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

Executive Summary
of the Third Party Written Submission and the
Third Party Oral Statement
of Australia

30 October 2013
I. WHETHER A CUSTOMS FORMALITY CAN BE EVALUATED UNDER ARTICLE XI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

1. Argentina has argued that the Declaración Juradas Anticipadas de Importación (DJAI) is a customs formality and therefore cannot be evaluated under Article XI of the General Agreement on Tariffs and Trade (GATT 1994). Australia does not necessarily accept that the DJAI is a customs formality, but considers that customs formalities can be evaluated under Article XI.

2. Article XI:1 of GATT 1994 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.

3. Since the only types of measure expressly excluded from this provision are “duties, taxes and other charges”, Australia considers that a customs formality could breach Article XI:1 by amounting to a “restriction”.

4. 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 to determine whether they have a “limiting” or “restrictive” effect. The Panel in China - Raw Materials noted that it saw no merit in seeking to determine whether a measure is permissible under Article XI:1 based solely on its label.

5. In India - Autos the Panel noted that Article XI:1 refers to restrictions “made effective through quotas, import or export licences or other measures”. The Panel stated that this formulation, which includes a “broad residual category” of “other measures”, suggests that Article XI:1 has a broad scope.

6. 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 have an impact on the competitive opportunities available, otherwise any restricting effect, no

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1 Argentina’s first written submission, para. 181.
4 Panel Report, India-Autos, para. 7.246.
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.\(^5\)

7. 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.\(^6\)

8. 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 1994 provides that nothing in GATT 1994 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 1994 (such as Article XI) do apply to such measures.

II. **THE PURPOSE AND FOCUS OF ARTICLE VIII OF GATT**

9. As noted above, Argentina has argued that the DJAI is a customs formality, and has made some comments about Article VIII of GATT 1994 in arguing 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 1994.\(^7\)

10. 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.

\(^5\) Panel Report, *India – Autos*, para. 7.269.


\(^7\) Argentina’s first written submission, para. 176.
11. Argentina has argued that this provision expressly acknowledges the need for Members to maintain customs formalities, and 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.

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

13. 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”.

14. Argentina also stated that:

   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.

15. Australia disagrees with Argentina’s characterisation of the purpose and focus of Article VIII of GATT 1994. Article VIII does not primarily aim to permit and govern customs formalities, and only mentions import and export formalities in order to state the need for contracting parties to minimize their incidence and complexity.

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8 Argentina’s first written submission, para. 163.
9 Argentina’s first written submission, para. 177.
10 Argentina’s first written submission, para. 181.
11 Argentina’s first written submission, para. 176.
12 Argentina’s first written submission, para. 163.
16. Argentina argues that the trade restrictive effects of customs formalities can only be evaluated under Article VIII, while noting that Article VIII does not impose any specific disciplines in relation to these procedures. If this argument succeeded it would mean that the trade restrictive effects of customs formalities would effectively not be able to be evaluated at all.

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

17. Argentina argues that the Import Licensing Agreement sets forth specific and more detailed disciplines concerning the trade restricting effects of import licensing procedures and 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. This argument does not pertain to the order of analysis, since 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. Argentina has noted, however, that its raising of this issue does not mean that the DJAI procedure is subject to the Import Licensing Agreement, as Argentina considers that it is not.

18. 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. In Argentina - Footwear, the Appellate Body considered the relationship between Article XIX of GATT 1994 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.

19. 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

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13 Argentina’s first written submission, para. 163.
14 Argentina’s first written submission, para. 171.
15 Argentina’s first written submission, para. 180.
16 Argentina’s first written submission, para. 301.
17 Appellate Body Report, Argentina – Footwear, para 81 (emphasis in original).
the same time or that WTO members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules.

20. The Panel explained that wherever the answer to this question is affirmative, the obligation or authorization contained in the Import Licensing Agreement 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.  

21. The Panel in EC - Bananas found that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the Import 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 1994 rules applicable to import licensing.

22. 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 notes a desire to ensure that import licensing procedures are not utilised in a manner contrary to the principles and obligations of GATT 1994.

23. 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 1994 and relevant obligations of the Import Licensing Agreement.

IV. OTHER ISSUES

24. Australia notes that due care must be taken 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.

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

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