ARGENTINA – MEASURES AFFECTING IMPORTATION OF GOODS
EDITED BY ANSHUMAN CHOWDHARY BBA LL.B. 4th YEAR

(WT/DS438/AB/R - WT/DS444/AB/R - WT/DS445/AB/R)

PARTICIPANTS:
Argentina, Appellant/Appellee
European Communities,
Other/Appellee/Appellee/Third Participant
Japan, Other Appellant/Appellee/Third Participant
United States, Appellee/Third Participant

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

APPELLATE BODY DIVISION:
Chang, Presiding Member
Bhatia, Member
Ramirez-Hernandez, Member

DISPUTE TIMELINE
Panel Request .......................................................... May 25th 2012
Panel Establishment ................................................... January 28th 2013
Panel Report Circulation ........................................... August 22nd 2014
AB Report Circulation .............................................. January 15th 2015
Adoption ............................................................... January 26th 2015
I. RELEVANT FACTS OF THE DISPUTE


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 unwritten measure (TRRs measure); 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.

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.

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. 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. 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 (iii) the application of the TRRs in particular instances, as identified in the complainants' submissions.

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. 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.

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). 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. 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.

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. 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. 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. 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.

II. ISSUES RAISED BEFORE APPELLATE BODY

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" 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).
III. DECISION OF THE APPELLATE BODY

A. THE PANEL’S TERMS OF REFERENCE

I. ARGENTINA’S APPEAL

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." 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.

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.

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".1

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.2 The panel request thus defines the scope of the dispute and serves to establish and delimit the panel's jurisdiction.3

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3 See e.g. Appellate Body Reports, US – Countervailing Measures (China), para. 4.6; and US – Countervailing and Anti-Dumping Measures (China), para. 4.6.
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." 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.

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. 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. 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.

Thus, there is no need for a "precise and exact identity" between the 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.

Like the Panel, 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

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4Appellate Body Report, India – Patents (US), para. 94.
5Appellate Body Report, India – Patents (US), para. 94.
6Appellate Body Report, Brazil – Aircraft, para. 132.
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. 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".

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 inconsistent 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 elaboration of the language of the consultations requests, possibly achieved through and shaped by the consultations process.9

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". Consequently, we find that the single or "overarching" TRRs measure was within the Panel's terms of reference.

II. EUROPEAN UNION'S APPEAL

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. Subsequently, in its panel request, the European Union identified as specific measures at issue "Restrictive Trade

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9First Preliminary Ruling, paras. 3.31 (quoting Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 138) and 3.33.
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".

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.

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". Thus, the "measure at issue" referred to in Article 6.2 is "what is being challenged by the complaining Member".

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". 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.

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. 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.

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

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11Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)
12Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641. (fn omitted)
14Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.
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.

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.

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".

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.

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.

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 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.

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. Therefore, the EU Panel Request narrative is sufficiently clear to enable a 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.

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.

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".

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. 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 definitiveduties', and 'the continuation of the anti-dumping [duty]' resulting from the proceedings listed in the annexes" to the request for consultations.\(^\text{15}\) 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".\(^\text{16}\)

\(^{15}\)Appellate Body Report, US – Continued Zeroing, para. 226. (emphasis original)

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.

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".

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.

**B. IDENTIFICATION OF THE SINGLE UNWRITTEN TRRs MEASURE**

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.

**I. JOINT CLAIMS AGAINST THE TRR MEASURES**

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. 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.\(^{17}\)

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". 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'".\(^{18}\)

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.\(^{19}\) 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.\(^{20}\)

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 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.\(^{21}\)

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.\(^{22}\) 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


\(^{18}\) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.


\(^{20}\) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

\(^{21}\) Appellate Body Report, *US – Continued Zeroing*, para. 179.

"rule or norm" is attributable to the responding Member, its precise content, and that it has general and prospective application.23

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. While the Appellate Body ultimately considered that the measure challenged in that dispute fell outside the panel's terms of 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.

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.

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.

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

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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.

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.

The 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. In this respect, we note the clarification 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 in US – Zeroing (EC). 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. Nevertheless, the complainants' descriptions of the challenged TRRs measure reveal their understanding of the defining characteristics of that measure.

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. 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.

It is true that this subsection of the Panel Reports is brief. 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.

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 subsubsection of its Reports. 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.

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.

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.

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. 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.

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 in US – Zeroing (EC), but rather a measure taking the form of a decision by Argentina to impose the TRRs, which "applies until it is withdrawn".

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".24

24 Panel Report, US – Orange Juice (Brazil), para. 7.176. (emphasis original)
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.

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.

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.e 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.

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".

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 the TRRs measure, or to have ruled on the individual TRRs in isolation, 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."

II. ARTICLE 11 OF THE DSU – JAPAN'S "AS SUCH" CLAIMS

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".

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.

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. 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".

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.

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. 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.

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". 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".27

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 DSU28, 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.29

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. 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.

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. 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. 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. 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.

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. Accordingly, we find that Argentina has not established that the Panel acted inconsistently with Article 11 of the DSU.
III. THE PANEL'S EXERCISE OF JUDICIAL ECONOMY ON JAPAN'S CLAIM UNDER
ARTICLE X:1 OF THE GATT 1994

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". 30

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." 31 Thus, panels need address only those claims "which must be addressed
in order to resolve the matter in issue in the dispute" 32, and panels "may refrain from ruling on
very claims as long as it does not lead to a 'partial resolution of the matter'". 33

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. Indeed, if this were so, then only in the rarest of circumstances would a panel be
able to exercise judicial economy on a claim.

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.

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

31 Appellate Body Report, Canada – Wheat Exports and Grain Imports, para. 133. (emphasis original)
(Mexico), para. 403.
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".

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.

IV. OVERALL CONCLUSIONS ON THE TRRS MEASURE

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 a 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".

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".

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.


I. INTERPRETATION OF ARTICLE XI:1 AND ARTICLE VIII OF THE GATT 1994

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.

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".34 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.35 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.35

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 licenses or other

34 Appellate Body Reports, China – Raw Materials, para. 319.
35 Appellate Body Reports, China – Raw Materials, para. 319.
measures”.

The Appellate Body has described the word "effective", when relating to a legal instrument, as "inoperation at a given time".36

As noted by the Panel, while the term "or other measures" suggests a broad coverage, 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.

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.

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.

36 Appellate Body Reports, China – Raw Materials, para. 356.
decreasing and simplifying import and export documentation requirements.

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.

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.

As the Appellate Body has held in previous disputes, and as noted by the Panel, the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.37

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 Article XI:1, or under both provisions.

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.

For the reasons set out above, we find that the Panel did not err in its interpretation of

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37 Appellate Body Reports, EC – Seal Products, para. 5.123; US – Anti-Dumping and Countervailing Duties (China), para. 570; and US – Upland Cotton, para. 549.
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.

II. Scope of Application of Article VIII of the GATT 1994

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.

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 for the importation of goods. 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.

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.

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.

III. Application of Article XI:1 of the GATT 1994

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.
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.

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". 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.

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. 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".

IV. OVERALL CONCLUSIONS ON THE DJAI PROCEDURE

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.

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".
IV. FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS438

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"; 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;
   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.

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"; 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"; 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".5

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 7.2.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".

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.

V. **FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS444**

For 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 “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”; and, consequently, finds that the TRRs measure was within the Panel's terms of reference.

For 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 “the 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 (TRRs measure) attributable to Argentina; and, as a consequence,

B. **upholds** the Panel’s finding in paragraph 7.5.d that “the TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994.”

For 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 application 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 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”.

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.

**VI. FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS445**

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”; and, consequently, finds that the TRRs measure was within the Panel’s terms of reference.

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"; 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"; 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";

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, in exercising judicial economy on Japan's claim that the TRRs measure is inconsistent with Article X:1 of the GATT 1994.

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".

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.