysis of the precise content of the TRRs measure in respect of Japan's "as such" claims would have benefited from an explicit cross-reference to its earlier findings on the content of the TRRs and of the TRRs measure in respect of the joint claims.<sup>530</sup> Nevertheless, we observe that, in laying out its general approach to the analysis of the unwritten measure, the Panel stated that it would first address whether the TRRs operate together as a single measure, and then, in considering the "as such" claims against the same measure, whether the TRRs measure has, in addition, general and prospective application.<sup>531</sup> In doing so, the Panel adopted a unified approach to the analysis of the TRRs measure, whereby the analysis of the precise content of the measure was common to the two sets of findings, while the analysis of the general and prospective application of the measure was limited to the section on the "as such" findings. Therefore, when the Panel turned to consider Japan's "as such" claims against the TRRs measure, the Panel was clearly relying on its earlier findings on the precise content of the TRRs measure as challenged under the joint claims, having already devoted a significant part of its Reports to discussing evidence of the content of each individual TRR and of the TRRs measure.

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<sup>525</sup> The Panel refers to, *inter alia*, the imposition of TRRs on prospective importers covering a broad range of sectors as a condition to import or to receive certain benefits and to the statements made by high-ranking Argentine Government officials suggesting that the TRRs seek to implement the "managed trade" policy with the objectives of substituting imports for domestically produced goods and reducing or eliminating trade deficits. (Panel Reports, para. 6.119)

<sup>526</sup> Panel Reports, para. 6.223.

<sup>527</sup> Panel Reports, para. 6.228.

<sup>528</sup> Panel Reports, para. 6.325.

<sup>529</sup> Panel Reports, para. 6.326.

<sup>530</sup> European Union's appellee's submission, para. 148.

<sup>531</sup> Panel Reports, paras. 6.219 and 6.220.

5.168. In sum, by arguing that the Panel failed to ensure that its findings on the precise content of the TRRs measure were based on the record evidence and sufficiently supported with adequate reasoning, Argentina reads the Panel's findings on Japan's "as such" claims against the TRRs measure in isolation from the Panel's earlier identification and explanation of the same TRRs measure, and disregards that, in response to the joint claims, the Panel had already made findings on the precise content of that same measure, which were based on record evidence. In our view, the Panel adopted a unified approach to its analysis of the TRRs measure, meaning that its analysis of Japan's "as such" claims cannot be read in isolation from its earlier findings on the TRRs measure.

5.169. Therefore, we reject Argentina's argument that the Panel acted inconsistently with Article 11 of the DSU because its findings on the precise content of the TRRs measure were neither based on the record evidence nor supported by sufficient and adequate reasoning.

### 5.2.3.3 The general and prospective application of the TRRs measure

5.170. Argentina also contends that the Panel violated Article 11 of the DSU because it failed to ensure that its findings concerning the general and prospective application of the alleged TRRs measure were based on record evidence and supported by reasoned and adequate explanations and coherent reasoning.<sup>532</sup> We recall that we have considered above that the Panel conducted a holistic analysis of all the claims against the TRRs measure and that its findings on Japan's "as such" claims do not appear to differ in substance from the findings that it made in respect of the TRRs measure as challenged under the joint claims, even though the respective analyses were conducted in different subsections of the Panel Reports. Bearing these considerations in mind, we turn to address Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in making its "as such" findings.

5.171. Argentina argues that the complainants failed to establish that the alleged TRRs measure is "general" in its application within the ordinary meaning of this term, considering that, by their own acknowledgement, the TRRs measure does not apply to all imports, to all importers, or to all economic operators.<sup>533</sup>

5.172. We have explained above that the TRRs measure is composed of several requirements that, as the Panel found, "contribute in different combinations and degrees ... towards the realization of common policy objectives".<sup>534</sup> Therefore, by definition, the TRRs measure cannot apply in the same manner to all imports, importers, or economic operators. Neither the TRRs measure nor the individual TRRs were designed to apply to specific individuals or companies, but potentially affect an unidentified number of economic operators. The multiplicity and flexibility of the TRRs and the fact that the list is non-exhaustive gives to the TRRs measure a very broad scope of application, which, as we have explained above, supports the Panel's finding that the TRRs measure has systematic application.

5.173. More fundamentally, however, we are of the view that Argentina's claim that the Panel erred in determining that the TRRs measure has general application is not concerned with whether the Panel made an objective assessment consistent with Article 11 of the DSU. We recall that, in previous disputes, the Appellate Body has held that "[i]t is ... unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim" and that "a participant must identify specific errors regarding the objectivity of the panel's assessment".<sup>535</sup> The Appellate Body also held that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand on its own, and should not be made merely as a 'subsidiary argument' in support of a claim that the panel erred in its application of a WTO provision."<sup>536</sup>

5.174. It seems to us that, by arguing that the complainants failed to establish that the alleged TRRs measure is "general" in its application within the ordinary meaning of this term, Argentina is questioning the legal standard or criteria applied by the Panel in finding that the TRRs measure has "general" application, rather than the objectivity of the Panel's assessment of the facts under

<sup>532</sup> Argentina's appellant's submission, para. 199.

<sup>533</sup> Argentina's appellant's submission, para. 189.

<sup>534</sup> Panel Reports, para. 6.228.

<sup>535</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>536</sup> Appellate Body Report, *US – COOL*, para. 301.

Article 11 of the DSU. Indeed, in contending that the TRRs measure cannot be considered to have general application because it does not apply to all imports, to all importers, or to all economic operators, Argentina is taking issue with the Panel's interpretation and application of the concept of "general application", rather than with the Panel's treatment of the evidence showing how the TRRs are applied, or the Panel's reasoning on the basis of that evidence. We, therefore, do not consider that Argentina's claim that the complainants failed to demonstrate that the TRRs measure has "general" application is properly raised under Article 11 of the DSU.

5.175. Argentina also claims that the Panel's finding that the alleged TRRs measure has prospective application lacks a sufficient evidentiary basis.<sup>537</sup> Argentina notes that the Panel cited only one single piece of evidence, Exhibit JE-759, in support of its conclusion that the alleged TRRs measure implements a deliberate policy, and that this exhibit does not suffice to establish that such policies are implemented through an unwritten measure of general and prospective application that is WTO-inconsistent.<sup>538</sup>

5.176. Depending on the circumstances of a particular case, a single piece of evidence may constitute sufficient proof that a measure has prospective application. As the trier of facts, a panel can exercise its discretion in selecting the evidence it relies upon to establish certain facts. It is only when it exceeds such discretion in weighing the evidence that an Article 11 violation can be found. In previous disputes, the Appellate Body has also considered that not every error in the appreciation of a particular piece of evidence will rise to the level of a failure by the panel to comply with its duties under Article 11 of the DSU<sup>539</sup>, and that for an Article 11 claim to succeed a party must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.<sup>540</sup> Thus, even assuming that the Panel relied only on Exhibit JE-759 to support its findings that the TRRs measure is prospective in nature, this does not, in our view, in and of itself constitute a violation of Article 11 of the DSU.

5.177. We recall that Exhibit JE-759 contains an interview with Argentina's Secretary of Domestic Trade stating that the policy of "managed trade" would continue to be applied in the future pursuant to instructions from the President of Argentina. This evidence was relevant to the Panel's understanding of the specific constituent elements of the TRRs measure, namely, its present and continued application, as well as the objectives that it pursues (import substitution and trade balancing) and the policy of managed trade underlying these objectives.

5.178. Furthermore, and as the complainants point out, the Panel did not rely exclusively on Exhibit JE-759 to determine that the TRRs measure has prospective application.<sup>541</sup> In this part of its analysis of Japan's "as such" claims, the Panel explicitly cross-referenced its earlier findings that the TRRs measure reflects a "deliberate policy", as it constitutes repeated actions, coordinated and publicly announced by the highest authorities.<sup>542</sup>

5.179. Finally, turning to Argentina's allegation that the Panel failed to provide coherent reasoning in its findings concerning the general and prospective application of the TRRs measure, the Appellate Body has found that internally incoherent reasoning by a panel may amount to a failure to make an objective assessment.<sup>543</sup> In this dispute, Argentina argues that the Panel failed to base its findings on the TRRs measure on record evidence and failed to support these findings with sufficient and adequate reasoning. However, Argentina does not elaborate any specific allegations

<sup>537</sup> Argentina's appellant's submission, para. 195.

<sup>538</sup> Argentina's appellant's submission, para. 198.

<sup>539</sup> Appellate Body Report, *EC – Hormones*, para. 133.

<sup>540</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 499.

<sup>541</sup> European Union's appellee's submission, para. 162; United States' appellee's submission, paras. 188-190; Japan's appellee's submission, para. 103.

<sup>542</sup> Panel Reports, para. 6.340 (referring to *ibid.*, paras. 6.230, 6.334, and 6.335). The European Union also points out that the Panel referred to evidence of agreements signed between economic operators and the Argentine authorities, as well as the commitments provided in letters by many economic operators, all of which require a prospective course of action. (European Union's appellee's submission, para. 162)

<sup>543</sup> In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body found that the panel had acted inconsistently with Article 11 of the DSU because its treatment of the evidence submitted by the parties lacked even-handedness, and its reasoning was internally incoherent. In particular, the Appellate Body found that the panel had treated competing evidence submitted by the parties inconsistently. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292)

or examples of incoherence or contradictions in the Panel's reasoning. Nor does Argentina point to any lack of even-handedness in the Panel's evaluation of the evidence. Indeed, Argentina did not present competing evidence to the Panel, and hardly engaged with the evidence presented by the complainants. In the light of the above, we consider that Argentina has not established that the Panel's reasoning in the context of the findings concerning the general and prospective application of the TRRs measure is incoherent, much less that any such deficiency amounted to a failure to make an objective assessment of the matter.

5.180. In the light of the above, we do not consider that Argentina has established that the Panel failed to ensure that its findings concerning the general and prospective application of the alleged TRRs measure were based on record evidence and were supported by reasoned and adequate explanations and coherent reasoning. Therefore we do not consider that the Panel acted inconsistently with Article 11 of the DSU.

5.181. Nevertheless, in dismissing Argentina's claim under Article 11 of the DSU, we do not wish to be seen as endorsing the Panel's additional findings on Japan's "as such" claims against the TRRs measure. As set out above, we see the Panel's "as such" findings on the TRRs measure as amounting in substance to no more than the findings the Panel had already made in respect of the TRRs measure as challenged under the joint claims.

5.182. We wish to underline that we understand the Panel, in purporting to find that the TRRs measure has "general application", in fact to have found nothing other than that the TRRs measure has "systematic application". Similarly, we understand the Panel, in purporting to find that the TRRs measure has "prospective application", to have found no more than that the TRRs measure will continue to be applied in the future. Thus, we do not understand the Panel's finding in its analysis of Japan's "as such" claims that the TRRs measure has "prospective application" as implying anything more than it had already found in its analysis of the element of "continued application" under the joint claims. Moreover, nothing in the Panel's reasoning indicates that it considered the TRRs measure to have the same level of security and predictability of continuation into the future typically associated with rules or norms.

5.183. In this connection, we also observe that, at the outset of its analysis of Japan's "as such" claims, the Panel identified what it considered to be relevant jurisprudence relating to the assessment of "as such" claims, in particular with respect to unwritten measures.<sup>544</sup> The excerpts cited by the Panel referred to such claims being brought as challenges to "rules or norms ... of general and prospective application". In the remainder of its analysis of Japan's "as such" claims, the Panel focused solely on analysing the content of the TRRs measure and on whether it has general and prospective application. The Panel did not further refer to, much less examine, whether the TRRs measure embodies or creates "rules or norms". Although rules and norms typically have general and prospective application, these two characteristics are not necessarily the only ones exhibited by rules and norms. The Panel did not inquire whether the TRRs measure possesses other types of attributes that characterize "rules or norms" and never affirmatively stated that it viewed the TRRs measure as embodying rules or norms. For all of these reasons, we are puzzled as to why the Panel separately addressed Japan's "as such" claims against the TRRs measure, particularly given the analysis that it had already completed, and the findings that it had already made, namely that the TRRs measure exists and is inconsistent with Articles III:4 and XI:1 of the GATT 1994.

#### 5.2.3.4 Conclusion

5.184. For the foregoing reasons, we do not consider that Argentina has established that the Panel failed to make an objective assessment of the matter in making its "as such" findings.<sup>545</sup> Accordingly, we find that Argentina has not established that the Panel acted inconsistently with Article 11 of the DSU.

<sup>544</sup> Panel Reports, paras. 6.315-6.319.

<sup>545</sup> As discussed earlier in these Reports, we emphasize again that we consider that the Panel's "as such" findings actually amount in substance to no more than the findings it made in respect of the TRRs measure challenged under the joint claims.

### 5.2.4 The Panel's exercise of judicial economy on Japan's claim under Article X:1 of the GATT 1994

5.185. We turn now to Japan's claim on appeal that the Panel erred in exercising judicial economy with respect to Japan's claim against the TRRs measure under Article X:1 of the GATT 1994. Japan requests that we reverse the Panel's decision to apply judicial economy and that we complete the analysis and find that the TRRs measure is inconsistent with Argentina's obligations under Article X:1.<sup>546</sup> According to Japan, the Panel acted inconsistently with Articles 3.4, 3.7, 7.2, and/or 11 of the DSU by exercising judicial economy on this claim because the "scope and content" of Article X:1 is distinct from the "scope and content" of Articles III:4 and XI:1 of the GATT 1994, and compliance with a finding under the latter provisions would not necessarily result in compliance with a finding under Article X:1.<sup>547</sup> Argentina requests us to reject Japan's claim, arguing that Japan fails to demonstrate why the Panel's findings under Article XI:1 alone lead to a partial resolution of this dispute.<sup>548</sup>

5.186. We recall that, after having found the TRRs measure to be inconsistent with Article XI:1 of the GATT 1994, the Panel stated that:

[a]n additional finding regarding the same measure under Article X:1 of the GATT 1994 is not necessary or useful in resolving the matter at issue. Accordingly, guided by the principle of judicial economy,<sup>549</sup> the Panel refrains from making any findings with respect to this particular claim.<sup>549</sup>

5.187. At the interim review stage, Japan and the United States requested the Panel to refrain from exercising judicial economy with respect to their claims under Article X:1 of the GATT 1994 against, *inter alia*, the TRRs measure.<sup>550</sup> Argentina objected to these requests, stating that Japan and the United States had not explained why the Panel's findings under Article XI:1 of the GATT 1994 would lead to a partial resolution of this dispute.<sup>551</sup>

5.188. The Panel responded that:

... in the light of the Panel's findings regarding the TRRs measure ..., additional findings regarding the same measure[] under Article X:1 of the GATT 1994 were not necessary or useful in resolving the matter at issue. Moreover, given the Panel's findings that the TRRs measure ... constitute[s] restrictions on the importation of goods and [is] thus inconsistent with Article XI:1 of the GATT 1994, as well as the Panel's finding in the complaint brought by Japan that the TRRs measure, with respect to its local content requirement, is inconsistent with Article III:4 of the GATT 1994, whether Argentina published its measures in a manner consistent with Article X:1 of the GATT 1994 was no longer relevant for purposes of resolving this dispute.<sup>552</sup>

5.189. The question before us is whether this exercise of judicial economy was proper. The proper exercise of judicial economy is linked to the aim of securing "a positive solution to a dispute", as reflected in Article 3.7 of the DSU, as well as to the duty imposed on panels by Article 11 of the DSU to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".<sup>553</sup>

5.190. The Appellate Body has explained that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."<sup>554</sup> Thus, panels need address only those claims "which must be addressed in order to

<sup>546</sup> Japan's other appellant's submission, paras. 3, 9, and 17.

<sup>547</sup> Japan's other appellant's submission, paras. 3, 4, and 13.

<sup>548</sup> Argentina's appellee's submission, para. 22.

<sup>549</sup> Panel Reports, para. 6.305.

<sup>550</sup> Panel Reports, paras. 5.9 and 5.10.

<sup>551</sup> Panel Reports, para. 5.11.

<sup>552</sup> Panel Reports, para. 5.12.

<sup>553</sup> See Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 331.

<sup>554</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (emphasis original)

resolve the matter in issue in the dispute"<sup>555</sup>, and panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."<sup>556</sup> Nonetheless, the Appellate Body has cautioned that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy", and that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"<sup>557</sup>

5.191. Thus, in order to succeed in its claim on appeal, Japan must show that the Panel provided only a "partial resolution of the matter at issue" or that an additional finding with respect to Japan's claim under Article X:1 of the GATT 1994 "is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance"<sup>558</sup> by Argentina with those recommendations and rulings.

5.192. Japan argues that panels may not exercise judicial economy with respect to provisions whose "scope and content" are different from those under which findings are made, as this would prevent an effective resolution of the dispute. Japan relies on the Appellate Body report in *US – Tuna II (Mexico)* to support its position.<sup>559</sup> Japan contends that, in this dispute, the "scope and content" of Article X:1 of the GATT 1994, which relates to the administration of measures, is different from the "scope and content" of Articles III:4 and XI:1 of the GATT 1994, which relate to the substantive content of measures. It follows, for Japan, that the Panel was required to address Japan's Article X:1 claim against the TRRs measure.<sup>560</sup>

5.193. Argentina considers that Japan's reliance on the Appellate Body's findings in *US – Tuna II (Mexico)* is misplaced because, in Argentina's view, the "scope and content" of Article X:1 of the GATT 1994 overlaps with the "scope and content" of Articles III:4 and XI:1 of the GATT 1994.<sup>561</sup> In addition, Argentina argues that Japan is incorrect in arguing that a panel engages in false judicial economy every time that the "scope and content" of the legal provision on which it declines to rule is not the same as the "scope and content" of the legal provision on which it does rule.<sup>562</sup>

5.194. In our view, the fact that two provisions have a different "scope and content" does not, in and of itself, imply that a panel must address each and every claim under those provisions.

<sup>555</sup> Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *US – Tuna II (Mexico)*, para. 403.

<sup>556</sup> Appellate Body Reports, *US – Upland Cotton*, para. 732; *US – Tuna II (Mexico)*, para. 404.

<sup>557</sup> Appellate Body Report, *Australia – Salmon*, para. 223. (fns omitted) For instance, in *Australia – Salmon*, the Appellate Body considered that the fact that the panel made findings concerning a violation of Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) with respect to certain Canadian salmon, without findings under Articles 5.5 and 5.6 of the SPS Agreement, would not enable the DSB to make sufficiently precise recommendations and rulings so as to allow for compliance by Australia with its obligations under the SPS Agreement. (Ibid., para. 224) The Appellate Body reached a similar conclusion in *EC – Export Subsidies on Sugar*, explaining that findings under Articles 3 and 8 of the Agreement on Agriculture were not sufficient to "fully resolve" that dispute because, by declining to rule on the claims under Article 3 of the SCM Agreement, that panel precluded the possibility of a remedy being made available, pursuant to Article 4.7 of the SCM Agreement, in the event of a finding of inconsistency under Article 3 of the SCM Agreement. (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335)

<sup>558</sup> Appellate Body Report, *Australia – Salmon*, para. 223. See also Appellate Body Reports, *EC – Export Subsidies on Sugar*, paras. 322 and 331; *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Upland Cotton*, para. 732; and *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.93.

<sup>559</sup> Japan's other appellant's submission, para. 12 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 405).

<sup>560</sup> Japan's other appellant's submission, paras. 4, 9, and 13 (referring to Appellate Body Report, *EC – Poultry*, para. 115).

<sup>561</sup> Argentina's appellee's submission, para. 23. Argentina argues that the entire universe of "laws, regulations, judicial decisions and administrative rulings" subject to Article X:1 falls within the scope of "other measures" covered by Article XI:1 of the GATT 1994, and that the content of these provisions substantially overlap. (Ibid., para. 24)

<sup>562</sup> Argentina recalls that, in *US – Zeroing (EC)*, the Appellate Body concluded that, having made findings of inconsistency under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the panel in that dispute did not err in refraining from making additional findings under Articles 2.4 and 9.3 of the Anti-Dumping Agreement. Yet, in Argentina's view, the "scope and content" of those provisions are unequivocally distinct. (Argentina's appellee's submission, para. 25 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 250))



Indeed, if this were so, then only in the rarest of circumstances would a panel be able to exercise judicial economy on a claim. As the Appellate Body has explained in previous disputes, what should guide panels in their decision to exercise judicial economy is the need to address all of those claims whose resolution is necessary to resolve the dispute so as to avoid a partial resolution of the dispute.

5.195. We note that there is a key difference between the situation in the present dispute and the situation that was before the Appellate Body in *US – Tuna II (Mexico)*. In this dispute, the Panel made a finding of inconsistency under Article XI:1 of the GATT 1994, before exercising judicial economy with respect to a claim under Article X:1 of the GATT 1994. In contrast, in *US – Tuna II (Mexico)*, the panel made no finding of inconsistency under Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement), before exercising judicial economy with respect to claims under Articles I:1 and III:4 of the GATT 1994. We recognize that, in *US – Tuna II (Mexico)*, the Appellate Body disagreed with the panel that the obligations under Articles I:1 and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand, were "substantially the same". This was, however, not the basis for the Appellate Body's ruling against the panel's exercise of judicial economy. Rather, after recalling that panels need address only "those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings"<sup>563</sup>, the Appellate Body concluded that the panel had not made sufficient findings and, for that reason, had exercised "false judicial economy".<sup>564</sup>

5.196. Japan also contends that the exercise of judicial economy would fail to ensure the effective resolution of disputes where compliance obligations arising from different claims are not identical and actions that would result in compliance with one finding would not necessarily result in compliance with the other finding.<sup>565</sup> Japan argues that its "Article X:1 claim is aimed at making Argentina undertake implementing actions in a transparent manner, which is different from and could go beyond what is required by implementing actions under Articles XI:1 and III:4 claims."<sup>566</sup> Japan adds that the transparency obligations under Article X:1 of the GATT 1994 are particularly important in the circumstances of this dispute. Japan contends that, given the opaque and non-transparent nature of the TRRs measure, without the publication of the current GATT-inconsistent TRRs measure, it may be unclear to economic operators whether, when, and how the TRRs measure has been fully removed or rectified.<sup>567</sup>

5.197. We note some ambiguity in Japan's arguments, which may be understood to refer to the publication of: (i) any implementing measures that may be adopted by Argentina to bring the TRRs measure into conformity with Articles III:4 and XI:1 of the GATT 1994; or (ii) the current GATT-inconsistent TRRs measure.

5.198. We disagree with Japan's argument to the extent that it may be understood as suggesting that a finding under Article X:1 of the GATT 1994 is necessary to ensure that Argentina is subject to an obligation to publish promptly any implementing measures that may be adopted to bring the TRRs measure into conformity with the GATT 1994. In our view, the obligation to publish promptly any new or modified laws of general application does not stem from the implementation of a finding of inconsistency of the current TRRs measure with Article X:1. Rather, for any new or modified implementing measures that fall within the scope of Article X:1, the publication obligation stems from Article X:1 itself. While the implementation of DSB recommendations and rulings under Articles III:4 and XI:1 of the GATT 1994 may require changes to the TRRs measure in order for Argentina to bring itself into compliance with those provisions, compliance with a finding of inconsistency under Article X:1 would lead only to publication of the existing measure.

5.199. We note that Japan's arguments may also be understood to refer to the publication of the current GATT-inconsistent TRRs measure. Japan contends that accepting the Panel's exercise of judicial economy would fail to ensure effective resolution of the dispute, considering that the compliance obligations arising from findings under Articles III:4 and XI:1 of the GATT 1994, on the one hand, and under Article X:1 of the GATT 1994, on the other hand, are not identical. We recall,

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<sup>563</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 403 (quoting Appellate Body Report, *Australia – Salmon*, para. 223).

<sup>564</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.

<sup>565</sup> Japan's other appellant's submission, para. 14.

<sup>566</sup> Japan's other appellant's submission, para. 4.

<sup>567</sup> Japan's opening statement at the oral hearing; Japan's response to questioning at the oral hearing.

in this connection, that the Panel considered that, given its findings of inconsistency with Articles III:4 and XI:1, the issue of "whether Argentina published its measures in a manner consistent with Article X:1 ... was no longer relevant for purposes of resolving this dispute."<sup>568</sup>

5.200. The Panel recommended that the DSB request Argentina to bring the TRRs measure into conformity with its obligations under Articles III:4 and XI:1 of the GATT 1994.<sup>569</sup> Argentina might have different ways to implement the recommendations and rulings of the DSB to bring the TRRs measure into conformity with the GATT 1994. Japan argues that, absent publication of the TRRs measure, it may be unclear to economic operators whether, when, and how the TRRs measure has been fully removed or rectified.<sup>570</sup> However, to the extent that Argentina will have to modify or withdraw the TRRs measure to comply with the recommendations under Articles III:4 and XI:1, the TRRs measure – in its current form and with its current content – will cease to exist. Accordingly, we fail to understand how the publication of this WTO-inconsistent measure would contribute to securing a positive solution to this dispute.

5.201. Finally, Japan suggests that the publication of the current TRRs measure is necessary for Japan and economic operators to verify Argentina's compliance with the obligations under Articles III:4 and XI:1 of the GATT 1994. In this respect, we consider that the elaboration of the content of the current TRRs measure, set out in some detail in the Panel Reports, will assist the complainants, other Members, and interested economic operators in assessing Argentina's actions to bring the TRRs measure into conformity with Argentina's obligations under the GATT 1994.

5.202. In the light of the above, we do not consider that Japan has demonstrated that requiring Argentina to publish the current GATT-inconsistent TRRs measure is necessary to secure a positive solution to this dispute. Although it could have been useful if the Panel had elaborated upon its reasoning for considering that the publication of the TRRs measure was "no longer relevant", we are not persuaded that the Panel's exercise of judicial economy with respect to Japan's claim under Article X:1 of the GATT 1994 against the TRRs measure provides only a "partial resolution of the matter at issue". Nonetheless, we recall that, pursuant to Article X:1, all trade-related measures, including *unwritten* measures, constituting "[l]aws, regulations, judicial decisions and administrative rulings of general application" that are made effective by a Member and that pertain to the subject-matters identified in the first sentence of Article X:1 "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them."

5.203. For the above reasons, we find that Japan has not established that the Panel erred, in paragraph 6.305 of the Panel Reports and paragraph 7.9.g of the Japan Panel Report, in exercising judicial economy on Japan's claim that the TRRs measure is inconsistent with Article X:1 of the GATT 1994. Given that we have not found that the Panel's exercise of judicial economy at issue was improper, we also reject Japan's request that we complete the analysis and find that the TRRs measure is inconsistent with Argentina's obligations under Article X:1 of the GATT 1994.

### 5.2.5 Overall conclusions on the TRRs measure

5.204. In the light of all of the above, we find that, in addressing the joint claims by the three complainants against the TRRs measure, the Panel correctly established the existence of a TRRs measure, composed of several interlinked individual TRRs and exhibiting several characteristics, in particular its systematic and continued application. In doing so, the Panel did not err in the criteria that it used to determine whether such measure exists. For these reasons, we uphold the Panel's finding, in paragraph 6.231 of the Panel Reports, paragraph 7.1.d of the EU Panel Report, paragraph 7.5.c of the US Panel Report, and paragraph 7.9.d of the Japan Panel Report, that "the Argentine authorities' imposition on economic operators of one or more of the five requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina".

5.205. As a consequence, we also uphold the Panel's finding, in paragraph 6.265 of the Panel Reports, paragraph 7.1.e of the EU Panel Report, paragraph 7.5.d of the US Panel Report, and paragraph 7.9.e of the Japan Panel Report, "that the TRRs measure, consisting of the Argentine authorities' imposition of one or more of the five requirements identified by the

<sup>568</sup> Panel Reports, para. 5.12.

<sup>569</sup> Japan Panel Report, para. 7.12.

<sup>570</sup> Japan's opening statement at the oral hearing; Japan's response to questioning at the oral hearing.

complainants as a condition to import, constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994", as well as the Panel's finding, in paragraph 6.295 of the Panel Reports, that "the TRRs measure, with respect to the local content requirement, is inconsistent with Article III:4 of the GATT 1994" because it "modifies the conditions of competition in the Argentine market to the detriment of imported products" so that "imported products are granted less favourable treatment than like domestic products".

5.206. We also find that Argentina has not established that, in addressing Japan's "as such" claims, the Panel acted inconsistently with Article 11 of the DSU, and that Japan has not established that the Panel erred in exercising judicial economy, in paragraph 6.305 of the Panel Reports and paragraph 7.9.g of the Japan Panel Report, on Japan's claim that the TRRs measure is inconsistent with Article X:1 of the GATT 1994.

### 5.3 The DJAI procedure: Articles VIII and XI:1 of the GATT 1994

#### 5.3.1 Introduction

5.207. We now turn to Argentina's appeal in connection with the DJAI procedure.<sup>571</sup> Argentina raises three claims of error in connection with the Panel's analysis of whether the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994. Argentina contends that the Panel erred in its assessment of the scope of Article VIII of the GATT 1994 and, in particular, in allegedly suggesting that this provision does not encompass import procedures that are a "necessary pre-requisite for importing goods".<sup>572</sup> In addition, Argentina contends that the Panel failed to establish and apply a proper analytical framework for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and Article XI:1 of the GATT 1994, on the other hand.<sup>573</sup> Finally, Argentina claims that the Panel erred in concluding that, because the approval of a DJAI is not "automatic", the DJAI procedure is inconsistent with Article XI:1.<sup>574</sup> Argentina contends that the mere fact that an import formality or requirement does not result in the "automatic" importation of goods does not render it a restriction under Article XI:1.<sup>575</sup>

5.208. Thus, Argentina requests us: (i) to modify or reverse the Panel's findings, in paragraph 6.433 of the Panel Reports, concerning the scope of Article VIII of the GATT 1994; (ii) to modify the Panel's reasoning in paragraphs 6.435 through 6.445 of the Panel Reports, and to find that import formalities and requirements can only be found to be inconsistent with Article XI:1 of the GATT 1994 where it is demonstrated that: (a) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (b) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature; and (iii) to reverse the Panel's finding in paragraph 6.474 of the Panel Reports, as well as the Panel's ultimate finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994.<sup>576</sup>

5.209. Before examining Argentina's claims, we summarize pertinent aspects of the Panel's interpretation of Article XI:1 of the GATT 1994. We then set out our understanding of certain issues relating to the interpretation of discrete elements of Article XI:1. Thereafter, we examine Argentina's claims of error in respect of the Panel's interpretation of Article XI:1 and the scope of Article VIII. In the last part of this section, we summarize the Panel's findings regarding the application of Article XI:1 to the DJAI procedure, and we then examine Argentina's claim that the Panel erred in concluding that, because the approval of a DJAI is not "automatic", the DJAI procedure is inconsistent with Article XI:1.

<sup>571</sup> The Panel's explanation of the DJAI procedure is summarized above in section 4.2 of these Reports.

<sup>572</sup> Argentina's appellant's submission, para. 206.

<sup>573</sup> Argentina's appellant's submission, para. 206.

<sup>574</sup> Argentina's appellant's submission, para. 206.

<sup>575</sup> Argentina's appellant's submission, para. 239.

<sup>576</sup> Argentina's appellant's submission, paras. 219, 223, 236, 242, and 243.3. With respect to the Panel's ultimate finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994, Argentina refers to paragraph 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report.

### 5.3.2 The Panel's findings in connection with the interpretation of Article XI:1 of the GATT 1994

5.210. Before the Panel, the complainants claimed that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction on the importation of products.<sup>577</sup> Argentina responded that the DJAI procedure is not subject to the disciplines of Article XI:1. According to Argentina, the DJAI procedure is used as a customs risk assessment tool by which Argentina assesses and manages the risk of non-compliance with Argentina's customs laws and regulations prior to customs clearance, and was adopted in line with the World Customs Organization (WCO) SAFE Framework of Standards to Secure and Facilitate Global Trade (WCO SAFE Framework).<sup>578</sup> As such, Argentina contended that the DJAI procedure is a formality or requirement imposed in connection with importation subject to Article VIII of the GATT 1994. For Argentina, because Articles VIII and XI:1 have mutually exclusive scopes of application, the DJAI procedure is subject to only the former of these two provisions.<sup>579</sup>

5.211. In examining this claim and addressing Argentina's defence, the Panel began by briefly examining Article VIII of the GATT 1994 and the question of whether the DJAI procedure is a customs risk assessment tool. Based on the responses that the WCO Secretariat provided to the questions that had been put to it<sup>580</sup>, the Panel expressed doubt as to whether the DJAI procedure is used as a customs risk assessment tool.<sup>581</sup> The Panel also expressed the view that the DJAI procedure "is not a mere formality imposed by Argentina in connection with the importation of goods".<sup>582</sup> The Panel observed, nevertheless, that, even assuming that the DJAI procedure were a customs or import formality subject to Article VIII, the Panel would still need to determine whether this fact would exclude *per se* the applicability of Article XI:1 of the GATT 1994. The Panel then turned to the interpretation of Article XI:1 to examine whether customs or import procedures or formalities that fall within the scope of Article VIII are excluded from the scope of Article XI:1.<sup>583</sup>

5.212. The Panel set out its understanding of Article XI:1 of the GATT 1994 in different sections of the Panel Reports.<sup>584</sup> The Panel noted that Article XI:1 imposes an obligation on Members not to institute or maintain import or export prohibitions or restrictions<sup>585</sup>, and does not distinguish between different categories of prohibitions or restrictions.<sup>586</sup> The Panel understood the expression "or other measures" in Article XI:1 to mean that this provision covers all measures that constitute prohibitions or restrictions other than measures that take the form of duties, taxes, or other charges.<sup>587</sup> In addition, the Panel took the view that the term "restriction" is defined as a limiting condition that has restrictive effects on importation.<sup>588</sup> The Panel considered, however, that "not any condition placed on importation is inconsistent with Article XI, but only those that have a limiting effect on imports".<sup>589</sup> According to the Panel, the expression "on ... importation" in Article XI:1 means a restriction "with regard to" or "in connection with" the importation of the product.<sup>590</sup> Finally, the Panel understood that it is not necessary to establish actual, quantifiable,

<sup>577</sup> Panel Reports, paras. 6.413, 6.415, 6.416, and 6.418.

<sup>578</sup> Argentina's first written submission to the Panel, paras. 191-193, 214, and 239-261; Panel Reports, para. 6.427.

<sup>579</sup> Argentina's first written submission to the Panel, paras. 155, 176-179, and 299; Panel Reports, paras. 6.419, 6.425, and 6.427.

<sup>580</sup> Panel Reports, paras. 1.37, 1.38, and 6.428.

<sup>581</sup> Panel Reports, para. 6.430.

<sup>582</sup> Panel Reports, para. 6.433.

<sup>583</sup> Panel Reports, paras. 6.434 and 6.444.

<sup>584</sup> The Panel examined Article XI:1 of the GATT 1994 in the context of: (i) its analysis of the claims against the TRRs measure at paragraphs 6.243 and 6.264 of the Panel Reports; (ii) its analysis of the relationship between Articles VIII and XI:1 of the GATT 1994 at paragraphs 6.435-6.443 of the Panel Reports; and (iii) its analysis of the claims against the DJAI procedure at paragraphs 6.449-6.478 of the Panel Reports.

<sup>585</sup> Panel Reports, paras. 6.440 and 6.449.

<sup>586</sup> Panel Reports, para. 6.435.

<sup>587</sup> Panel Reports, paras. 6.246, 6.248, 6.435, 6.440, 6.442, and 6.450 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.17; and GATT Panel Report, *Japan – Semi-Conductors*, para. 104).

<sup>588</sup> Panel Reports, paras. 6.251, 6.254, and 6.452 (referring to Appellate Body Reports, *China – Raw Materials*, para. 319; and Panel Reports, *India – Quantitative Restrictions*, paras. 5.128 and 5.129; and *India – Autos*, paras. 7.265, 7.269, and 7.270).

<sup>589</sup> Panel Reports, para. 6.253 (referring to Panel Reports, *China – Raw Materials*, para. 7.917).

<sup>590</sup> Panel Reports, para. 6.458 (quoting Panel Report, *India – Autos*, para. 7.257; and referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261).

negative effects on the overall level of imports to find that a measure is inconsistent with Article XI:1. Rather, to determine whether a measure imposes a "limiting condition" on imports, a panel must examine the design and structure of the measure at issue.<sup>591</sup>

5.213. In addressing Argentina's specific defence to the claims under Article XI:1 of the GATT 1994 against the DJAI procedure, the Panel opined that Article VIII customs or import procedures or formalities are not excluded *per se* from the scope of application of Article XI:1<sup>592</sup>, and that Articles VIII and XI:1 of the GATT 1994 do not impose mutually exclusive obligations.<sup>593</sup> In the Panel's view, the consistency of an import or customs formality or requirement could be assessed under either Article VIII or Article XI:1, or under both provisions.<sup>594</sup>

### 5.3.3 Article XI:1 of the GATT 1994

5.214. Argentina's appeal calls for us to consider certain issues relating to the interpretation of discrete elements of Article XI:1 of the GATT 1994. In order to situate these elements properly within their broader context, we begin by setting out relevant aspects of our understanding of Article XI.

5.215. Article XI of the GATT 1994 provides, in relevant part:

#### *General Elimination of Quantitative Restrictions*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.
2. The provisions of paragraph 1 of this Article shall not extend to the following: ...

5.216. Article XI:1 of the GATT 1994 lays down a general obligation to eliminate quantitative restrictions. It prohibits Members to institute or maintain prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another Member.

5.217. In *China – Raw Materials*, the Appellate Body observed that the term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity".<sup>595</sup> In that dispute, the Appellate Body also referred to the term "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and, thus, generally, as something that has a limiting effect.<sup>596</sup> The use of the word "quantitative" in the title of Article XI of the GATT 1994 informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported.<sup>597</sup> This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation ... or on the exportation or sale for export". Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or

<sup>591</sup> Panel Reports, paras. 6.264, 6.451, and 6.476 (referring to Panel Reports, *Argentina – Hides and Leather*, para. 11.20; *Colombia – Ports of Entry*, paras. 7.240 and 7.252; and *China – Raw Materials*, paras. 7.915 and 7.1081).

<sup>592</sup> Panel Reports, paras. 6.435, 6.439, and 6.444.

<sup>593</sup> Panel Reports, paras. 6.436-6.439 and 6.443.

<sup>594</sup> Panel Reports, para. 6.443.

<sup>595</sup> Appellate Body Reports, *China – Raw Materials*, para. 319 (quoting *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2363).

<sup>596</sup> Appellate Body Reports, *China – Raw Materials*, para. 319 (quoting *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2553).

<sup>597</sup> Appellate Body Reports, *China – Raw Materials*, para. 320.

exportation of products.<sup>598</sup> Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.

5.218. Article XI:1 of the GATT 1994 prohibits prohibitions or restrictions other than duties, taxes, or other charges "made effective through quotas, import or export licences or other measures". The Appellate Body has described the word "effective", when relating to a legal instrument, as "in operation at a given time".<sup>599</sup> We note that the definition of the term "effective" also includes something "[t]hat is concerned in the production of an event or condition".<sup>600</sup> Moreover, the Appellate Body has described the words "made effective", when used in connection with governmental measures, as something that may refer to a measure being "operative", "in force", or as having "come into effect".<sup>601</sup> In Article XI:1, the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.<sup>602</sup>

5.219. As noted by the Panel, while the term "or other measures" suggests a broad coverage<sup>603</sup>, the scope of application of Article XI:1 of the GATT 1994 is not unfettered. Article XI:1 itself explicitly excludes "duties, taxes and other charges" from its scope of application. Article XI:2 of the GATT 1994 further restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed in Article XI:2.<sup>604</sup>

5.220. We acknowledge that certain provisions of the GATT 1994, such as Articles XII, XIV, XV, XVIII, XX, and XXI, permit a Member, in certain specified circumstances, to be excused from its obligations under Article XI:1 of the GATT 1994.<sup>605</sup> In these provisions, express reference is made to the relationship of each provision with the obligations contained in Article XI:1<sup>606</sup> or with the obligations under the GATT 1994 more generally.<sup>607</sup> This is not to say that provisions not explicitly

<sup>598</sup> We note that our understanding of Article XI:1 of the GATT 1994 is supported by two provisions of the Import Licensing Agreement that suggest that certain import licensing procedures may result in some burden without themselves having trade-restrictive effects on imports. Footnote 4 of the Import Licensing Agreement provides that "import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of [Article 2]", which deals with automatic import licensing. In addition, Article 3.2 of the Import Licensing Agreement provides that, while "[n]on-automatic licensing shall not have trade-restrictive ... effects on imports additional to those caused by the imposition of the restriction", such procedures "shall be no more administratively burdensome than absolutely necessary to administer the measure."

<sup>599</sup> Appellate Body Reports, *China – Raw Materials*, para. 356 (quoting *Black's Law Dictionary*, 9th edn, B.A. Garner (ed.) (West Group, 2009), p. 592).

<sup>600</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 799. (emphasis original)

<sup>601</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, p. 19 (quoting *The New Shorter Oxford English Dictionary on Historical Principles*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 786).

<sup>602</sup> Our understanding of Article XI:1 of the GATT 1994 is supported by the wording of the first sentence of Article 3.2 of the Import Licensing Agreement, which provides that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports *additional* to those caused by the imposition of the restriction." (emphasis added) In our view, the first sentence of Article 3.2 of the Import Licensing Agreement also suggests an examination of whether a restriction is produced or caused through the measure at issue itself, which seems to support our understanding of the relevant part of Article XI:1 of the GATT 1994.

<sup>603</sup> See Panel Reports, paras. 6.246, 6.435, and 6.450.

<sup>604</sup> Article XI:2 of the GATT 1994 provides, in relevant part, that the provisions of Article XI:1 shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) 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;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,\* necessary to the enforcement of governmental measures which operate: ...

<sup>605</sup> See Appellate Body Report, *Argentina – Textiles and Apparel*, para. 73.

<sup>606</sup> See e.g. Article XII:1 of the GATT 1994, which authorizes certain restrictions to safeguard the balance of payments, and starts with the phrase "[n]otwithstanding the provisions of paragraph 1 of Article XI".

<sup>607</sup> See e.g. Article XV:9 of the GATT 1994, which provides that nothing in the GATT 1994 shall preclude the use by Members of the exchange restrictions or controls defined therein.

referring to the obligations contained in Article XI:1, or to the obligations under the GATT 1994 more generally, do not contain elements that are relevant to their relationship with, and the interpretation of, Article XI:1.

5.221. We note that, even for those measures that are expressly excluded or excused from the obligations contained in Article XI:1 of the GATT 1994, this is only the case to the extent that those measures satisfy all of the conditions specified for such treatment. For example, the scope of certain exclusions or exceptions is circumscribed with the imposition of certain conditions, often with reference to the concept of "necessity".<sup>608</sup> When a measure imposes a restriction or prohibition on the importation of goods, and such restriction or prohibition exceeds what is "necessary" for the authorized objective, or departs from the specified conditions, then such restriction or prohibition will violate the obligation contained in Article XI:1.<sup>609</sup>

5.222. With this understanding in mind, we turn to consider the arguments made by Argentina on appeal that Article VIII of the GATT 1994 creates, or operates as a form of, derogation or carve-out from the scope of the obligations under Article XI:1 of the GATT 1994.

### 5.3.4 Argentina's claim that the Panel erred in its interpretation of Article XI:1 of the GATT 1994

5.223. Turning to Argentina's appeal, we begin with its claim that the Panel erred in its interpretation of Article XI:1 of the GATT 1994 by failing to establish and apply a "proper analytical framework" for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and the scope and disciplines of Article XI:1, on the other hand.<sup>610</sup> Argentina requests us to modify the Panel's reasoning in paragraphs 6.435 through 6.445 of the Panel Reports, and to find that import formalities and requirements can be found to be inconsistent with Article XI:1 only where it is demonstrated that: (i) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature.<sup>611</sup>

5.224. We begin by noting the limited scope of Argentina's challenge to the Panel's interpretation of Article XI:1 of the GATT 1994. Argentina alleges that the Panel failed to recognize that an import formality or requirement could have some degree of trade-restricting effect that is "an ordinary incident of the formality or requirement itself" and that does not render the formality or requirement inconsistent with Article XI:1.<sup>612</sup> Argentina does not appeal any other specific elements or intermediary findings of the Panel's interpretation of Article XI:1.

5.225. Argentina makes two main arguments. First, Argentina argues that the scope of application of Articles VIII and XI:1 of the GATT 1994 are mutually exclusive. Second, Argentina argues that a harmonious interpretation of Articles VIII and XI:1 would require, at a minimum, some means of distinguishing the trade-restrictive effect of a formality or requirement itself from the

<sup>608</sup> See e.g. Articles XI:2(b), XI:2(c), XII:2(a), XIV:5(a), XV:9, and XX of the GATT 1994.

<sup>609</sup> In this regard, we note the following statement by the 1954-1955 Review Working Party on "Quantitative Restrictions":

The Working Party ... [considered that it] might be useful ... to reaffirm that the maintenance or the application of a restriction which went beyond what would be "necessary" to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text of these provisions by the use of the word "necessary". Restrictions related to the application of standards or regulations for the classification, grading or marketing of commodities in international trade which go beyond what is necessary for the application of those standards or regulations and thus have an unduly restrictive effect on trade, would clearly be inconsistent with Article XI.

(GATT Analytical Index: Guide to GATT Law and Practice, updated 6th edn (WTO, 1995), pp. 326-327 and fn 55 thereto (quoting WTO document L/332/Rev.1 and Addenda, adopted on 2, 4, and 5 March 1955, BISD 3S/170, pp. 189-190, para. 67))

We also note that Article XII:2(b) of the GATT 1994 provides that Members "shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under [subparagraph (a)]."

<sup>610</sup> Argentina's appellant's submission, para. 206.

<sup>611</sup> Argentina's appellant's submission, paras. 223, 236, and 243.3.

<sup>612</sup> Argentina's appellant's submission, paras. 232 and 234.

trade-restrictive effect of any substantive rule of importation that the measure implements. We examine each of these arguments below.

5.226. Argentina argues that Articles VIII and XI of the GATT 1994 "must be interpreted as mutually exclusive in their respective spheres of application in order to ensure that Members are allowed to maintain the types of import formalities and requirements that Article VIII expressly contemplates."<sup>613</sup> Argentina notes that "Article VIII expressly acknowledges the right of Members to maintain import formalities and requirements" and "recognizes the necessity of these measures", whereas Article XI categorically prohibits any type of measure that falls within its scope.<sup>614</sup> Argentina contends that, by acknowledging "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements", the drafters of Article VIII were aware that import formalities and requirements are potentially an impediment to trade, at least to some degree.<sup>615</sup> In Argentina's view, if such effects rendered the measure a prohibited quantitative restriction under Article XI, then Members would be unable to maintain import formalities and requirements even though Article VIII recognizes the necessity of these measures.<sup>616</sup>

5.227. The complainants argue that Articles VIII and XI:1 of the GATT 1994 apply cumulatively where import formalities or requirements regulate the importation of products.<sup>617</sup> The United States also submits that Article VIII does not limit the scope of Article XI of the GATT 1994, and that a restriction cannot escape scrutiny under the latter provision merely by being characterized as an Article VIII formality or requirement.<sup>618</sup> Japan and the United States also contend that Article VIII:1(c) of the GATT 1994 contains hortatory language and does not create an exception to Article XI:1.<sup>619</sup> Finally, Japan notes that, where the treaty drafters intended to insert derogations from other Articles of the GATT 1994, they did so explicitly.<sup>620</sup>

5.228. We recall that the Panel only briefly examined Article VIII:4 of the GATT 1994, and the meaning of the term "formality" in this provision.<sup>621</sup> Without further examination of Article VIII of the GATT 1994, the Panel considered that, even assuming that the DJAI procedure were a customs or import formality subject to Article VIII, an examination of the applicability of Article XI:1 of the GATT 1994 would still be required. On this basis, the Panel turned to the interpretation of Article XI:1.<sup>622</sup> Given Argentina's argument that the scope of application of Articles VIII and XI:1 are mutually exclusive, we consider it necessary to examine Article VIII in greater detail. Thus, we turn first to Article VIII of the GATT 1994.

5.229. We note that Article VIII of the GATT 1994 provides, in relevant part:

*Fees and Formalities connected with Importation and Exportation*[]

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by Members on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The Members recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).

<sup>613</sup> Argentina's appellant's submission, para. 205.

<sup>614</sup> Argentina's appellant's submission, para. 221.

<sup>615</sup> Argentina's appellant's submission, para. 221.

<sup>616</sup> Argentina's appellant's submission, para. 221.

<sup>617</sup> European Union's response to questioning at the oral hearing; United States' appellee's submission, paras. 58-60; Japan's appellee's submission, para. 122.

<sup>618</sup> United States' appellee's submission, paras. 59, 60, and 65.

<sup>619</sup> United States' appellee's submission, para. 66; Japan's appellee's submission, paras. 117 and 121.

<sup>620</sup> Japan's appellee's submission, para. 119.

<sup>621</sup> See Panel Reports, paras. 6.431 and 6.432. Subsequently, the Panel restated the disciplines contained in Article VIII of the GATT 1994. See *ibid.*, para. 6.441.

<sup>622</sup> Panel Reports, paras. 6.434 and 6.435.



(c) The Members also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.[]

2. A Member shall, upon request by another Member or by the Ministerial Conference, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No Member shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

- (a) consular transactions, such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

5.230. We consider that Article VIII of the GATT 1994 imposes three clear obligations on Members. First, Article VIII:1(a) provides that all fees and charges, other than import and export duties and internal taxes under Article III of the GATT 1994, shall be limited in amount to the approximate cost of services rendered, and shall not represent an indirect protection to domestic production or a taxation of imports or exports for fiscal purposes. Second, Article VIII:2 provides that, upon request, a Member shall review the operation of its laws and regulations in the light of Article VIII. Finally, Article VIII:3 provides that, *inter alia*, no Member shall impose substantial penalties for minor breaches of customs regulations or procedural requirements.

5.231. By contrast, Articles VIII:1(b) and VIII:1(c) do not appear to us to impose mandatory obligations. Rather, in dealing, respectively, with (i) fees and charges and (ii) formalities and documentation requirements, the language of these two provisions is more hortatory in nature. Unlike the provisions discussed above, neither of these two subparagraphs uses the mandatory verb "shall". Instead, Members "recognize the need" to do something. Nor do these provisions speak of a prohibition. Instead, they refer to "reducing", "minimizing", "simplifying", and "decreasing" the number, diversity, and complexity of fees, charges, formalities, and documentation requirements. Article VIII:1(c), in particular, provides that Members recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

5.232. Finally, Article VIII:4 outlines the scope of Article VIII, setting forth that the provisions of Article VIII shall extend to fees, charges, formalities, and requirements imposed by governmental authorities in connection with importation and exportation. Article VIII:4 also provides an illustrative list of the types of measures to which these fees, charges, formalities, and requirements may relate.

5.233. Argentina's argument relies on the language in Article VIII:1(c) of the GATT 1994. We do not necessarily disagree with Argentina that the reference, in Article VIII:1(c), to the "need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements" implies a recognition by Members that import formalities and requirements can have trade-restricting effects, at least to some degree.<sup>623</sup> We also accept that Article VIII:1(c) constitutes context for the interpretation of Article XI:1 of the GATT 1994, and for what amounts to a restriction on importation within the meaning of the latter provision. Yet, such language does not suffice to establish the type of carve-out or derogation from Article XI:1 that Argentina seems to envisage for formalities and requirements referred to in Article VIII of the GATT 1994. To the contrary, the general and hortatory language of Article VIII:1(c) stands in contrast to, for example, the language of Article VIII:1(a) of the GATT 1994. The mandatory language used in Article VIII:1(a) makes clear that fees and charges imposed in connection with importation will be consistent with the obligation set down in that provision only when such fees and charges meet the specific conditions prescribed therein, that is, when they are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports for fiscal purposes.

5.234. The language of Article VIII:1(c) of the GATT 1994 differs from that of Article VIII:1(a) of the GATT 1994 in another important respect. Article VIII:1(a) explicitly excludes from the scope of its application import duties (covered by Article II of the GATT 1994<sup>624</sup>), export duties, and taxes falling within the scope of Article III of the GATT 1994. In contrast, Article VIII:1(c) does not contain express language identifying its relationship with other provisions of the GATT 1994.

5.235. Similarly, the language of Article VIII:1(c) of the GATT 1994 also stands in opposition to that of other provisions of the GATT 1994 that exclude or excuse measures from the obligation under Article XI:1 of the GATT 1994. As previously explained, where the GATT 1994 permits Members to adopt a particular type of restriction on the importation of goods, the relevant provisions typically refer to the relationship with the obligations contained in Article XI:1 or the obligations under the GATT 1994 more generally. In this connection, Argentina has not identified any language in Article VIII or Article XI:1 that somehow authorizes Members to apply import formalities and requirements that amount to restrictions on the importation of goods.<sup>625</sup>

5.236. Lastly, to the extent that Argentina's argument may imply the existence of a conflict between Articles VIII and XI:1 of the GATT 1994, Argentina has identified no specific obligation or language in Article VIII that allegedly conflicts with the general obligation in Article XI:1 to eliminate quantitative restrictions. Nor has Argentina explained its understanding of such a conflict.<sup>626</sup> As the Appellate Body has held in previous disputes, and as noted by the Panel<sup>627</sup>, the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.<sup>628</sup>

5.237. For all of these reasons, we agree with the Panel that formalities or requirements under Article VIII of the GATT 1994 are not excluded *per se* from the scope of application of Article XI:1 of the GATT 1994, and that their consistency could be assessed under either Article VIII or

<sup>623</sup> Argentina's appellant's submission, para. 221.

<sup>624</sup> Article II of the GATT 1994, which concerns the imposition of import duties, also contains language elucidating the relationship between the scope of coverage of the obligations thereunder and of those in Article VIII of the GATT 1994. Article II:2(c) of the GATT 1994 provides that nothing in Article II shall prevent a Member from imposing at any time on the importation of any product "fees or other charges commensurate with the cost of services rendered".

<sup>625</sup> We recall that, as noted above, there are no explicit cross-references concerning the general relationship between "prohibitions or restrictions" under Article XI:1 of the GATT 1994 and "formalities" or "requirements" under Article VIII of the GATT 1994.

<sup>626</sup> We note that past panels have taken different views on the notion of conflict in international law. (See e.g. Panel Reports, *EC – Bananas III*, para. 7.159; and *Indonesia – Autos*, fn 649 to para. 14.28)

<sup>627</sup> Panel Reports, para. 6.437.

<sup>628</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.123; *US – Anti-Dumping and Countervailing Duties (China)*, para. 570; and *US – Upland Cotton*, para. 549 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and fn 72 thereto, in turn referring to Appellate Body Reports, *Korea – Dairy*, para. 81; *US – Gasoline*, p. 23, DSR 1996:I, p. 21; *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, p. 106; and *India – Patents (US)*, para. 45).

Article XI:1, or under both provisions.<sup>629</sup> Thus, we reject Argentina's argument that Articles VIII and XI:1 have mutually exclusive spheres of application.

5.238. We turn now to Argentina's second argument. Argentina argues that a harmonious interpretation of Articles VIII and XI:1 of the GATT 1994 would require, at a minimum, some means of distinguishing the trade-restrictive effect of a formality or requirement itself from the trade-restrictive effect of any substantive rule of importation that the measure implements.<sup>630</sup> In Argentina's view, this harmonious interpretation must provide a basis for identifying the point at which an Article VIII import formality or requirement becomes a prohibited "quantitative restriction" under Article XI:1.<sup>631</sup> Argentina proposes that, for an import formality or requirement to be found to constitute an Article XI:1 restriction, in its own right, then it must be shown that: (i) the formality or requirement limits the quantity of imports to a material degree that is independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature.<sup>632</sup> Argentina purports to find support for its proposed approach in the reasoning employed by the panels in *Korea – Various Measures on Beef* and *China – Raw Materials*.<sup>633</sup>

5.239. The complainants contend that Argentina's analytical framework is not applicable to these disputes because, while the framework is intended to determine whether an import formality or requirement constitutes a restriction under Article XI:1 of the GATT 1994, the complainants' claims do not concern import formalities or requirements. Rather, the complainants' claims concern the DJAI's discretionary system of authorization of imports that, on its face, does not implement a separate WTO-consistent restriction.<sup>634</sup> The European Union and Japan also argue that Argentina's proposed analytical framework has no textual basis in the GATT 1994.<sup>635</sup> Finally, the complainants submit that the panel reports in *Korea – Various Measures on Beef* and *China – Raw Materials* do not support Argentina's proposed analytical framework, and stand only for the proposition that, for purposes of Article XI:1, the challenged measures themselves, as opposed to any underlying restriction such as a quota, must restrict the importation of products.<sup>636</sup>

5.240. At the outset, we note that Argentina has not identified a specific legal basis for its analytical framework to determine whether an import formality or requirement constitutes a "restriction" under Article XI:1 of the GATT 1994. Argentina does not point to the text of either Article XI:1 or Article VIII of the GATT 1994 as support for its proposed analytical framework. Moreover, despite Argentina's contention to the contrary<sup>637</sup>, Argentina's two-step proposal is not set out in or implied by the reasoning employed by the panels in *Korea – Various Measures on Beef* and *China – Raw Materials*. Rather, as argued by the complainants, these panel reports stand for the proposition that, for purposes of Article XI:1, the challenged measures themselves must

<sup>629</sup> Panel Reports, paras. 6.435, 6.439, 6.443, and 6.444.

<sup>630</sup> Argentina's appellant's submission, para. 222.

<sup>631</sup> Argentina's appellant's submission, para. 205. We also note Argentina's argument that it would be unnecessary for Article VIII:1(c) of the GATT 1994 to recognize the need for minimizing the incidence and complexity of certain formalities and for decreasing and simplifying certain documentation requirements if such characteristics were prohibited *per se* under Article XI:1 of the GATT 1994. (Argentina's appellant's submission, para. 221; response to questioning at the oral hearing)

<sup>632</sup> Argentina's appellant's submission, para. 223.

<sup>633</sup> Argentina's appellant's submission, paras. 225 and 226 (quoting Panel Reports, *Korea – Various Measures on Beef*, para. 782; and *China – Raw Materials*, para. 7.917).

<sup>634</sup> European Union's appellee's submission, paras. 177, 181, 188, and 189; United States' appellee's submission, paras. 57 and 81; Japan's appellee's submission, paras. 112 and 124.

<sup>635</sup> European Union's appellee's submission, para. 192; Japan's appellee's submission, para. 116.

<sup>636</sup> European Union's appellee's submission, para. 191; United States' appellee's submission, paras. 77-80; Japan's appellee's submission, paras. 126 and 127.

<sup>637</sup> Argentina's appellant's submission, paras. 224-226 (quoting Panel Reports, *Korea – Various Measures on Beef*, para. 782; and *China – Raw Materials*, para. 7.917).

limit the importation of products, and the limitation caused by other measures should not be attributed to them.<sup>638</sup>

5.241. We further observe that some of the arguments raised by Argentina in this part of its appeal seem to suggest that the Panel's reasoning implies that any measure falling within the scope of Article VIII of the GATT 1994 would be prohibited *per se* under Article XI:1 of the GATT 1994.<sup>639</sup> We do not see that the Panel made any such suggestion. Indeed, as explained above, in setting out its understanding of Article XI:1, the Panel expressed the view that "not any condition placed on importation is inconsistent with Article XI, but only those that have a limiting effect on imports".<sup>640</sup> In making this statement, the Panel agreed with and quoted from two previous panel reports, in which the panels also took the view that conditions or prerequisites placed on importation would be prohibited under Article XI:1 only where they have a limiting effect on importation.<sup>641</sup> Indeed, Argentina itself invokes the reasoning from one of those panel reports – *China – Raw Materials* – in support of its position. Accordingly, it is clear to us that the Panel did not, as Argentina suggests, consider that any measure that constitutes a fee or formality falling within the scope of Article VIII would necessarily be inconsistent with Article XI:1.

5.242. Argentina's appeal calls for us to examine whether and under what circumstances measures that qualify as "formalities" or "requirements" under Article VIII of the GATT 1994 may constitute "restrictions" under Article XI:1 of the GATT 1994. As we have explained above, not every condition or burden placed on importation or exportation will be prohibited by Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.

5.243. Formalities and requirements connected to importation that fall within the scope of application of Article VIII of the GATT 1994 typically involve the use of documentary and procedural tools to collect, process, and verify information in connection with the importation of products. Such import formalities and requirements will often entail a certain burden on the importation of products. At the same time, such formalities and requirements are, at least to some extent, a routine aspect of international trade. Compliance with such formalities and requirements enables trade to occur within a Member's specific regulatory framework. In our view, not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so.

5.244. Argentina requests us to find that the Panel should have followed an analytical framework similar to the one that Argentina proposes.<sup>642</sup> The first step of Argentina's proposed analytical framework would require a finding concerning whether an import formality or requirement limits the importation of products independently of any substantive restriction that such formality or requirement may implement. As explained above, Argentina purports to find support for its proposed approach in the reasoning employed by the panels in *Korea – Various Measures on Beef* and *China – Raw Materials*.<sup>643</sup> In our view, these panel reports stand for the proposition that, for

<sup>638</sup> We recall that the panel in *Korea – Various Measures on Beef* did not agree with the United States' claim that a discretionary licensing system, used in conjunction with a quantitative restriction, necessarily provides some additional level of restriction over and above the inherent restriction on access created through the imposition of a quantitative restriction. Ultimately, the panel exercised judicial economy on the United States' claim. (See Panel Report, *Korea – Various Measures on Beef*, paras. 782 and 785) Similarly, the panel in *China – Raw Materials* concluded that import and export licences, including those granted only upon meeting a certain prerequisite, may be, but are not necessarily, permissible under Article XI:1 of the GATT 1994. For that panel, the key issue was whether the licensing system is designed and operates such that, by its nature, it does not have a restrictive or limiting effect on importation or exportation. (Panel Reports, *China – Raw Materials*, paras. 7.917 and 7.918)

<sup>639</sup> Argentina's appellant's submission, para. 234.

<sup>640</sup> Panel Reports, para. 6.253.

<sup>641</sup> Panel Reports, paras. 6.252-6.254 (quoting Panel Reports, *India – Autos*, para. 7.270; and *China – Raw Materials*, para. 7.917).

<sup>642</sup> Argentina's appellant's submission, para. 236. As previously described, Argentina proposes that, for an import formality or requirement to be found to constitute an Article XI:1 restriction, in its own right, it must be shown that: (i) the formality or requirement limits the quantity of imports to a material degree that is independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. (Ibid., para. 223)

<sup>643</sup> Argentina's appellant's submission, paras. 224-226 (quoting Panel Reports, *Korea – Various Measures on Beef*, para. 782; and *China – Raw Materials*, para. 7.917).

purposes of Article XI:1 of the GATT 1994, the challenged measures themselves must limit the importation of products, and the limitation caused by other measures should not be attributed to them.<sup>644</sup> Moreover, as noted by Argentina, this proposed approach has some similarity with the one implied in the first sentence of Article 3.2 of the Import Licensing Agreement, which provides that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction."<sup>645</sup> Without necessarily accepting Argentina's suggestion that such an analysis is mandated as the first part of a two-step approach, we observe that, in any event, this analysis is consistent with the understanding of Article XI:1 that we have set out above. As we have explained, Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative. If an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, then such import formality or requirement cannot be said to produce the limiting effect and, thus, it will not amount to a "restriction" captured by the prohibition in Article XI:1.

5.245. The second step in Argentina's proposed analytical framework would require a finding concerning whether any "independent trade-restricting effect" of an import formality or requirement is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. Such an inquiry would, according to Argentina, provide a basis for identifying the point at which an import formality or requirement covered by Article VIII of the GATT 1994 becomes a prohibited "quantitative restriction" under Article XI:1 of the GATT 1994.<sup>646</sup> Argentina neither identifies any textual basis for this proposed analytical step, nor provides any illustration of how this abstract and general legal test might be undertaken in practice. We are not persuaded that this element of Argentina's proposed analytical framework is useful or necessary. Rather, as explained above, we consider that the analysis under Article XI:1 must be done on a case-by-case basis, taking into account the import formality or requirement at issue and the relevant facts of the case. In the context of import formalities or requirements, Article XI:1 requires an examination of whether those measures themselves produce a limiting effect on imports.

5.246. For the reasons set out above, we find that the Panel did not err in its interpretation of Article XI:1 of the GATT 1994 by failing to establish and apply a "proper analytical framework" for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and the scope and disciplines of Article XI:1, on the other hand. Consequently, we reject Argentina's request that we modify the Panel's reasoning in paragraphs 6.435 through 6.445 of the Panel Reports, and that we find that the Panel erred in failing to adopt a two-step analytical framework similar to the one that Argentina proposes.

### **5.3.5 Argentina's claim that the Panel erred in its assessment of the scope of application of Article VIII of the GATT 1994**

5.247. We now turn to Argentina's request that we modify or reverse certain aspects of the Panel's findings in paragraph 6.433 of the Panel Reports.<sup>647</sup> We note that Argentina appeals only the statements in paragraph 6.433 made by the Panel in its discussion of whether the DJAI procedure can be considered an import formality or requirement under Article VIII of the GATT 1994.<sup>648</sup> Argentina does not appeal the Panel's findings with respect to the operation of the DJAI procedure, or the Panel's characterization of the DJAI procedure in the light of the Panel's understanding of the WCO SAFE Framework.<sup>649</sup> Argentina also accepts that the Panel did not make an ultimate finding as to the applicability of Article VIII to the DJAI procedure.<sup>650</sup> Nonetheless, Argentina contends that the statements in paragraph 6.433, in particular that a DJAI in "exit" status is a necessary prerequisite for importation and that the DJAI procedure determines the right

<sup>644</sup> See Panel Reports, *Korea – Various Measures on Beef*, para. 782; and *China – Raw Materials*, paras. 7.917 and 7.918.

<sup>645</sup> Argentina's appellant's submission, para. 241.

<sup>646</sup> Argentina's appellant's submission, para. 205. We note that it is also implicit in the first step of Argentina's proposed analytical framework that, for Argentina, the point at which an import formality or requirement becomes a restriction is when it limits the quantity of imports to a "material degree" that is independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements. (Ibid., para. 223)

<sup>647</sup> Argentina's appellant's submission, para. 219.

<sup>648</sup> Argentina's appellant's submission, paras. 208-210.

<sup>649</sup> Panel Reports, paras. 6.428 and 6.430.

<sup>650</sup> Argentina's appellant's submission, paras. 208, 209, and 218.

to import, reflect legal error.<sup>651</sup> Argentina's challenge focuses on the alleged implications of the statements made in paragraph 6.433 as regards the scope of application of Article VIII. Argentina considers that the Panel's understanding of the scope of Article VIII influenced the Panel's conclusions: (i) regarding the relationship between Articles VIII and XI:1 of the GATT 1994; and (ii) that any import formality or requirement that does not result in the "automatic" importation of goods is necessarily inconsistent with Article XI. Argentina submits that, if left uncorrected, these statements will create confusion and uncertainty concerning the interpretation and application of Article VIII.<sup>652</sup>

5.248. The complainants argue that the Panel did not find that the DJAI procedure falls outside the scope of application of Article VIII of the GATT 1994 simply because it is a prerequisite for importing goods.<sup>653</sup> Rather, according to the complainants, the assertion that the DJAI procedure is a prerequisite for importing goods was just the starting point for the Panel's analysis. The complainants submit that this assertion must be read together with the detailed analysis in paragraphs 6.459 through 6.474 of the Panel Reports, where the Panel found that the DJAI procedure operates as a discretionary system of authorization of imports by which the Argentine authorities decide on an *ad hoc* basis whether to grant the right to import to each applicant on the basis of criteria not specified in advance.<sup>654</sup>

5.249. We recall that, before the Panel, Argentina argued that the DJAI procedure is a customs risk assessment tool and, as such, a formality or requirement imposed in connection with importation subject to Article VIII of the GATT 1994.<sup>655</sup> In addressing Argentina's argument, and after having sought the assistance and expertise of the WCO Secretariat, the Panel expressed the view that certain important elements of the DJAI procedure are not consonant with the type of customs risk assessment tool envisaged under the WCO SAFE Framework.<sup>656</sup> In addition, the Panel briefly examined the scope of application of Article VIII and the meaning of the term "formality". According to the Panel, "[i]n the context of Article VIII ..., a formality can be considered to include all requirements that, although in appearance directed at a mere observance of forms, must be usually observed in connection with the importation or the exportation of goods."<sup>657</sup>

5.250. Thereafter, the Panel made the following statements in paragraph 6.433 of the Panel Reports:

Even if the Panel were to accept that the DJAI procedure is used by AFIP as a "customs risk assessment tool", that is not the only manner in which the DJAI procedure is used. The Panel has noted that a DJAI in exit status is a necessary pre-requisite for importing goods into Argentina. It has also noted that a DJAI application may be subject to "observations" that will prevent the application from proceeding to exit status. In such case, the prospective importer will have to contact the agencies concerned and provide the information that may be required. In some cases, the prospective importer may have to undertake certain trade-related commitments as a condition for the agency to lift the observation and to complete the DJAI procedure. Accordingly, the DJAI procedure is not directed at a mere observance of forms; it is not a mere formality imposed by Argentina in connection with the

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<sup>651</sup> Argentina's appellant's submission, paras. 209-212.

<sup>652</sup> Argentina's appellant's submission, para. 218.

<sup>653</sup> European Union's appellee's submission, para. 174; United States' appellee's submission, para. 57; Japan's appellee's submission, para. 112.

<sup>654</sup> European Union's appellee's submission, paras. 175 and 176; United States' appellee's submission, para. 57; Japan's appellee's submission, paras. 112, 127, and 134.

<sup>655</sup> Argentina's first written submission to the Panel, paras. 191 and 263; Panel Reports, paras. 6.419, 6.425, and 6.427.

<sup>656</sup> In particular, the Panel noted that: (i) the risks that Argentina seeks to prevent – breaches of internal laws and regulations governing domestic economic affairs, public health, and the quality of products – are not directly related to terrorism-related risks; (ii) the type of information requested by Argentina when a DJAI is "observed" is unrelated to information listed in the WCO SAFE Framework; and (iii) the time at which prospective importers are required to submit information, i.e. prior to the issuance of purchase orders, means that such information would not be useful to assess risks pursuant to the WCO SAFE Framework, which suggests that customs should not require information for maritime cargo to be submitted more than 24 hours before loading at port of departure. (See Panel Reports, para. 6.430)

<sup>657</sup> Panel Reports, para. 6.432.

importation of goods. Rather, it is a procedure by which Argentina determines the right to import.<sup>658</sup>

5.251. Argentina challenges this reasoning by the Panel. Argentina takes issue, in particular, with the following two statements: (i) "a DJAI in exit status is a necessary pre-requisite for importing goods into Argentina"; and (ii) "the DJAI procedure ... is not a mere formality imposed by Argentina in connection with the importation of goods ... [r]ather, it is a procedure by which Argentina determines the right to import." Argentina argues that the "clear implication" of these statements, and of paragraph 6.433 of the Panel Reports as a whole, is that "the Panel considered any import procedure that is a 'necessary pre-requisite for importing goods' or by which a Member 'determines the right to import' to be outside the scope of Article VIII" of the GATT 1994.<sup>659</sup> As further evidence that this was the Panel's view, Argentina points to the Panel's contrasting of a procedure "directed at a mere observance of forms" with "a procedure by which Argentina determines the right to import", and its alleged implication that only the former falls within the scope of application of Article VIII.<sup>660</sup>

5.252. Before engaging with these arguments raised by Argentina, we consider it useful to make certain preliminary observations. First, we highlight that certain aspects of Argentina's argumentation seem to rest on assumptions that do not correspond, in fact, to the approach taken by the Panel, as set out in its Reports. In particular, Argentina argues that the DJAI procedure consists exclusively of customs or import formalities. The Panel, however, did not seem to share this view. Indeed, the Panel expressed the view that the DJAI procedure is not a "mere formality" imposed by Argentina in connection with the importation of goods.<sup>661</sup> As explained below, we understand the Panel to have taken the view that, even if certain characteristics of the DJAI procedure correspond to import formalities, other characteristics of the DJAI procedure do not. Yet the Panel did not clearly express a view on either which elements of the DJAI procedure correspond to which types of measures, or whether individual elements of the DJAI procedure could be assessed separately. To some extent, the Panel's reticence to do so may be attributable to the way in which the parties presented their arguments. That is, none of the parties sought to separate and distinguish the different elements composing the DJAI procedure, including any of those possibly relating to import licensing procedures, underlying measures restricting the importation of goods, the discretion granted to certain Argentine agencies, particular formalities or requirements in connection with importation, or the TRRs measure. Rather, the complainants challenged the DJAI procedure as something other than a customs or import formality, and Argentina defended the DJAI procedure as a customs or import formality.<sup>662</sup> Possibly due to this difference in the positions of the parties, the Panel did not clearly outline its understanding of the nature of the DJAI procedure, or its component elements. Indeed, in several places in its Reports, the Panel seems to have structured its analysis so as to avoid doing so.

5.253. For example, when setting out the order of its analysis in respect of the DJAI procedure, the Panel decided to "first consider whether the DJAI is a customs formality imposed in connection with importation subject to Article VIII of the GATT 1994 and, if so, whether Article XI:1 of the GATT 1994 and the Import Licensing Agreement are not applicable".<sup>663</sup> Yet, after assessing the scope of Article VIII, the Panel made no clear ruling in this regard, and instead decided to proceed to examine the DJAI procedure under Article XI:1 of the GATT 1994 "irrespective of whether the DJAI procedure is considered to be a customs or import formality subject to the obligations contained in Article VIII".<sup>664</sup> Subsequently, the Panel declined to opine on whether or not the DJAI

<sup>658</sup> Panel Reports, para. 6.433.

<sup>659</sup> Argentina's appellant's submission, para. 211.

<sup>660</sup> Argentina's appellant's submission, para. 211.

<sup>661</sup> Panel Reports, para. 6.433.

<sup>662</sup> The complainants submit that their claims under Article XI:1 of the GATT 1994 against the DJAI procedure were not concerned with the import formalities or procedural requirements of the DJAI procedure, i.e. whether the DJAI must be submitted electronically or using particular forms. Rather, according to the complainants, their Article XI:1 claims concern the discretionary system of the DJAI procedure. (European Union's appellee's submission, para. 181; United States' appellee's submission, para. 57; Japan's appellee's submission, paras. 112, 127, and 134)

<sup>663</sup> Panel Reports, para. 6.357. With respect to the claims under Article XI:1 of the GATT 1994 and those under the Import Licensing Agreement, the Panel decided to "commence its analysis with the complainants' claims under Article XI:1 ... since this is the only provision among the ones raised by the complainants that deals with trade measures of a substantive nature". (Ibid., para. 6.361)

<sup>664</sup> Panel Reports, para. 6.444.

procedure is an import licensing procedure, and proceeded to assess the consistency of the DJAI procedure with Article XI:1 "irrespective of whether it constitutes an import licence".<sup>665</sup> That the Panel took such an approach did not, in our view, contribute either to the clarity of its reasoning, or to a clear understanding of the relationship between different obligations under the GATT 1994 and the Import Licensing Agreement.<sup>666</sup> Nevertheless, no party has challenged the Panel's approach on appeal.

5.254. Returning, therefore, to Argentina's arguments on appeal, we turn to examine the implications that, according to Argentina, arise from the reasoning of the Panel in paragraph 6.433 of the Panel Reports. First, we examine whether this paragraph implies something about "any import procedures". Second, we examine whether this paragraph implies that an import procedure that is a "necessary pre-requisite for importing goods" is outside the scope of Article VIII of the GATT 1994. Finally, we consider whether an "import procedure by which a Member determines the right to import" is outside the scope of Article VIII.

5.255. It is clear to us that paragraph 6.433 of the Panel Reports is concerned solely with the DJAI procedure. In other words, the Panel did not set out, in this paragraph, general principles or legal tests to be applied to import measures generally. All but two sentences in this paragraph refer explicitly to the DJAI or the DJAI procedure. The fourth sentence in paragraph 6.433 provides: "In such case, the prospective importer will have to contact the agencies concerned and provide the information that may be required." "[S]uch case" is explained by the previous sentence: a DJAI application which contains an "observation". Thus, in substance, the fourth sentence also refers to the DJAI procedure. The last sentence in paragraph 6.433 provides: "Rather, it is a procedure by which Argentina determines the right to import." The subject of this sentence – i.e. "it" – is identified by the previous sentence: the DJAI procedure. Once more, it is clear that this sentence refers, in substance, to the DJAI procedure.

5.256. We now examine whether paragraph 6.433 of the Panel Reports implies that an import procedure that is a necessary pre-requisite for importing goods is outside the scope of Article VIII of the GATT 1994. The second sentence in paragraph 6.433 provides: "The Panel has noted that a DJAI in exit status is a necessary pre-requisite for importing goods into Argentina." In our view, the Panel refers here to its earlier examination of the DJAI procedure, where it concluded that an importer must attain a DJAI in "exit" status to import goods into Argentina.<sup>667</sup> We see nothing in paragraph 6.433 suggesting that import procedures that are a necessary pre-requisite for the importation of goods are excluded from the scope of Article VIII.

5.257. In addition, the immediately preceding paragraph of the Panel Reports contradicts Argentina's view that paragraph 6.433 of the Panel Reports implies that import procedures that are a necessary pre-requisite for the importation of goods are excluded from the scope of Article VIII of the GATT 1994. We note that, in paragraph 6.432 of the Panel Reports, the Panel examined the meaning of "formality" in the context of Article VIII, and concluded that "a formality can be considered to include all requirements that, although in appearance directed at a mere observance of forms, must be usually observed in connection with the importation of the exportation of goods." In our view, "requirements" that "must be usually observed" in connection with the importation of goods can be said to include procedures that are a necessary pre-requisite

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<sup>665</sup> Panel Reports, para. 6.479.

<sup>666</sup> Similarly to these disputes, the complainants in *EC – Bananas* made claims under provisions of the GATT 1994 and the Import Licensing Agreement. In that case, the Appellate Body considered that a panel should apply first the agreement that "deals specifically, and in detail," with the matter at issue. (Appellate Body Report, *EC – Bananas III*, para. 204) As the Panel's decision to start its examination with the claims under Article XI:1 is not appealed, we neither endorse nor reject the Panel's approach in this regard. (See Panel Reports, paras. 6.358-6.361 and 6.448) In addition, we recall that the Panel examined the consistency of the DJAI procedure with Article XI:1 of the GATT 1994, irrespective of whether the DJAI procedure constitutes an import licensing procedure, and subsequently refrained from making any findings under the Import Licensing Agreement. (Ibid., paras. 6.479, 6.505, 6.511, 6.517, 6.523, 6.529, 6.535, 6.540, and 6.543) As the Panel's approach, in this regard, is not appealed, we neither endorse nor reject it. Moreover, since the Panel made no finding as to the consistency of the DJAI procedure with the Import Licensing Agreement, we do not opine on the general relationship between the GATT 1994 and the Import Licensing Agreement.

<sup>667</sup> Panel Reports, paras. 6.364 and 6.407-6.409.



for the importation of goods.<sup>668</sup> Thus, to the extent that paragraph 6.433 implies something about import procedures in general, when this paragraph is read together with paragraph 6.432, it implies that the Panel considered that import procedures that are a necessary pre-requisite for the importation of goods fall within the scope of application of Article VIII.

5.258. Finally, we examine whether paragraph 6.433 of the Panel Reports implies that an import procedure by which a Member determines the right to import is outside the scope of Article VIII of the GATT 1994. At the end of paragraph 6.433, the Panel concluded that "the DJAI procedure is not directed at a mere observance of forms; it is not a mere formality imposed by Argentina in connection with the importation of goods ... [r]ather, it is a procedure by which Argentina determines the right to import." In our view, these sentences may imply that procedures by which a Member determines the right to import are not mere formalities in connection with importation within the meaning of Article VIII. Ultimately, however, this implication does not support Argentina's claim of error.

5.259. In our view, a statement that a procedure is not a *mere* formality does not necessarily imply that such procedure is *not* a formality. While this may be one way of understanding the statement, the use of the word "mere" seems to us to suggest, instead, that such procedure is something more than a formality – i.e. that it goes beyond a formality. Understanding the Panel's statement in this way is, moreover, entirely consistent with the approach and reasoning of the Panel as set out in the paragraphs that precede and follow paragraph 6.433 of the Panel Reports. In the context of the DJAI procedure, the Panel's statement suggests that, while it did not exclude that certain elements of the DJAI procedure constitute formalities, it considered that other elements of the DJAI procedure go beyond import formalities. As noted above, moreover, the parties never sought to separate and distinguish the different elements composing the DJAI procedure.

5.260. In addition, we note that paragraph 6.434 of the Panel Reports starts with the phrase "[e]ven assuming *ad arguendo* that the DJAI procedure is a customs or import formality, subject to Article VIII of the GATT 1994". As from this point, the Panel conducted its analysis on the basis of an assumption that the DJAI procedure falls within the scope of Article VIII. Thus, the Panel cannot be understood to have implied that the DJAI procedure falls outside the scope of Article VIII of the GATT 1994.<sup>669</sup>

5.261. As a final matter, we recall Argentina's concern that the Panel's understanding of the scope of Article VIII of the GATT 1994 influenced the Panel's conclusions: (i) regarding the relationship between Articles VIII and XI:1 of the GATT 1994; and (ii) that any import formality or requirement that does not result in the "automatic" importation of goods is necessarily inconsistent with Article XI.

5.262. We are not persuaded that any possible implication from paragraph 6.433 of the Panel Reports, as explained above, influenced the Panel's conclusion regarding the relationship between Articles VIII and XI:1 of the GATT 1994. We recall that the Panel considered that the obligations contained in Articles VIII and XI:1 apply harmoniously and cumulatively, rather than on a mutually exclusive basis.<sup>670</sup> The Panel concluded that the consistency of an import or customs formality or requirement could be assessed under either Article VIII or Article XI:1, or under both provisions.<sup>671</sup> Thus, the question of whether or not paragraph 6.433 implies that certain elements of an import procedure by which a Member determines the right to import fall outside the scope of application of Article VIII becomes less relevant. Given that the obligations in Articles VIII and XI:1 apply cumulatively, such import procedure, or at least certain of its elements, may well be subject to both provisions.

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<sup>668</sup> Emphasis added. We do not consider that the use of the term "usually" in the definition provided by the Panel detracts from this conclusion. Although the Panel did not explain why it included the term "usually" in the dictionary meaning of the word "formality", we understand it intended to mean "typically" or "generally". In any event, we consider that a "requirement" already implies something that is required or necessary, and thus must be observed.

<sup>669</sup> We also recall that, as Argentina accepts, the Panel did not make an ultimate finding as to the applicability of Article VIII of the GATT 1994 to the DJAI procedure. (See Argentina's appellant's submission, paras. 208, 209, and 218)

<sup>670</sup> Panel Reports, para. 6.438.

<sup>671</sup> Panel Reports, para. 6.443.

5.263. We are equally unpersuaded by Argentina's final assertion that the implications from paragraph 6.433 of the Panel Reports influenced the Panel's alleged conclusion "that any import formality or requirement that does not result in the 'automatic' importation of goods is necessarily inconsistent with Article XI."<sup>672</sup> This is particularly because, as explained in more detail in the following subsection, we do not find error in the Panel's reference to the obtaining of a DJAI in "exit" status as being not "automatic". Thus, we need not further consider this argument of Argentina here.

5.264. For the reasons set out above, we disagree with Argentina's understanding of the implications of paragraph 6.433 of the Panel Reports. Thus, we reject Argentina's request that we modify or reverse the Panel's findings in paragraph 6.433.

### 5.3.6 Application of Article XI:1 of the GATT 1994

5.265. Having addressed Argentina's claims that the Panel erred in its interpretation of Article XI:1 of the GATT 1994, and in its assessment of the scope of Article VIII of the GATT 1994, we now direct our attention to Argentina's claim that the Panel erred in its application of the legal standard under Article XI:1 to the DJAI procedure. We first summarize the Panel's findings in connection with the application of Article XI:1 of the GATT 1994, and we then examine Argentina's claim that the Panel erred in concluding that, because the approval of a DJAI is not "automatic", the DJAI procedure is inconsistent with Article XI:1.

#### 5.3.6.1 The Panel's findings in connection with the application of Article XI:1 of the GATT 1994 to the DJAI procedure

5.266. The Panel first recalled certain elements of Article XI:1 of the GATT 1994, and noted that measures that had been found, in prior disputes, to constitute "restrictions" prohibited under this provision include measures that, *inter alia*: (i) limited market access for imports<sup>673</sup>; (ii) created uncertainties<sup>674</sup>; (iii) conditioned the right to import on trade balancing requirements<sup>675</sup>; and (iv) made importation prohibitively costly.<sup>676</sup> The Panel then stated that it would examine the DJAI procedure in the light of the legal background that it had identified.<sup>677</sup> In doing so, the Panel seems to have structured its analysis in parallel with the four above-mentioned types of restrictions.

5.267. First, the Panel considered whether the DJAI procedure limits the access of imports into the Argentine market. The Panel noted that a DJAI will attain "exit" status if either: (i) no Argentine agency enters an observation within a certain time period; or (ii) the relevant agency has lifted any observation entered into a DJAI after the prospective importer provided the information or took any other action requested by the agency. The Panel concluded:

Accordingly, on its face the DJAI procedure affects the opportunities for the importation of goods into Argentina. The requirement to obtain a DJAI in exit status is a necessary condition to import goods into Argentina in most cases. The attainment of such status is not automatic. This results in a restriction on the access of imports into the Argentine market.<sup>678</sup>

5.268. Second, the Panel evaluated whether the DJAI procedure created uncertainty for an applicant's ability to import. The Panel noted that the relevant Argentine legislation does not identify all the agencies that may intervene in the DJAI procedure, the complete list of information that must be provided or may be required, or the specific criteria on which the agencies may enter

<sup>672</sup> Argentina's appellant's submission, para. 218.

<sup>673</sup> Panel Reports, fn 903 to para. 6.454 (referring to GATT Panel Reports, *Canada – Provincial Liquor Boards (EEC)*, paras. 4.24 and 4.25; *Canada – Provincial Liquor Boards (US)*, para. 5.6; and *EEC – Minimum Import Prices*, para. 4.9).

<sup>674</sup> Panel Reports, fn 904 to para. 6.454 (referring to Panel Reports, *China – Raw Materials*, paras. 7.948 and 7.957).

<sup>675</sup> Panel Reports, fn 906 to para. 6.454 (referring to Panel Report, *India – Autos*, para. 7.277).

<sup>676</sup> Panel Reports, fn 905 to para. 6.454 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.370-7.372).

<sup>677</sup> Panel Reports, para. 6.459.

<sup>678</sup> Panel Reports, para. 6.461. (fn omitted)

and lift observations.<sup>679</sup> The Panel considered that the broad discretion that participating agencies have to enter and lift observations, coupled with the lack of clarity as to the agencies participating and the fact that a DJAI in "exit" status is a necessary condition to import goods, creates uncertainty as to the applicant's ability to import goods into Argentina and has a limiting effect on the importation of goods.<sup>680</sup>

5.269. Third, the Panel considered the role of the SCI in the DJAI procedure and the requirements that it imposes on importers as a condition to lift observations. The Panel noted that the SCI often requires prospective importers to submit documents that are unrelated to the importation and, in certain cases, to commit to increase exports as a condition to lifting its observations.<sup>681</sup> The Panel noted that the export commitment required by the SCI has two effects: (i) it makes the declarants' right to import conditional upon their commitment to increase their exports; and (ii) it limits the value of goods that can be imported to the value of their exports. In the Panel's view, the export commitment creates an additional restriction on importation, as importers are not free to import as much as they desire without regard to their export performance.<sup>682</sup>

5.270. Lastly, the Panel examined whether the DJAI procedure increases transaction costs for importers. The Panel considered that the export commitment required by the SCI imposes a significant burden on importers that is unrelated to their normal importing activity. This, in turn, results in higher import costs, making importation "prohibitively costly", thus restricting importation.<sup>683</sup>

5.271. On the basis of the above, the Panel stated, in paragraph 6.474 of its Reports:

In sum, the Panel finds that the DJAI procedure has a limiting effect on imports, and thus constitutes an import restriction, because it: (a) restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic; (b) creates uncertainty as to an applicant's ability to import; (c) does not allow companies to import as much as they desire or need without regard to their export performance; and, (d) imposes a significant burden on importers that is unrelated to their normal importing activity.

### **5.3.6.2 Argentina's claim that the Panel erred in its application of Article XI:1 of the GATT 1994 to the DJAI procedure**

5.272. Argentina claims that the Panel erred in finding that, because the attainment of a DJAI in "exit" status is not "automatic", the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994. Argentina seeks reversal of this specific basis for the Panel's finding in paragraph 6.474 of the Panel Reports. Argentina also requests us to reverse the Panel's ultimate finding that the DJAI procedure is inconsistent with Article XI:1.<sup>684</sup>

5.273. We again note the limited scope of this claim of error by Argentina. Argentina takes issue only with the part of the Panel's reasoning leading to its intermediate finding that the DJAI procedure is not "automatic". Argentina does not appeal the Panel's decision to start its examination with the claims under Article XI:1 of the GATT 1994 instead of those under the Import Licensing Agreement.<sup>685</sup> Argentina also does not appeal the Panel's findings with respect to the description and operation of the DJAI procedure within Argentina's legal framework. Finally, Argentina does not question the remaining three intermediate findings – i.e. regarding uncertainty,

<sup>679</sup> Panel Reports, paras. 6.462-6.466.

<sup>680</sup> Panel Reports, paras. 6.467 and 6.469. The Panel also explicitly linked the uncertainty associated with the DJAI procedure to the uncertainty that characterized the process for the review of export licence restrictions in *China – Raw Materials*, as both create uncertainty by conditioning an applicant's ability to either export or import upon compliance with an unidentified number of requirements. (Ibid., para. 6.468)

<sup>681</sup> Panel Reports, paras. 6.470-6.472.

<sup>682</sup> Panel Reports, para. 6.472.

<sup>683</sup> Panel Reports, para. 6.473.

<sup>684</sup> Argentina's appellant's submission, paras. 239, 242, and 243.3. With respect to the Panel's ultimate finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994, Argentina refers to paragraph 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report.

<sup>685</sup> We note that none of the participants has appealed or called into question the Panel's exercise of judicial economy with respect to the claims against the DJAI procedure under the Import Licensing Agreement.

export commitments, and making importation prohibitively costly – made by the Panel and relied upon in support of its ultimate finding of inconsistency with Article XI:1.<sup>686</sup>

5.274. Argentina argues that "in the context of the Panel's overall analysis ... it appears to have been the Panel's conclusion that any import formality or requirement that is 'a necessary condition to import goods' and that is not 'automatically' obtained is, necessarily, a prohibited 'quantitative restriction' under Article XI:1."<sup>687</sup> For Argentina, even assuming that an evaluation of import formalities or requirements under Article XI:1 is possible, it cannot be the case that an import formality or requirement is an Article XI:1 restriction merely because it is not "automatic".<sup>688</sup> Argentina contends that this conclusion is supported by the context provided by the Import Licensing Agreement. Argentina refers, in particular, to Article 3.2 of the Import Licensing Agreement, which, according to Argentina, distinguishes between the potential trade-restricting effects of a licensing procedure and those of the underlying rule of importation that the procedure implements. Argentina argues that to interpret Article XI:1 of the GATT 1994 as prohibiting non-automatic import licensing procedures *per se* would conflict with Article 3.2 of the Import Licensing Agreement. In Argentina's view, this conflict is avoided by recognizing that an import procedure is not an Article XI:1 restriction merely because it is not "automatic".<sup>689</sup>

5.275. The complainants contend that the Panel considered that the approval of DJAIs is not "automatic" in the sense that the DJAI procedure is a highly discretionary and non-transparent procedure whereby, even if an importer complies with all formal DJAI requirements, Argentine authorities are free to deny the application on unspecified grounds.<sup>690</sup> The United States recalls that the Panel found that Argentine authorities have discretion to grant or deny DJAIs for undisclosed reasons and on grounds that are unrelated to the information that importers are required to provide in their DJAIs.<sup>691</sup> The European Union adds that it is undisputed that the non-approval of a DJAI may have a limiting effect on imports.<sup>692</sup> Finally, the complainants argue that Argentina's reliance on the Import Licensing Agreement is misplaced because there is no conflict between Article XI:1 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement.<sup>693</sup> In the United States' view, Argentina's reliance on Article 3.2 of the Import Licensing Agreement is misplaced because that provision anticipates that there is a separate, WTO-consistent restriction imposed through licensing procedures, whereas, in these disputes, the DJAI procedure is itself a trade restriction.<sup>694</sup>

5.276. We do not see that the Panel's use of the term "automatic" in connection with the DJAI procedure carries the import or significance that Argentina seeks to attribute to it. As acknowledged by Argentina<sup>695</sup>, the Panel did not elaborate on what it meant by "automatic" when it stated that the attainment of a DJAI in "exit" status is not "automatic".<sup>696</sup> Nonetheless, Argentina argues that the Panel's finding suggests that "any import formality or requirement that is 'a necessary condition to import goods' and that is not 'automatically' obtained is, necessarily, a prohibited 'quantitative restriction' under Article XI:1."<sup>697</sup> For Argentina, the Panel's finding, if left undisturbed, would have significant repercussions because it would mean that a formality or requirement – including those related to non-automatic import licensing procedures regulated under Article 3.2 of the Import Licensing Agreement – would be inconsistent with Article XI:1 of the GATT 1994 merely because it is not "automatic".<sup>698</sup> In Argentina's view, this cannot be the

<sup>686</sup> In this regard, see United States' appellee's submission, paras. 52 and 53; and Japan's appellee's submission, para. 129.

<sup>687</sup> Argentina's appellant's submission, para. 238.

<sup>688</sup> Argentina's appellant's submission, para. 239.

<sup>689</sup> Argentina's appellant's submission, para. 241.

<sup>690</sup> European Union's appellee's submission, paras. 201 and 203; United States' appellee's submission, paras. 93-97; Japan's appellee's submission, paras. 127, 130, and 131.

<sup>691</sup> United States' appellee's submission, para. 96 (quoting Panel Reports, para. 6.466).

<sup>692</sup> European Union's appellee's submission, para. 202.

<sup>693</sup> European Union's appellee's submission, para. 205; United States' appellee's submission, paras. 103 and 106; Japan's appellee's submission, para. 132.

<sup>694</sup> United States' appellee's submission, paras. 103 and 106.

<sup>695</sup> Argentina's appellant's submission, para. 238.

<sup>696</sup> Panel Reports, para. 6.461.

<sup>697</sup> Argentina's appellant's submission, para. 238.

<sup>698</sup> Argentina's appellant's submission, paras. 239 and 241.

case.<sup>699</sup> Moreover, the Panel's finding directly conflicts with Article 3.2 of the Import Licensing Agreement.<sup>700</sup>

5.277. Argentina appears to understand the term "automatic" in the same sense as that word is used in connection with import licensing procedures in the Import Licensing Agreement. In our view, however, the Panel's finding that the attainment of a DJAI in "exit" status is not "automatic" does not, and was not intended to, refer to the definition of "automaticity" in Article 2 of the Import Licensing Agreement.

5.278. We recall that the Panel made no findings as to whether the DJAI procedure qualifies as an "import licensing procedure" within the meaning of the Import Licensing Agreement. In fact, the Panel concluded that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 "irrespective of whether it constitutes an import licence".<sup>701</sup> Given this finding of inconsistency, the Panel subsequently refrained from making any findings with respect to the complainants' claims under the provisions of the Import Licensing Agreement, including those under Articles 3.2 and 3.5(f) thereof.<sup>702</sup>

5.279. As explained above, none of the parties sought to separate and distinguish the different elements that compose the DJAI procedure, including any of those possibly relating to import licensing procedures. Even though aspects of the DJAI procedure may resemble an import licensing procedure<sup>703</sup>, it was not these characteristics of the DJAI procedure that were the target of the complainants' claims<sup>704</sup> under Article XI:1 of the GATT 1994. Rather, the main focus of their claims was the discretionary elements involved in the entering and lifting of observations.<sup>705</sup> Moreover, as further explained below, the Panel's finding that the attainment of a DJAI in "exit" status is not "automatic" did not address the features of the DJAI procedure that arguably resemble import licensing procedures within the meaning of Article 1.1 of the Import Licensing Agreement.

5.280. We note that one of the dictionary definitions of "automatic" is "[o]ccurring as a necessary consequence; ... taking effect without further process in set circumstances".<sup>706</sup> The Panel's reasoning leading up to its statement that the attainment of a DJAI in "exit" status is not "automatic" seems consistent with this meaning of "automatic". We also note that the Panel identified the specific features of the operation of the DJAI procedure that are responsible for the fact that attaining "exit" status is not a "necessary consequence" of initiating the DJAI procedure.

5.281. When the relevant passage in paragraph 6.461 of the Panel Reports is read in the light of the preceding and subsequent paragraphs, the meaning of the term "not 'automatic'", as intended

<sup>699</sup> Argentina contends that many types of import formalities and requirements involve some amount of delay so that relevant authorities may determine conformity with domestic legislation. (Argentina's appellant's submission, para. 239)

<sup>700</sup> Argentina's appellant's submission, para. 241.

<sup>701</sup> Panel Reports, para. 6.479.

<sup>702</sup> Panel Reports, paras. 6.505, 6.511, 6.517, 6.523, 6.529, 6.535, 6.540, and 6.543.

<sup>703</sup> Article 1.1 of the Import Licensing Agreement provides: "For the purpose of this Agreement, import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member." (fn omitted)

<sup>704</sup> Before the Panel, with respect to their claims under the Import Licensing Agreement, the complainants argued that the DJAI procedure is an import licensing procedure within the meaning of Article 1.1 of the Import Licensing Agreement. The European Union contended that "the DJAI system is an import licensing system, because it is a set of administrative procedures which involves the submission of an application and other documentation, other than those required for customs purposes, as a prior condition for importation into Argentina." (European Union's first written submission to the Panel, para. 281) Similarly, the United States argued that the DJAI procedure requires an importer to submit an electronic application, and obtain an approval by relevant Argentine agencies, as a prior condition for import, and that the DJAI procedure is not required for customs purposes. (United States' first written submission to the Panel, paras. 124 and 125) Japan argued that the DJAI procedure requires the submission of an application, other than that required for customs purposes, as prior condition for importation. (Japan's first written submission to the Panel, paras. 163 and 166)

<sup>705</sup> European Union's appellee's submission, para. 181; United States' appellee's submission, para. 57; Japan's appellee's submission, paras. 112 and 127.

<sup>706</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 157.

by the Panel, becomes clear. In paragraph 6.460 of its Reports, the Panel explained that a DJAI in "exit" status is necessary for clearing customs. In addition, the Panel stated:

A DJAI will attain exit status if either: (a) no agency of the Argentine Government enters an observation within the prescribed time period; or, (b) when an agency has entered an observation on a DJAI, the observation is lifted by the agency concerned following information provided by and/or action taken by the declarant or prospective importer.<sup>707</sup>

5.282. In paragraphs 6.462 through 6.469 of the Panel Reports, the Panel examined the discretionary nature of the DJAI procedure. After examining Argentina's statements and legal framework relating to the conditions that importers must fulfil to have observations lifted, the Panel stated:

These statements imply that (a) the information or documents to be provided to secure a DJAI in exit status depend on shortcomings detected by the relevant agency in a particular case which may be unrelated to the information requested from the declarant when filing a DJAI application; and (b) the discretion granted to participating agencies to *lift* observations is as broad as that accorded on them to *enter* observations.<sup>708</sup>

5.283. The Panel also explained that the discretion to enter and lift observations creates uncertainty for importers of goods. These importers are unable to anticipate the agencies that may intervene in the specific DJAI procedure, the requirements that should be met, or the complete list of documents that must be provided to attain a DJAI in "exit" status and, hence, to secure their right to import.<sup>709</sup> On this basis, the Panel concluded:

[T]he fact that a DJAI in exit status is a necessary condition to import goods, coupled with the lack of clarity as to who the participating agencies are and the absence of specific criteria that they can apply to exercise their discretion has a limiting effect on the importation of goods. Participating agencies have a broad discretion to enter and lift observations on a DJAI, which may result in an interruption of the DJAI procedure.<sup>710</sup>

5.284. Thus, in our view, the Panel's reference, in paragraph 6.461 of the Panel Reports, to the attainment of a DJAI in "exit" status as being not "automatic" is a reference both to the direct connection between the DJAI procedure and the right to import, and to the discretionary control exercised by Argentine agencies in deciding when and subject to what conditions "exit" status can be attained.<sup>711</sup>

5.285. Accordingly, we accept neither Argentina's understanding of what the Panel meant in using the word "automatic" in paragraph 6.461 of the Panel Reports, nor the implication that Argentina draws from the Panel's statements to the effect that attaining a DJAI in "exit" status is not "automatic". We are, therefore, not persuaded that the Panel committed reversible error in this part of its reasoning or in reaching this intermediate finding. Moreover, Argentina has not

<sup>707</sup> Panel Reports, para. 6.460.

<sup>708</sup> Panel Reports, para. 6.466. (emphasis original)

<sup>709</sup> Panel Reports, para. 6.467.

<sup>710</sup> Panel Reports, para. 6.469.

<sup>711</sup> We also disagree with Argentina's suggestion that the Panel's interpretation of Article XI:1 of the GATT 1994 implies a conflict with Article 3.2 of the Import Licensing Agreement. (Argentina's appellant's submission, paras. 240 and 241) We recall that the Panel took the view that the term "restriction" in Article XI:1 is defined as a limiting condition that has restrictive effects on importation. (Panel Reports, paras. 6.251, 6.254, and 6.452 (referring to Appellate Body Reports, *China – Raw Materials*, para. 319; and Panel Reports, *India – Quantitative Restrictions*, paras. 5.128 and 5.129; and *India – Autos*, paras. 7.265, 7.269, and 7.270)) Article 3.2 of the Import Licensing Agreement provides that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports *additional* to those caused by the imposition of the restriction." (emphasis added) If, consistent with the first sentence of Article 3.2 of the Import Licensing Agreement, a non-automatic licensing procedure itself has no trade-restrictive effects on imports, this would appear to support – rather than conflict with – a conclusion that such non-automatic licensing procedure has no restrictive effects on importation. This conclusion, however, can only be made on a case-by-case basis in the light of all relevant facts.

challenged the remaining elements relied upon by the Panel in support of its ultimate finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994. Thus, Argentina has not established that the Panel erred in finding that the DJAI procedure has limiting effects on imports, or in characterizing it as an import restriction within the meaning of Article XI:1.

5.286. For the reasons set out above, we disagree with Argentina's understanding of the Panel's use of the term "automatic" in paragraph 6.461 of the Panel Reports. Instead, we find that the Panel did not err in considering that the fact that attaining "exit" status – and thus the right to import – is not "automatic" under the DJAI procedure is an element supporting its finding that the DJAI procedure constitutes an import restriction. Accordingly, we reject Argentina's request that we reverse the Panel's finding, in paragraph 6.474 of the Panel Reports, that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because the DJAI procedure "restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic".

### **5.3.7 Overall conclusions on the DJAI procedure**

5.287. In the light of all of the above, we find that the Panel did not err in failing to adopt a two-step analytical framework similar to the one that Argentina proposes for interpreting Article XI:1 of the GATT 1994. In addition, we disagree with Argentina's understanding of the implications of paragraph 6.433 of the Panel Reports as regards the scope of application of Article VIII of the GATT 1994. Finally, we also disagree with Argentina's understanding of the Panel's use of the term "automatic" in paragraph 6.461 of the Panel Reports. Accordingly, we find that Argentina has not established that the Panel erred in its interpretation of Article XI:1, or Article VIII, of the GATT 1994, or in its application of Article XI:1 to the DJAI procedure.

5.288. For the above reasons, we uphold the Panel's finding, in paragraph 6.479 of the Panel Reports, paragraph 7.2.a of the EU Panel Report, paragraph 7.6.a of the US Panel Report, and paragraph 7.10.a of the Japan Panel Report, that the DJAI procedure "constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994".

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS438

6.1. In the appeal of the Panel Report, *Argentina – Measures Affecting the Importation of Goods* (WT/DS438/R) (EU Panel Report), for the reasons set out in section 5.1 of this Report, with respect to the Panel's terms of reference, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.1.b that "[t]he characterization of the [TRRs] as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute"<sup>1</sup>; and, consequently, finds that the TRRs measure was within the Panel's terms of reference; and
- b. with respect to the Panel's finding regarding the 23 specific instances of application of the TRRs identified in section 4.2.4 of the European Union's first written submission:
  - i. reverses the Panel's finding in paragraph 7.1.c that these 23 specific instances of application of the TRRs were not precisely identified in the EU Panel Request as measures at issue, and thus do not constitute measures at issue in this dispute<sup>2</sup>;
  - ii. finds, instead, that the EU Panel Request identified the 23 specific instances of application of the TRRs as "specific measures at issue" in conformity with Article 6.2 of the DSU, and that these measures are, therefore, within the Panel's terms of reference; and
  - iii. finds it unnecessary to rule on the European Union's request for completion of the analysis with respect to the 23 specific instances of application of the TRRs as measures at issue, as the conditions on which such request is premised are not met.

6.2. For the reasons set out in section 5.2 of this Report, with respect to the TRRs measure, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.1.d that "[t]he Argentine authorities' imposition on economic operators of one or more of the five trade-related requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina"<sup>3</sup>; and, as a consequence,
- b. upholds the Panel's finding in paragraph 7.1.e that "[t]he TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994"<sup>4</sup>; and also
- c. upholds the Panel's finding in paragraph 7.1.f that "[t]he TRRs measure, with respect to its local content requirement" is inconsistent with Article III:4 of the GATT 1994 because it "modifies the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products".<sup>5</sup>

6.3. For the reasons set out in section 5.3 of this Report, with respect to the DJAI procedure, the Appellate Body:

- a. finds that Argentina has not established that the Panel erred in its interpretation of Article XI:1, or Article VIII, of the GATT 1994;
- b. finds that Argentina has not established that the Panel erred in its application of Article XI:1 of the GATT 1994 to the DJAI procedure; and, as a consequence,

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<sup>1</sup> See also Panel Reports, para. 6.14; and First Preliminary Ruling, para. 4.1.b.

<sup>2</sup> See also Panel Reports, para. 6.14; and Second Preliminary Ruling, para. 5.1.b.

<sup>3</sup> See also Panel Reports, para. 6.231.

<sup>4</sup> See also Panel Reports, para. 6.265.

<sup>5</sup> See also Panel Reports, para. 6.295.



- c. upholds the Panel's finding in paragraph 7.2.a that the DJAI procedure "constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994".<sup>6</sup>

6.4. The Appellate Body recommends that the DSB request Argentina to bring its measures found in this Report, and in the EU Panel Report as modified by this Report, to be inconsistent with the GATT 1994 into conformity with that Agreement.

Signed in the original in Geneva this 12th day of December 2014 by:



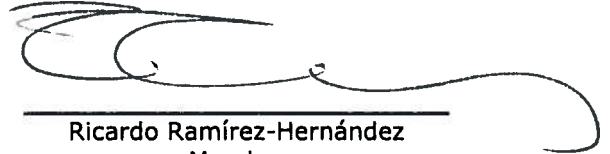
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Seung Wha Chang  
Presiding Member



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Ujal Singh Bhatia  
Member



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Ricardo Ramírez-Hernández  
Member

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<sup>6</sup> See also Panel Reports, para. 6.479.

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS444

6.1. In the appeal of the Panel Report, *Argentina – Measures Affecting the Importation of Goods* (WT/DS444/R) (US Panel Report), for the reasons set out in section 5.1.1 of this Report, with respect to the Panel's terms of reference, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.5.b that "[t]he characterization of the [TRRs] as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute"<sup>1</sup>; and, consequently, finds that the TRRs measure was within the Panel's terms of reference.

6.2. For the reasons set out in section 5.2 of this Report, with respect to the TRRs measure, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.5.c that "[t]he Argentine authorities' imposition on economic operators of one or more of the five trade-related requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina"<sup>2</sup>; and, as a consequence,
- b. upholds the Panel's finding in paragraph 7.5.d that "[t]he TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994".<sup>3</sup>

6.3. For the reasons set out in section 5.3 of this Report, with respect to the DJAI procedure, the Appellate Body:

- a. finds that Argentina has not established that the Panel erred in its interpretation of Article XI:1, or Article VIII, of the GATT 1994;
- b. finds that Argentina has not established that the Panel erred in its application of Article XI:1 of the GATT 1994 to the DJAI procedure; and, as a consequence,
- c. upholds the Panel's finding in paragraph 7.6.a that the DJAI procedure "constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994".<sup>4</sup>

6.4. The Appellate Body recommends that the DSB request Argentina to bring its measures found in this Report, and in the US Panel Report as upheld by this Report, to be inconsistent with the GATT 1994 into conformity with that Agreement.

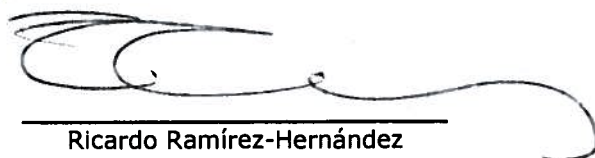
Signed in the original in Geneva this 12th day of December 2014 by:



Seung Wha Chang  
Presiding Member



Ujal Singh Bhatia  
Member



Ricardo Ramírez-Hernández  
Member

<sup>1</sup> See also Panel Reports, para. 6.14; and First Preliminary Ruling, para. 4.1.b.

<sup>2</sup> See also Panel Reports, para. 6.231.

<sup>3</sup> See also Panel Reports, para. 6.265.

<sup>4</sup> See also Panel Reports, para. 6.479.

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS445

6.1. In the appeal of the Panel Report, *Argentina – Measures Affecting the Importation of Goods* (WT/DS445/R) (Japan Panel Report), for the reasons set out in section 5.1.1 of this Report, with respect to the Panel's terms of reference, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.9.b that "[t]he characterization of the [TRRs] as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute"<sup>1</sup>; and, consequently, finds that the TRRs measure was within the Panel's terms of reference.

6.2. For the reasons set out in section 5.2 of this Report, with respect to the TRRs measure, the Appellate Body:

- a. upholds the Panel's finding in paragraph 7.9.d that "[t]he Argentine authorities' imposition on economic operators of one or more of the five trade-related requirements identified by the complainants as a condition to import or to obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina"<sup>2</sup>; and, as a consequence,
- b. upholds the Panel's finding in paragraph 7.9.e that "[t]he TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994"<sup>3</sup>; and also
- c. upholds the Panel's finding in paragraph 7.9.f that "[t]he TRRs measure, with respect to its local content requirement" is inconsistent with Article III:4 of the GATT 1994 because it "modifies the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products"<sup>4</sup>;
- d. finds that Argentina has not established that, in assessing Japan's "as such" claims, the Panel acted inconsistently with Article 11 of the DSU; and
- e. finds that Japan has not established that the Panel erred, in paragraph 7.9.g of the Japan Panel Report<sup>5</sup>, in exercising judicial economy on Japan's claim that the TRRs measure is inconsistent with Article X:1 of the GATT 1994.

6.3. For the reasons set out in section 5.3 of this Report, with respect to the DJAI procedure, the Appellate Body:

- a. finds that Argentina has not established that the Panel erred in its interpretation of Article XI:1, or Article VIII, of the GATT 1994;
- b. finds that Argentina has not established that the Panel erred in its application of Article XI:1 of the GATT 1994 to the DJAI procedure; and, as a consequence,
- c. upholds the Panel's finding in paragraph 7.10.a that the DJAI procedure "constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994".<sup>6</sup>

6.4. The Appellate Body recommends that the DSB request Argentina to bring its measures found in this Report, and in the Japan Panel Report as upheld by this Report, to be inconsistent with the GATT 1994 into conformity with that Agreement.

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<sup>1</sup> See also Panel Reports, para. 6.14; and First Preliminary Ruling, para. 4.1.b.

<sup>2</sup> See also Panel Reports, para. 6.231.

<sup>3</sup> See also Panel Reports, para. 6.265.

<sup>4</sup> See also Panel Reports, para. 6.295.

<sup>5</sup> See also Panel Reports, para. 6.305.

<sup>6</sup> See also Panel Reports, para. 6.479.

Signed in the original in Geneva this 12th day of December 2014 by:



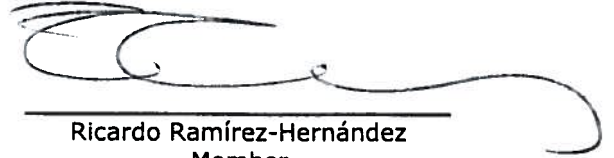
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Seung Wha Chang  
Presiding Member



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Ujal Singh Bhatia  
Member



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Ricardo Ramírez-Hernández  
Member

## ANNEX 1

WORLD TRADE  
ORGANIZATIONWT/DS438/15  
WT/DS444/14  
WT/DS445/14

29 September 2014

(14-5434)

Page: 1/3

Original: English

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**ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS****NOTIFICATION OF AN APPEAL BY ARGENTINA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 26 September 2014, from the Delegation of Argentina, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the reports of the Panel in *Argentina – Measures Affecting the Importation of Goods* (WT/DS438/444/445) ("Panel Report").

2. The measures at issue are the *Declaración Jurada Anticipada de Importación* ("DJAI") and the alleged "Trade-Related Requirements" ("TRRs") measure.

3. The issues that Argentina raises in this appeal relate to the Panel's findings and conclusions in respect of the Panel's terms of reference under the DSU, as well as the Panel's findings and conclusions with respect to the consistency of the challenged measures with various provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

4. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, Argentina files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

5. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel, without prejudice to Argentina's ability to rely on other paragraphs of the Panel Report in its appeal.

**I. REVIEW OF THE PANEL'S FINDINGS REGARDING THE PANEL'S TERMS OF REFERENCE**

6. Argentina seeks review by the Appellate Body of the Panel's finding that the alleged "TRRs" measure was within its terms of reference. The Panel's errors of law and legal interpretation include:

- The Panel erred by relying on its prior "conclusion" that the alleged "TRRs" measure was "explicitly identified as a measure at issue" in the complainants' consultations requests;<sup>1</sup>
- The Panel erred by failing to consider Argentina's argument that the complainants' introduction in their panel requests of "as such" or equally broad claims with respect to the alleged "TRRs" measure impermissibly expanded the scope of the dispute.<sup>2</sup>

7. For these reasons, Argentina requests that the Appellate Body reverse the Panel's conclusion in paragraph 4.1(b) of the Preliminary Ruling by the Panel (16 September 2013), in which the Panel concluded that "[t]he characterization of the TRRs as a single 'overarching measure' in the complainants' panel requests does not expand the scope or change the essence of the dispute."<sup>3</sup> Argentina requests that the Appellate Body also reverse the Panel's ultimate conclusions to this effect in paragraphs 7.1(b), 7.5(b), and 7.9(b) of the Panel Report.

8. Argentina requests that the Appellate Body find, instead, that the complainants' introduction of the alleged "TRRs" measure in their panel requests did expand the scope or change the essence of the dispute, and that the alleged measure was therefore outside of the Panel's terms of reference.

## II. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLES III:4 AND XI:1 OF THE GATT 1994 AS THEY PERTAIN TO THE ALLEGED "TRRS" MEASURE

9. Argentina seeks review by the Appellate Body of the Panel's findings that the alleged "TRRs" measure is inconsistent with Articles III:4 and XI:1 of the GATT 1994, as well as the Panel's separate findings that the alleged "TRRs" measure is inconsistent "as such" with Articles XI:1 and III:4 of the GATT 1994. The Panel's errors of law and legal interpretation include:

- The Panel erred in failing to apply the correct legal standard to ascertain the existence of the alleged "TRRs measure";<sup>4</sup>
- The Panel acted inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter when assessing Japan's "as such" claims against the alleged "TRRs measure".<sup>5</sup>

10. Argentina therefore respectfully requests that the Appellate Body reverse the Panel's finding that the complainants had established that the alleged "TRRs measure" existed or "operate[d] as a single measure",<sup>6</sup> as well as the Panel's findings that the alleged measure was inconsistent with Articles XI:1 and III:4 of the GATT 1994.<sup>7</sup> Accordingly, Argentina respectfully requests that the Appellate Body reverse the Panel's ultimate conclusions to this effect in paragraphs 7.1(d)-(f), 7.5(c)-(d), and 7.9(d)-(f) of the Panel Report.

11. Argentina also respectfully requests that the Appellate Body reverse the Panel's ultimate conclusion in paragraph 7.9(h) that the alleged "TRRs measure" is "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994.

## III. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLES VIII AND XI OF THE GATT 1994 AS THEY PERTAIN TO THE DJAI

12. Argentina seeks review by the Appellate Body certain limited aspects of the Panel's findings and conclusions in respect the interpretation and application of Articles VIII and XI:1 of the GATT 1994 as they pertain to the DJAI. The Panel's errors of law and legal interpretation include:

<sup>1</sup> Panel Report, Annex D.1, para. 3.30.

<sup>2</sup> Panel Report, Annex D.1, paras. 3.29-3.33.

<sup>3</sup> Panel Report, Annex D.1, para. 4.1(b).

<sup>4</sup> Panel Report, paras. 6.138-6.231.

<sup>5</sup> Panel Report, paras. 6.315-6.343.

<sup>6</sup> Panel Report, para. 6.231.

<sup>7</sup> Panel Report, paras. 6.265, 6.295, 6.343.

- The Panel erred in its assessment of the scope of Article VIII, and in particular in its implication that Article VIII does not encompass import procedures that are a "necessary pre-requisite for importing goods";<sup>8</sup>
- The Panel erred in not establishing and applying a proper analytical framework for distinguishing between the scope and disciplines of Article VIII, on the one hand, and the scope and disciplines of Article XI:1, on the other;<sup>9</sup> and,
- The Panel erred in its conclusion that the DJAI procedure is inconsistent with Article XI:1 based on its finding that the approval of a DJAI application is not "automatic".<sup>10</sup>

13. For these reasons, Argentina requests that the Appellate Body modify or reverse the Panel's findings in paragraph 6.433 of the Panel Report implying that any import procedure that is a "necessary pre-requisite for importing goods" or by which a Member "determines the right to import" to be outside the scope of Article VIII.

14. Argentina respectfully requests the Appellate Body to modify the Panel's reasoning in paragraphs 6.435 to 6.445 of the Panel Report and to find that, to the extent that import formalities and requirements can be examined under Article XI:1 at all, a finding of inconsistency would require the complaining Member to prove that: (1) the formality or requirement at issue limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting 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 its nature.

15. Argentina respectfully requests the Appellate Body to reverse the Panel's finding in paragraph 6.474 of the Panel Report that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 on the grounds that the attainment of a DJAI in exit status is not "automatic". Argentina also requests that the Appellate Body reverse the Panel's ultimate conclusion that the DJAI procedure is inconsistent with Article XI:1, as set forth in paragraphs 6.479, 7.2(a), 7.6(a) and 7.10(a) of the Panel Report.

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<sup>8</sup> Panel Report, paras. 6.425-6.444.

<sup>9</sup> Panel Report, paras. 6.435-6.445.

<sup>10</sup> Panel Report, paras. 6.461, 6.474.

## ANNEX 2

WORLD TRADE  
ORGANIZATION

WT/DS438/16

2 October 2014

(14-5540)

Page: 1/1

Original: English

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**ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS****NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 1 October 2014, from the Delegation of the European Union, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the *Working Procedures for Appellate Review*, the European Union hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *Argentina – Measures Affecting the Importation of Goods* (WT/DS438/R) (Panel Report).

2. The European Union submits that the Panel made an error in applying Article 6.2 of the DSU when determining its terms of reference in this case. Specifically, The European Union submits that the Panel erred when finding that the 23 measures described by the European Union in Section 4.2.4 of its first written submission as "specific instances" of application of alleged RTRRs were not precisely identified in the EU's Panel Request as measures at issue and that, accordingly, those 23 measures did not constitute "measures at issue" in the present dispute.<sup>1</sup> Those measures were clearly identified on substance in the EU's Panel Request in accordance with the requirements under Article 6.2 of the DSU. Thus, they were "measures at issue" in this dispute and the Panel should have examined them accordingly.

3. Moreover, as a conditional appeal, should the Appellate Body agree with Argentina's appeal in this case and, thus, reverse or otherwise modify any of the Panel's findings that the TTR measure exists and that was inconsistent with Articles XI:1 and III:4 of the GATT 1994, the European Union requests the Appellate Body to complete the analysis and find that Argentina violated Articles XI:1 and/or III:4 of the GATT 1994 in each of the 23 specific measures described by the European Union in Section 4.2.4 of its first written submission.

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<sup>1</sup> See e.g. Preliminary Ruling of 20 November 2013, para. 4.38; and Panel Report, para. 7.1(c).



## ANNEX 3

WORLD TRADE  
ORGANIZATION

WT/DS445/15

2 October 2014

(14-5541)

Page: 1/1

Original: English

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**ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS****NOTIFICATION OF AN OTHER APPEAL BY JAPAN  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 1 October 2014, from the Delegation of Japan, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *Argentina – Measures Affecting the Importation of Goods* (WT/DS445/R) and certain legal interpretations developed by the Panel in this dispute.

The Panel Report was based on a meticulous and objective review of the extensive factual record before it, as well as sound legal reasoning. Japan appeals only one limited aspect of the Panel Report, in accordance with Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*. In particular, Japan submits that the Panel erred by exercising false judicial economy with respect to Japan's claim against the TRRs measure under Article X:1 of the GATT 1994, as reflected at paragraphs 6.305 and 7.9(g) of its Report. This exercise of judicial economy was false because it would prevent an "effective resolution" of this dispute. In declining to address Japan's claim under Article X:1, the Panel falsely applied judicial economy and acted inconsistently with its obligations under Articles 3.4, 3.7, 7.2, and/or 11 of the DSU. Japan therefore respectfully requests that the Appellate Body reverse the Panel's exercise of judicial economy in this regard and complete the analysis to find that Argentina administers the TRRs measure in a manner that is inconsistent with its obligations under Article X:1.

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**ANNEX 4**

The following communication, dated 3 October 2014, was sent to all participants and third participants in this appeal.

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*Argentina – Measures Affecting the Importation of Goods*

AB-2014-9

On 29 September 2014, the Appellate Body received a letter from Japan requesting that the oral hearing in this appeal not be scheduled during the period of 3-5 November 2014 due to a scheduling conflict of a key member of Japan's litigation team.

Also on 29 September 2014, the Division hearing this appeal wrote to the other participants and to the third participants soliciting their views on Japan's request. On 1 October 2014, comments were received from Argentina, the European Union, and the United States.

In their comments, none of the other participants objected to Japan's request. However, Argentina and the European Union each indicated their own scheduling constraints and requested that the oral hearing not be held on certain other dates (27-31 October and 11-12 November, respectively). The United States did not object to Japan's request, but expressed a preference that the oral hearing not be unduly delayed to a date more than 45 days after the date of the Notice of Appeal, and noted that an oral hearing after 21 November 2014 would cause a scheduling conflict for its lead counsel.

In the draft Working Schedule for this appeal drawn up prior to the receipt of Japan's letter of 29 September 2014, the Appellate Body had scheduled the oral hearing in this appeal to take place on 3-4 November 2014. The scheduling of the oral hearing in this appeal was coordinated with the working schedules of the Appellate Body in the two other proceedings that are also currently before the Appellate Body in *US – Carbon Steel (India)* (DS436) and *US – Countervailing Measures (China)* (DS437). The overlap in the dates of the three working schedules, and in the composition of the Divisions hearing these three appeals, left the Appellate Body with limited choices for scheduling the oral hearings as well as its internal deliberations in these appeals.

In the light of the above-mentioned scheduling constraints, and taking into consideration the concerns expressed by the other participants over alternative dates for the oral hearing, the Division regrets that it is not in a position to accommodate Japan's request.

The oral hearing in this appeal is therefore scheduled for 3-4 November 2014. Please find enclosed a revised Working Schedule for appeal that includes these dates for the oral hearing.

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