BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

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

Third Participant Oral Statement of Australia

3-4 November 2014
1. Thank you for the opportunity to present Australia’s views in this Appeal.

2. As a preliminary issue, Australia supports the Panel’s finding that the Advance Sworn Import Declaration procedure (also known as the DJAI) constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994.

3. Australia will not comment on every issue raised in this appeal. Rather, we will focus on issues of legal interpretation, concerning the role of Article VIII of the GATT 1994 and its interaction with Article XI of the GATT 1994.

4. In the course of its arguments in its submission to the Appellate Body, Argentina has made certain statements about the role of Article VIII. These statements are intended to assist an attempt by Argentina to invoke Article VIII to prevent a measure being assessed under Article XI of the GATT 1994.

5. Australia’s view is that such an approach not only mischaracterises the role of Article VIII but also undermines the intended role of Article XI.

6. In its submission to the Appellate Body, Argentina states that:

   Before the Panel, Argentina argued that Articles VIII and XI are properly interpreted to be mutually exclusive in their respective spheres of application. Article VIII expressly acknowledges the right of Members to maintain import formalities and requirements, whereas Article XI categorically prohibits any type of measure that falls within its scope. It cannot be the case that measures
that are permitted under Article VIII are categorically prohibited three articles later. ¹

7. Firstly, Australia disagrees with Argentina’s statement that Article VIII expressly acknowledges the right of Members to maintain import formalities and requirements. There is no such express statement anywhere in Article VIII.

8. Part of Argentina’s argument is that “it cannot be the case that measures that are permitted under Article VIII are categorically prohibited three articles later.”

9. Australia disagrees that import and export formalities are “permitted” by Article VIII. While they are not prohibited by Article VIII, they are not expressly permitted either.

10. In Australia’s view, Article VIII does recognise that governments impose fees and formalities in connection with trade, but such recognition is on the basis that (for example) such measures need to be minimized in their incidence and complexity. ²

11. Australia does not consider that there is any contradiction in the fact that measures to which Article VIII applies can also be subject to Article XI. Australia agrees with the following statement by the Panel:

Contrary to what Argentina asserts, formalities or requirements that are connected with importation (including customs formalities) can also be subject to Article XI:1 of the GATT 1994. ³

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¹ Argentina’s first written submission, para. 221.
² Article VIII:1(c) of the GATT 1994.
12. Argentina has also stated that Article VIII recognises the necessity of import formalities and requirements. As mentioned earlier, Australia considers that Article VIII does recognise that governments impose fees and formalities.

13. However, Australia considers that there is no statement in Article VIII that can be interpreted as Article VIII recognizing the *necessity* of import formalities and requirements.

14. In its Appellee Submission, the United States has commented that:

    …Argentina has distorted the text of Article VIII of the GATT 1994 in an effort to advance a claim that Article VIII can be used by any WTO Member as a permission slip to declare unilaterally that a trade-restrictive measure is a permissible derogation from Article XI:1 by labelling it a “formality” or “requirement”. Article VIII does nothing of the sort…

15. Australia agrees with the United States that this is not the proper role of Article VIII of the GATT 1994.

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3 Panel Report, para. 6.443.
4 United States’ Appellee Submission, para. 65.