Argentina – Measures Affecting the Importation of Goods
(WT/DS438, WT/DS444, WT/DS445)

Third Party Oral Statement of Australia

25 September 2013
Madam Chair, Members of the Panel

I. INTRODUCTION

1. Thank you for the opportunity to present Australia’s views on this dispute. We have previously provided a written submission, and our comments today are intended to reinforce the points outlined in our submission.

2. In our statement, Australia will focus on a number of issues relating to the interpretation of the General Agreement on Tariffs and Trade (GATT):

   (a) Whether a customs formality can be evaluated under Article XI of GATT;

   (b) the purpose and focus of Article VIII of GATT; and

   (c) whether a non-automatic import licensing procedure can also be a prohibited quantitative restriction under Article XI of GATT.

3. With regard to the factual issues raised by the complainants, Australia notes that the overall picture they describe accords with our experience.

A. WHETHER A CUSTOMS FORMALITY CAN BE EVALUATED UNDER ARTICLE XI OF GATT

4. The respondent has argued that the Declaraciones Juradas Anticipadas de Importación (DJAI) is a customs formality and that customs formalities cannot be evaluated under Article XI of GATT.

5. Australia, however, considers that Article XI is a broad provision covering prohibitions or restrictions on imports, other than duties, taxes or other charges.

6. As such, if a customs formality amounts to a “restriction”, it may be covered by Article XI of GATT.

7. In China – Raw Materials, the Panel noted that panels have assessed measures by examining their design and structure to determine whether they have a “limiting” or “restrictive” effect.\(^1\)

8. The Panel in China – Raw Materials stated that it would adopt a similar analytical approach and noted that it saw no merit in seeking to determine whether or not a measure is permissible under Article XI based solely on its label.\(^2\)

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\(^1\) Panel Report, China – Raw Materials, para. 7.914.
9. As such, Australia therefore considers that even if the Panel accepts Argentina’s argument that the DJAI is a customs formality, the measure may still be evaluated under Article XI.

B. THE PURPOSE AND FOCUS OF ARTICLE VIII OF GATT

10. The respondent has argued that the DJAI procedure is a customs formality and therefore must be evaluated under Article VIII of GATT and not under Article XI of GATT. Argentina has also argued that “it cannot be the case that customs formalities that are permitted under Article VIII are prohibited quantitative restrictions under Article XI.”

11. Australia does not consider that the primary purpose of Article VIII of GATT is to permit and govern customs formalities.

12. Article VIII covers various issues, and specifically mentions import and export formalities only for the purposes of stating the need for contracting parties to minimize their incidence and complexity. No specific disciplines are imposed on these formalities under Article VIII of GATT.

13. As mentioned above, Australia considers that a customs formality can be evaluated under Article XI of GATT. The existence of Article VIII does not prevent this, and the two Articles are not mutually exclusive.

C. WHETHER A NON-AUTOMATIC IMPORT LICENSING PROCEDURE CAN ALSO BE A PROHIBITED QUANTITATIVE RESTRICTION UNDER ARTICLE XI OF GATT

14. The complainants have argued that the DJAI procedure is a non-automatic import licensing procedure that is subject to the Import Licensing Agreement and that the DJAI procedure is also a prohibited quantitative restriction under Article XI of GATT.

15. The respondent notes that the Import Licensing Agreement sets forth specific and more detailed disciplines concerning the trade restrictive effects of import licensing procedures. The respondent argues that this therefore means that the trade-restrictive effects of import licensing procedures must therefore be analysed under the relevant provisions of the Import Licensing Agreement and not under Article XI.

16. It is noted that this argument does not pertain to the order of analysis, as the respondent is arguing that if the Panel considers the DJAI to be a non-automatic import licensing system, then it should not be evaluated under Article XI at all.

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3 Argentina’s first written submission, para. 177.
4 Argentina’s first written submission, para. 176.
5 Argentina’s first written submission, para. 171.
17. Australia considers that the trade-restrictive effects of the DJAI can be analysed under both the relevant provisions of the Import Licensing Agreement and under Article XI of GATT.

18. In Argentina – Footwear, the Appellate Body considered the relationship between Article XIX of GATT and the Agreement on Safeguards, and stated:

…the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members…a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this “inseparable package of rights and disciplines” must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.⁶

19. In EC – Bananas, the Panel notes that it had to ascertain whether the provisions of the Import Licensing Agreement and the Agreement on Trade-Related Investment Measures contain any obligations that conflict with GATT, in the sense that Members could not comply with the obligations of both Agreements at the same time or that WTO Members are authorised to act in a manner that would be inconsistent with the requirements of GATT rules.

20. The Panel explained that where the answer to this question is negative, both provisions would apply equally.⁷

21. Australia also notes that the preambular provision in the Import Licensing Agreement provides that Members recognise the provisions of GATT as they apply to import licensing procedures, and also refers to a desire to ensure that import licensing procedures are not utilised in a manner contrary to the principles and obligations of GATT.

22. Australia considers that Members can comply with both Article XI of GATT and the relevant obligations of the Import Licensing Agreement. As such, the DJAI can be evaluated under both Article XI of GATT and the relevant obligations of the Import Licensing Agreement.

II. CONCLUSION

23. That concludes Australia’s remarks. Australia thanks the Chair and the Panel for this opportunity to present its views in this dispute.

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⁶ Appellate Body Report, Argentina – Footwear, para 81.