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

Third Party Written Submission of Australia

28 August 2013
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I. INTRODUCTION

1. Australia addresses, in this submission, Argentina’s request for a preliminary ruling concerning whether the Restrictive Trade Related Requirements (RTRRs) are within the Panel’s terms of reference.

2. Australia will also focus on select issues raised in this dispute that raise significant issues of legal interpretation in relation to the General Agreement on Tariffs and Trade 1994 (GATT) and how it applies to the Declaraciones Juradas Anticipadas de Importación (DJAI). We will also make some comments regarding factual issues surrounding the RTRRs and their application.

3. In its submission, Argentina has made the following statement:

   …the trade effects of the DJAI procedure must be evaluated, if at all, under Article VIII of the GATT or, in the event that the Panel erroneously considers that the DJAI procedure is a non-automatic import licensing procedure other than for customs purposes, under the relevant provisions of the ILP Agreement. This means that in no event can the DJAI procedure be evaluated as a potential quantitative restriction under Article XI of the GATT.  

4. In its submission, Australia addresses a number of issues relating to the interpretation of certain provisions of GATT, with a particular focus on:

   (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.

5. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. ARGENTINA’S REQUEST FOR A PRELIMINARY RULING

6. In its first written submission, Argentina has asked the Panel to issue a preliminary ruling relating to the RTRRs. Argentina has argued that the complainants’ claims in respect of the RTRRs are based on an unjustified expansion of the complainants’ panel requests beyond the scope of the matter that was the subject of consultations. Argentina has argued that the panel requests purport to identify measures relating to the RTRRs that were not identified in the requests for consultations.  


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1 Argentina’s first written submission, para. 312.
2 Argentina’s first written submission, para. 15.
7. Australia considers that the RTRRs were identified in the requests for consultations. The requests for consultations from all three complainants state that:

   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 the products they manufacture in Argentina, not to transfer benefits abroad and/or to control their prices.3

8. In the requests for consultations, these measures were referred to as “trade restrictive commitments”.4

9. Under the heading “Restrictive Trade Related Requirements”, the complainants’ panel requests state:

   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.5

10. Australia considers that the measures mentioned under the heading “Restrictive Trade Related Requirements” in the complainants’ panel requests are the measures referred to as “trade restrictive commitments” in the complainants’ requests for consultations. The differences relate only to terminology. The various forms of terminology appear, in any event, to have been used by the complainants purely for ease of reference in their requests and submissions in order to identify a particular group of measures for the purposes of those documents.

11. As such, the RTRRs were identified in the requests for consultations, and are within the Panel’s terms of reference.

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3 European Union’s request for consultations, para. 5, Japan’s request for consultations, para. 5, United States’ request for consultations, para. 5.
4 European Union’s request for consultations, para. 6, Japan’s request for consultations, para. 6, United States’ request for consultations, para. 6.
5 European Union’s request for the establishment of a panel, Part 3, Japan’s request for the establishment of a panel, Part III, United States’ request for the establishment of a panel, Part III.
III. WHETHER A CUSTOMS FORMALITY CAN BE EVALUATED UNDER ARTICLE XI OF GATT

12. Argentina has argued that the DJAI procedure is a customs formality and that customs formalities cannot be evaluated under Article XI of GATT.6 Australia considers that customs formalities can be evaluated under Article XI (but notes that Australia does not necessarily accept the argument that the DJAI is a customs formality).

13. Article XI:1 of GATT provides that:

No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

14. The only types of measure that are expressly excluded from this provision are “duties, taxes and other charges.” As such, the wording of the provision does not support an interpretation that a customs formality could not breach Article XI:1 by amounting to a “restriction” as that term is interpreted for the purposes of that provision.

15. In China - Raw Materials, the Panel referred to findings of other GATT and WTO panels that types of measures “other” than quotas, import or export licenses, duties, taxes or charges that have a “limiting effect” or impose a “limiting condition”, are prohibited under Article XI:1, and noted that panels have assessed such measures by examining their design and structure to determine whether they have a “limiting” or “restrictive” effect.7 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:1 based solely on its label.8

16. In India - Autos the Panel noted that Article XI:1 refers to restrictions “made effective through quotas, imports or export licences or other measures”. The Panel stated that this formulation, which includes a “broad residual category” of “other measures”, suggests a broad scope of the types of measures which can be considered to fall within the meaning of Article XI:1.9

17. The Panel in India - Autos referred to past jurisprudence to support this view, in particular recalling the conclusion in Japan - Semi-Conductors where that panel noted that:

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6 Argentina’s first written submission, para. 181.
9 Panel Report, India-Autos, para. 7.246.
Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by the provision, irrespective of the legal status of the measure. 

18. Australia also notes that the Panel in Colombia - Ports of Entry examined the measure in question based on whether it had a “limiting effect on importation by negatively affecting the competitive opportunities available”.

19. Australia notes that there is some question as to whether it is enough that the measure places a limiting effect or condition on importation, or whether it must also be shown that the measure affects the competitive opportunities available. Proponents of the latter view argue that a panel would likely also require that the measure impact the competitive opportunities available, otherwise any restricting effect, no matter how minimal, would be enough to find a Member in breach of Article XI:1. Accordingly, the Panel in India - Autos noted the following:

The question of whether [the] measure can appropriately be described as a restriction on importation turns on the issue of whether Article XI can be considered to cover situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.

20. The Panel in Colombia - Ports of Entry noted that:

a number of GATT and WTO Panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer.

21. 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:1. Australia notes that Article XX(d) of GATT provides that nothing in GATT shall be construed to prevent the adoption or enforcement of measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement. The application of such an exception to measures relating to customs enforcement clearly suggests that other provisions of GATT (such as Article XI) do apply to such measures.

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10 GATT Panel Report, Japan - Semi-Conductors, para. 106.
11 Panel Report, Colombia – Ports of Entry, para. 7.257.
12 Panel Report, India – Autos, para. 7.269.
13 Panel Report, Colombia – Ports of Entry para. 7.240.
IV. THE PURPOSE AND FOCUS OF ARTICLE VIII OF GATT

22. As noted above, Argentina has argued that the DJAI procedure is a customs formality. In this context, it has made a number of statements about Article VIII of GATT for the purposes of an argument that Article VIII and Article XI are mutually exclusive and that the DJAI, as a customs formality, must be evaluated under Article VIII and not Article XI of GATT. 14

23. Article VIII: 1(c) of GATT states that:

   the contracting parties 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.

24. Argentina has argued that this provision expressly acknowledges the need for Members to maintain customs formalities. 15

25. Argentina has also argued that Article VIII contemplates that customs formalities can have at least some restrictive effect on trade. Argentina states 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 customs formalities are potentially an impediment to trade…Because the potential trade-restricting effects of customs formalities are governed by Article VIII… and because Article VIII contemplates by its terms that such effects may occur, it cannot be the case that these same effects render a customs formality a prohibited quantitative restriction under Article XI. 16

26. Argentina argues in its submission that customs formalities cannot be evaluated under Article XI. Argentina considers that to the extent that customs formalities have some effect on the quantity or amount of imports, that effect must be evaluated under Article VIII or, in the case of import licensing procedures other than for customs purposes, under the Import Licensing Agreement. 17

27. Another statement made by Argentina is that “it cannot be the case that customs formalities that are permitted under Article VIII are prohibited quantitative restrictions under Article XI”. 18

28. Argentina also stated that:

14 Argentina’s first written submission, para. 176.
15 Argentina’s first written submission, para. 163.
16 Argentina’s first written submission, para. 177.
17 Argentina’s first written submission, para. 177.
18 Argentina’s first written submission, para. 176.
Article VIII recognizes the need for Members to maintain import formalities and requirements in the ordinary course of implementing and enforcing their domestic laws. Article VIII:1(c) acknowledges “the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements”, but otherwise does not impose more specific disciplines in respect of these types of procedures. 19

29. Australia disagrees with the way in which the purpose and focus of Article VIII of GATT has been characterised in Argentina’s submission. Article VIII does not primarily aim to permit and govern customs formalities. Article VIII specifically mentions import and export formalities only for the purposes of stating the need for contracting parties to minimize their incidence and complexity.

30. Australia also notes that it is problematic that Argentina asserts that trade restrictive effects of customs formalities can only be evaluated under Article VIII while also noting that Article VIII does not impose any specific disciplines in relation to these procedures. 20 If this argument succeeded it would result in a situation where the trade restrictive effects of customs formalities would effectively not be able to be evaluated at all.

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

31. Argentina’s submission notes that the complainants have alleged 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.

32. Argentina argues that the Import Licensing Agreement sets forth specific and more detailed disciplines concerning the trade restricting effects of import licensing procedures that fall within its scope. Argentina therefore argues that this means that the trade-restricting effects of import licensing procedures must therefore be analysed under the relevant provisions of the Import Licensing Agreement and not under Article XI. 21 It is noted that this argument does not pertain to the order of analysis; Argentina is arguing that if the Panel considers the DJAI to be a non-automatic import licensing system, then the DJAI should not be evaluated under Article XI at all. 22

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19 Argentina’s first written submission, para. 163.
20 Argentina’s first written submission, para. 163.
21 Argentina’s first written submission, para. 171.
22 Argentina’s first written submission, para. 180.
33. Argentina has noted, however, that its raising of this issue does not mean that it considers that the DJAI procedure is subject to the Import Licensing Agreement, as Argentina considers that it is not.  

34. 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.

35. 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.

36. In EC - Bananas, the Panel noted that it had to ascertain whether the provisions of the Import Licensing Agreement and the Agreement on Trade-Related Investment Measures (TRIMS Agreement), contain any conflicting obligations which are contrary to those stipulated by Articles I, III, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules.

37. The Panel explained that wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretive Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

38. The Panel in EC - Bananas went on to note that based on its detailed examination of the provisions of the Import Licensing Agreement, Article 2 of the TRIMS Agreement as well as GATT 1994, it found that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the Licensing Agreement, the TRIMs Agreement and GATT 1994. Indeed, the Panel noted that the first substantive provision of the Import Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

23 Argentina’s first written submission, para. 301.
24 Appellate Body Report, Argentina – Footwear, para 81.
39. Australia also notes that the preambular provision in the Import Licensing Agreement provides that Members recognise the provisions of GATT 1994 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 1994.

40. 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 relevant obligations of the Import Licensing Agreement.

VI. CONCLUSION

41. In this submission Australia has focused on some issues of interpretation of GATT in relation to the DJAI procedure.

42. As most of the RTRRs imposed by Argentina are unwritten or only partially recorded, the Panel must establish their existence through a close examination of all the evidence in this dispute. The Panel must take care in determining the existence of unwritten measures. However, it is equally important that the Panel recognise the importance of appropriately applying WTO rules to WTO Members’ unwritten measures. In particular, the lack of transparency associated with such measures creates uncertainty for exporters from other countries and can cause a “chilling effect” on trade.

43. In conclusion, Australia supports the claims made by the complainants in their first written submissions regarding the RTTRs and the DJAI procedure. These claims are consistent with our observations.