

***ARGENTINA - MEASURES AFFECTING
THE IMPORTATION OF GOODS
(DS438/444/445)***

**RESPONSES OF THE UNITED STATES TO THE PANEL'S
FIRST SET OF QUESTIONS TO THE PARTIES**

October 11, 2013

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<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Australia – Apples (Panel)</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, adopted 22 February 2012
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
<i>Mexico – Taxes on Soft Drinks (Panel)</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007

<i>US – COOL (Panel)</i>	Panel Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R, WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R, WT/DS386/AB/R
<i>US – COOL (AB)</i>	Appellate Body Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R; WT/DS386/AB/R, adopted 23 July 2012
<i>US – Large Civil Aircraft (Panel)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R, adopted 17 June 2011
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Tuna II (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

5. (To Argentina) In its oral statement at the first substantive meeting, Argentina asserted that “[m]ost –if not all– recent panels have ... provided the parties with an opportunity for responsive submissions before issuing a formal [preliminary] ruling. In many instances, panels have adopted separate procedures exclusively for ... adjudicating preliminary ruling requests, with multiple rounds of briefing, questions from the Panel, and the opportunity for oral hearing. ... Although the Argentine Republic did not request such separate procedures in this case, it nonetheless had a legitimate expectation that it would have more than a single opportunity to express its views with respect to its preliminary objection.” Please provide support for these assertions by identifying:

- a. The preliminary rulings where WTO panels have provided multiple rounds for parties to express their views before the adoption of the ruling; and,**
- b. The preliminary rulings where WTO panels have provided the opportunity for oral hearings with the parties to address their views before the adoption of the ruling.**

1. The United States is not aware of the basis for Argentina’s purported “legitimate expectation” for multiple rounds of briefings, questions from the Panel, and an opportunity for an oral hearing. In certain cases, particularly where a party requests a preliminary ruling at an early stage in the dispute, the Panel may invite separate comments, ask questions as necessary, and even allow for rebuttals. However, there are many instances where that has not been the case and the panel’s ruling was based on the initial request and response.¹ The United States further considers that, not having requested “separate procedures,” there is no basis for Argentina to complain now that there were no “separate procedures” (as it has defined them). And, in any event, Argentina is wrong when it implies that it does not “have more than a single opportunity to express its views with respect to its preliminary objection.” Nothing in the Panel’s working procedures precludes Argentina from expressing those views, including through its oral statement at the first Panel meeting or comments on the Panel’s interim report.

6. (To the European Union, the United States and Japan) Please comment on the statistics of trade with the European Union, the United States and Japan, provided by Argentina in its first written submission and in its oral statements at the first substantive meeting.

2. Argentina alleges that complainants have “conceal[ed]” trade statistics in their submissions.² This assertion implies that the trade statistics are relevant to the complainants’ claims. They are not. Argentina’s own submission, which fails to make any arguments of the legal implications of the statistics, reveals the lack of any significance of this information for the Panel’s analysis.

¹ See, e.g., *US – Large Civil Aircraft (Panel)*, para. 7.19; *Dominican Republic – Safeguard Measures*, Annex H; *US – Poultry (China)*, paras. 7.8-9; *US – Orange Juice (Brazil)*, Annex A; *Australia – Apples (Panel)*, paras. 1.7-16; *Colombia – Ports of Entry*, para. 7.1; *EC – Trademarks and Geographical Indications (Australia)*, paras. 2.2-9; *EC – Trademarks and Geographical Indications (US)*, paras. 2.2-9; *Mexico – Taxes on Soft Drinks (Panel)*, Annex B; *EC – Tube or Pipe Fittings (Panel)*, Annex A; *EC – Approval and Marketing of Biotech Products*, paras. 1.14-16.

² Argentina’s First Written Submission, para. 62.

3. First, it is not necessary for the complainants to demonstrate “trade effects” of the measures at issue to establish a *prima facie* case. Second, neither trade statistics nor “trade effects” cannot rebut a finding that Argentina’s measures are inconsistent with its Article XI:1. As such, Argentina’s discussion of its bilateral trade with each complainant is not directly relevant to the Panel’s analysis. Further, the trade statistics that Argentina cites do not demonstrate that imports to Argentina from the United States are free from restriction. Rather, a closer examination of the flow of goods from the United States to Argentina reveals the opposite.

4. As the United States explained in its opening statement at the first substantive meeting of the Panel, the text of Article XI:1 does not support Argentina’s assertion that co-complainants must demonstrate “trade effects.”³ In addition, the Appellate Body and past panels have consistently found that the trade effects of a measure are not a necessary or sufficient factor in determining whether a measure is inconsistent with various WTO obligations, including those under Article XI of the GATT 1994.⁴ In *EC – Bananas III*, the Appellate Body endorsed a statement by the GATT panel in *US – Superfund*, which examined a measure under Article III:2 of the GATT 1947 and noted that, “[a] demonstration that a measure . . . has no or insignificant effects would . . . not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.”⁵

5. Past panels and the Appellate Body have also noted in other contexts that an examination of trade-restrictiveness does not require an examination of any potential “trade effects.” For example, the panel in *US – COOL*, relying on past panel reports concerning Article XI:1, concluded in its consideration of Article 2.2 of the TBT Agreement that “the concept of ‘trade-restrictiveness’ under provisions of the GATT 1994 does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products.”⁶ In both *US – COOL* and *US – Tuna II (Mexico)* the Appellate Body also considered the meaning of the term “trade-restrictive” in the context of Article 2.2 of the TBT Agreement. In both disputes, the Appellate Body concluded that trade effects were not part of the analysis of “trade restrictiveness.”⁷ This is despite the fact that, in *US – Tuna II (Mexico)*, the Appellate Body relied on its prior consideration of the term “restriction” under Article XI:1 in *China – Raw Materials*,⁸ and in turn, the Appellate Body in *US – COOL* referred to the *US – Tuna II (Mexico)* discussion.⁹ As a result, it is clear that the Appellate Body does not consider “trade effects” to be a part of the consideration of whether a measure is a “restriction” or “trade-restrictive.”

6. These Appellate Body and panel reports concerning the concept of “restriction” or trade-restrictiveness in the WTO Agreement confirm the plain meaning of the text of Article XI:1; that a measure need not result in “trade effects” to be inconsistent with that provision. Nor is

³ U.S. First Opening Statement, para. 16.

⁴ See, e.g., *Argentina – Hides and Leather*, para. 11.20 (“[I]t should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.”); *Turkey – Textiles (Panel)*, paras. 9.202-06; *Colombia – Ports of Entry*, paras. 7.252-54.

⁵ *EC – Bananas III (AB)*, paras. 252-53 (quoting *US – Superfund (GATT Panel)*, para. 5.1.9).

⁶ *US – COOL (Panel)*, para. 7.571.

⁷ *US – Tuna II (Mexico) (AB)*, para. 319; *US – COOL (AB)*, para. 375.

⁸ *US – Tuna II (Mexico) (AB)*, para. 319 (citing *China – Raw Materials (AB)*, paras. 319-21 and its discussion of “restriction” under Article XI:1 and XI:2).

⁹ *US – COOL (AB)*, para. 375 (relying on the analysis in *US – Tuna II (Mexico) (AB)*).

evidence related to “trade effects” sufficient to rebut a finding that a measure is a “restriction” under Article XI:1.

7. Further, the trade statistics cited by Argentina fail to demonstrate that the DJAI Requirement and RTRRs are not having a restrictive effect on trade. As an initial matter, statistics about the trade balance between the United States and Argentina¹⁰ reveals no information about the impact of the DJAI and RTRR measures on U.S. imports into Argentina. Further, Argentina cites statistics relating to the 2009-2012 time period for the fact that imports from the United States have been increasing.¹¹ However, the beginning of that period coincides with the global recovery in trade after a downturn in overall trade due to the global financial crisis.¹² The relative rates of growth in imports¹³ across countries in that period could have as much to do with the relative impact of that crisis and varying experiences in recovery as any other factor. The time period of 2008 to 2013, in contrast, demonstrates that imports of non-energy U.S. goods in Argentina have not increased at all, or have increased only slightly.¹⁴

8. The United States would also note that Argentina’s use of aggregate trade data is not useful for understanding how trade flow across goods and sectors are impacted by the DJAI Requirement and RTRRs. For example, Argentina’s energy imports from the United States have comprised an increasing share of total imports, with a monthly share of up to 45 percent of total imports in 2012.¹⁵ (The United States has not identified any reports of energy imports being observed under the DJAI system, and so it appears that Argentine officials use the discretion afforded through the DJAI system to allow energy imports.) Argentina’s increasing importation of energy products therefore obscures the impact of its trade-restrictive measures on the multitude of other products imported by Argentina from the United States.

9. In addition, the RTRRs and DJAI Requirement may have varying impacts over time and products. One feature of a discretionary import licensing system is that it can be used selectively to restrict trade more or less for certain time periods, or with respect to particular products. For example, the *Turkey – Rice* panel report described how Turkey refrained from granting licenses during certain periods of time.¹⁶ For that reason, aggregate trade data may obscure the impact of the measures on particular sectors or importers and during particular time periods.

10. To better understand the overall impact of Argentina’s measures on U.S. exports, it would be more useful to examine the impact on sectors or products. For example, aggregate

¹⁰ Argentina’s First Opening Statement, para. 24.

¹¹ Argentina’s First Written Submission, paras. 94, 98.

¹² See World Trade Organization, International Trade Statistics 2010 at 4, *available at* http://www.wto.org/english/res_e/statis_e/its2010_e/its10_toc_e.htm (noting that the end of 2008 saw trade entering “into a phase of steep decline, falling each month until starting to level out in February 2009” and that “trade started to grow again in March 2009 comparable to the level of world trade in early 2006, though the growth was from a low base”); World Trade Organization, International Trade Statistics 2011 at 14, *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its11_toc_e.htm (“World merchandise exports bounced back strongly in 2010.”).

¹³ See Argentina’s First Opening Statement, para. 29.

¹⁴ See US - Argentina Imports and Exports, Charts 1&2 (US-2).

¹⁵ See US - Argentina Imports and Exports, Chart 3 (US-2).

¹⁶ *Turkey – Rice*, para. 7.134.

imports in non-energy products either did not grow or grew slightly in 2011,¹⁷ but as a result of RTRRs imposed in conjunction with a motor vehicles *Certificado de Importacion* (“CI”) introduced in February of 2011,¹⁸ imports from the United States of motor vehicles decreased by 31 percent in the first 12 months following the CI’s adoption.¹⁹ This period of time coincided with the Ministry of Industry’s announcement of RTRR commitments by motor vehicle companies.²⁰

11. For these reasons, even if the Panel were to consider trade statistics relevant to its analysis, the statistics cited by Argentina fail to provide any information related to the trade-restrictiveness of the measures, and in fact, a closer examination of trade flows from the United States to Argentina demonstrates the opposite.

7. (To parties) Provide a copy of the Plan Estratégico Industrial 2020 (Strategic Industrial Plan 2020) adopted by the Argentine Ministry of Industry.

12. A complete copy of the *Plan Estratégico Industrial 2020* is provided at JE-749.

9. (To the European Union, the United States and Japan) What enforcement mechanisms other than the DJAI does the Argentine Government use to ensure compliance with the alleged RTRRs?

13. Argentina enforces RTRRs through the withholding of permission to import. Importers can only receive permission to import goods to the extent that they are able to comply with the requisite RTRR. Accordingly, the RTRRs measure is a restriction on importation within the meaning of Article XI of the GATT 1994, and Argentina’s adoption of the RTRRs results in a breach of that Article.

14. The United States has submitted extensive evidence (in the form of anonymized affidavits, statements by government officials, company statements, information from trade sources) demonstrating that the RTRRs are currently enforced through the withholding of approval of the DJAI applications.²¹ In particular, unless a company complies with RTRRs requested by Argentine officials, its DJAI submissions will not be approved. Illustrations of how the DJAI Requirement is used to enforce the RTRR are provided, for example, in the affidavits of Company X and Company Y.²²

15. The United States has also shown that in the recent past, the withholding of permission to import for enforcement of the RTRRs was accomplished through the predecessor border measures, the CIs. As the United States explained in its first written submission, up until the last working day before the establishment of this Panel, Argentina maintained a set of product-specific non-automatic import licenses, the CIs.²³ For example, the CI requirement for motor

¹⁷ See US - Argentina Imports and Exports, Charts 1&2 (US-2).

¹⁸ *MI Resolution 45* (JE-38).

¹⁹ Motor Vehicles Analysis (US-3).

²⁰ U.S. First Written Submission, paras. 58-63 (describing agreements by motor vehicles companies to comply with RTRRs concluded in March through October of 2011).

²¹ See U.S. First Written Submission, paras. 35-47, 113 and the accompanying footnotes and cited exhibits.

²² *VP of Company X Affidavit Revision* (JE-751); *VP of Company Y Affidavit Revision* (JE-752).

²³ U.S. First Written Submission, paras. 17-18.

vehicles was adopted in February of 2011.²⁴ Starting almost immediately, in March of that year, the Ministry of Industry started extracting RTRR commitments from motor vehicle manufacturers.²⁵ In order for importers to obtain permission to import motor vehicles, it was necessary for them to agree to export goods from Argentina.²⁶

16. The U.S. first written submission and accompanying exhibits includes many additional statements from companies and Argentine officials explaining that products cannot be imported unless and until a company agrees to undertake RTRRs.

17. To the extent the Panel's question asks whether Argentina may have additional enforcement mechanisms for the RTRRs (beyond withholding of permission to import), this may be the case – especially given that the RTRRs are unwritten measures. However, the U.S. claims concerning the RTRRs do not require a finding of any other enforcement measures. Rather, the United States has established that the RTRRs are enforced by withholding permission to import, and the existence of this enforcement measure confirms that the RTRRs are restrictions on importation within the meaning of Article XI.

10. (To the European Union, the United States and Japan) In the light of Israel's statement in its written submission that the alleged RTRRs are "Argentina's broader trade restrictive policy", whereas the DJAI "may be viewed as one of several policy tools for implementing Argentina's [RTRRs]", can you comment on the possible relationship between the DJAI and the alleged RTRRs?

18. The DJAI Requirement and the RTRRs are separate measures. But, these measures do indeed have an important relationship. The DJAI Requirement is a discretionary import licensing measure that breaches Article XI:1 of the GATT 1994. As the United States has explained,²⁷ as a discretionary import licensing measure, the DJAI Requirement may be used to simply stop or delay import transactions, regardless of compliance with RTRRs, or for other purposes.²⁸ Argentine officials also use the discretion under the DJAI system in order to

²⁴ *MI Resolution 45* (JE-38).

²⁵ See, e.g., *Ministry of Industry Press Release, March 25, 2011* (JE-1); *Ministry of Industry Press Release May 2, 2011* (JE-4); Press Release, Ministerio de Industria, La comercializadora de Porsche acordó compensar importaciones con exportaciones de vinos y aceites (March 30, 2012), available at <http://www.prensa.argentina.ar/2011/03/30/17964-la-comercializadora-de-porsche-acordo-compensar-importaciones-con-exportaciones-de-vinos-y-aceites.php> (Arg.) (JE-81); Press Release, Ministerio de Industria, La automotriz Chery acordó con el Gobierno revertir su balanza comercial en 2012 (May 19, 2011), available at <http://www.prensa.argentina.ar/2011/05/19/19735-la-automotriz-chery-acordo-con-el-gobierno-revertir-su-balanza-comercial-en-2012.php> (Arg.) (JE-82); *Ministry of Industry Press Release April 7, 2011* (JE-84); *Ministry of Industry Press Release June 13, 2011* (JE-86); Press Release, Ministerio de Industria [Ministry of Industry], También la automotriz Kia se comprometió a equilibrar su balanza comercial [The car manufacturer Kia has also agreed to adjust its trade balance] (June 15, 2011), available at <http://www.prensa.argentina.ar/2011/06/15/20707-tambien-la-automotriz-kia-se-comprometio-a-equilibrar-su-balanza-comercial.php> (Arg.) (JE-87); *Ministry of Industry Press Release May 5, 2011* (JE-88); *Ministry of Industry Press Release August 5, 2011* (JE-90).

²⁶ For example, Secretary of Domestic Trade Moreno explained in an interview at Exhibit JE-8 that BMW did not meet demands to compensate for the dollars spend on importing with exports, and that as a result it could not import for seven months. U.S. First Written Submission, paras 58-63.

²⁷ See, e.g., U.S. First Written Submission, para. 109.

²⁸ See, e.g., *Zatel* (JE-57); *Wabro S.A.* (JE-58); *Yudigar S.A.* (JE-59); *Fity SA* (JE-302) (domestic court cases involving instances where DJAI approvals were withheld, but no RTRR commitments were demanded).

withhold permission for importers to conclude their import transactions until they comply with the RTRRs. Thus, the relationship between the DJAI Requirement and the RTRRs provides further support for a finding that the DJAI Requirement is a discretionary non-automatic import licensing requirement that is inconsistent with Argentina's obligations under Article XI.

19. Similarly, as noted in the answer to Question 9, the United States has established that the RTRRs are enforced through withholding permission to import, and that this is currently accomplished through the DJAIs. Because the importers can only receive permission to import goods to the extent that they are able to comply with the RTRRs, the RTRRs are restrictions on importation within the meaning of Article XI:1.

11. (To the European Union, the United States and Japan) In their first written submissions, the complainants have referred to several alleged RTRRs that are required from economic operators as a condition to import, or to enjoy certain benefits, or even to do business in Argentina. In the view of the complainants, which are the specific alleged RTRRs that, if not complied with, would involve consequences different from a limitation on the ability to import products?

20. As noted in response to Question 9, it may be the case – especially given that the RTRRs is an unwritten measure – that Argentina uses enforcement measures in addition to the withholding of permission to import. However, the U.S. claims concerning the RTRRs do not require a finding of any other enforcement measures. Rather, the United States has established that the RTRRs are enforced by withholding permission to import. More specifically, as is demonstrated in the U.S. first written submission at Section III.B, all five types of commitments comprising the RTRRs are enforced through the withholding of permission to import. The existence of this enforcement measure establishes that importers may only import to the extent they have complied with any RTRRs, and that the RTRRs are therefore restrictions on importation within the meaning of Article XI:1.

12. (To the United States and Japan) Complainants refer in their panel requests to an alleged requirement to "limit the volume of imports and/or reduce their price". In its first written submission, the United States argues that Argentina requires importers to limit the volume of imports or, less frequently, to limit the unit price of imports. It cites, as an example, the case of a company that was allegedly required to submit revised price lists reducing the value of its imports. In its first written submission, Japan refers to an alleged requisite imposed by Argentina to "limit the volume of imports and/or reduce their price". Does the reduction of the price of imports identified in the complainants' panel requests refer to: (a) the unit price of value of such imports; (b) the total value of imports; or (c) the price at which imported products are sold in the Argentine domestic market?

21. As set out in the U.S. panel request and explained in the U.S. first written submission,²⁹ one of the types of requirements that Argentine officials impose on importers is a requirement to limit or reduce the volume or price of imports. The reduction in the price of imports refers to the

²⁹ Argentina – Measures Affecting the Importation of Goods, Request for the Establishment of a Panel by the United States at 4, WT/DS444/10 (Dec. 7, 2012); U.S. First Written Submission, paras. 84-85.

unit price value of such imports. A reduction in unit price (or reduction in volume of imports) in turn would often result in a reduction in the total value of proposed imports.

22. One example of this requirement is the demand imposed on Company X, which was required to submit a revised price list for its proposed import transaction, resulting in a total decrease in the value of its imports by around nine percent.³⁰ In addition, respondents to the U.S. Chamber of Commerce Survey indicated that Argentine officials demanded the reduction in value or prices of imports.³¹

15. (To the European Union, the United States and Japan) With reference to exhibits JE-306 and JE-307 (affidavits from officials of private companies), please identify the notaries public that witnessed the statement.

23. See attached Exhibits JE-751 and JE-752 for revised redacted affidavits.

19. (To the European Union, the United States and Japan) As support of its argument on the existence of certain RTRRs, the complainants have referred to agreements signed between the Argentine Government and economic operators in Argentina and to letters addressed by economic operators in Argentina to officials in the Argentine Government. Please provide copies of agreements or letters of this kind. Alternatively, please indicate the type of procedural rules that you would request the Panel to adopt in order to protect information in a manner that would enable the submission of such information to the Panel.

24. A letter and email to the Secretary of Domestic Trade from a U.S. company (Company X) seeking to import goods are included at exhibits JE-304 and 305 and describe Company X’s commitments to comply with RTRRs. All such agreements, letters and emails are in the possession of individual companies and Argentina. The United States is only able to provide such documents to the Panel to the extent that U.S. companies provide them along with permission to disclose their contents. However, commitments and agreements are described in Ministry of Industry press releases and other sources as set out in Section III.B of the U.S. first written submission. This evidence is sufficient for the Panel to find that the commitments were made and agreements were concluded.

25. The United States would observe that the reluctance of companies to provide documentation for purposes of this dispute may be attributed to concern that, even if documentation is submitted anonymously, a company’s identity may be discernible. The official from Company Y stated in his or her affidavit:

It is important to highlight that our Argentine Company has been advised by counsel that any direct challenge to the requirements imposed as a result of the Resolution could result in retaliation by the government.

We have heard about cases in which companies that “spoke up” faced government audits and other retaliatory measures, which ultimately crippled their businesses. Accordingly, we are submitting this affidavit to USTR with the express

³⁰ See *VP of Company X Affidavit Revision* (JE-751); *Company X Email* (JE-305).

³¹ *US Chamber of Commerce Report* (JE-56).

understanding that USTR will maintain the confidentiality of our company’s identity as well as the identity of the affiant and any other details of our business activities that could identify our company or any individual.³²

26. The difficulty in obtaining information from companies is inherent in the nature of a discretionary import restriction, such as the RTRRs. Because Argentine officials can withhold permission for any reason, and arbitrarily apply the RTRRs, importers fear that these measures will be applied in a retaliatory manner.

22. (To all parties) Concerning entities that can observe a DJAI, please explain:

a. How do applicants become acquainted with the reasons that led to an observation?

27. Importers are not informed of the reasons an observation is placed through the DJAI system. Rather, importers must reach out to the agencies which have lodged the observations, and even then may not be able to discern the reasons that led to an observation. For example, Argentina’s appellate courts have found in a number of cases that Argentine authorities placed observations on DJAI applications, thereby suspending the approval process for periods of six months or more, yet failed during that extended period of delay to provide the applicants with the “comments” required under the DJAI system to explain such observations.³³ In one such case, the court stated as follows:

As regards the implementation of the D.J.A.I., it should be considered that the period of time (almost six months) since the submission of the request has elapsed without any response and that this reasonably exceeds the deadlines established by the relevant resolutions for the implementing authority to issue a decision; in addition, it should be considered (vid. Resolution A.F.I.P. N° 3.255/2012 and Resolution S.C.I. N° 1/2012), that the party cannot expedite the proceedings since it does not have, either on paper or electronically, the “comments” made by the competent body –as explained by A.F.I.P. itself on p. 143/145; and since the Secretariat of Domestic Trade has remained silent regarding this issue-establishing a prima facie administrative infringement (Article 9° of the L.P.A.), affecting the rights of the party for implicating in the facts, a ban - albeit temporary - to imports without any legal basis.³⁴

28. The experiences of Company X and Company Y similarly demonstrate that the reasons for an observation are often not explained. For example, the Vice President of Company Y explained in his/her affidavit that Argentine authorities provided no reasons or guidance for observations, and that local company personnel were unable to find anyone at SCI to provide such reasons or guidance. As a result the Company experienced an extended delay over several months, during which time Argentine authorities simply denied permission to engage in importation without explanation. Company Y first received information relating to SCI’s placement of observations by telephone. It bears emphasizing that Company Y never received a statement of reasons (written or oral) for the observation; what Company Y instead received,

³² VP of Company Y Affidavit Revision at 4 (JE-752).

³³ See generally Selected Evidence Supporting GATT Article X:3(a) Claim (US-1).

³⁴ See Yudigar S.A. (JE-59).

after months of delay, was an ultimatum: it either had to comply with Argentina's demands that it balance imports with exports, or else it would continue to be denied permission to import its products into the country.³⁵

29. Similarly, the Vice President of Company X indicated that the Argentine affiliate of Company X received no written explanation of the observations placed on 19 DJAI applications. Instead, its imports were simply suspended by means of observations over an extended period of time, until SCI contacted the company by phone to direct the company to comply with pricing and trade balancing demands. All communications with the government were verbal as reflected below.

In March, 2012, the General Manager of [] began pressing [] to both reduce prices and to initiate either production in Argentina or to export Argentine products to other markets. When pressed, he told me and my staff that these requests were prompted by verbal demands by the Secretary of Commerce in Argentina. . . .

[] employees tell me that they want to comply with these demands by the Secretary of Commerce but they could not provide me with documentation as all of these demands were received through phone calls and verbal communications made by individuals who contend that they are acting on behalf of Secretary of Commerce, Lic. Guillermo Moreno. . . .

Our General Manager tells me that the first of these demands took place on or about March 9, 2012, after business hours, when he received a phone call on his office answering machine by an unidentified operator said to be speaking on the behalf of the Secretary of Commerce. . . . On Monday, March 12, 2012, the General Manager, along with the Marketing/Operations Manager and the Finance Manager, called the number from the local offices. The call was answered by a female operator who identified herself as "Operator No. 3." . . .

On or about Wednesday, March 28, 2012, our managers received another call from a person identifying herself by the name of "Marcela," asking to speak to the General Manager "on behalf of the Secretary of Commerce"³⁶

30. Even though (as discussed in greater detail in the affidavit) Company X took steps to meet the Argentine authorities' demands, by reducing prices and making a written commitment to export \$1,000,000 USD worth of Argentine products, Argentine authorities released only some of the company's pending DJAI applications from observation status, and did not process any new DJAI applications by the Company. The Company X affidavit does not indicate that the Argentine authorities provided any explanation or justification for these continued denials of approval to import. Similarly, two thirds of respondents in Japan's survey of Japanese exporters

³⁵ See *VP of Company Y Affidavit Revision*, paras. 6-13 (JE-752).

³⁶ See *VP of Company X Affidavit Revision* at 1-3 (JE-751).

indicated that Argentina did not provide an explanation for delays in approvals of DJAI applications.³⁷

b. How are applicants informed which agency made an observation?

31. The United States does not have information as to whether applicants can view which agency has lodged an observation in the DJAI system. However, the evidence demonstrates that applicants are not provided with contact information sufficient to permit them to make contact with agency representatives who will respond to, and help them secure the release of, “observed” DJAI applications. This is despite the fact that Article 4 of Resolution 3252 states that, in the case of negative decisions (such as observations), AFIP “shall inform importers of the . . . institution the importer should contact in order to rectify the situation.”³⁸

32. For example, in the case of Company Y, the Argentine affiliate’s representatives proactively attempted – without success – to secure guidance regarding the observations placed on its DJAI applications by visiting SCI’s offices on multiple occasions. Ultimately, it was only after SCI representatives affirmatively contacted Company Y by telephone that Company Y was able to obtain guidance regarding the demands that SCI required to be met as a condition to lifting the observation.³⁹ Similarly, in the case of Company X, the Argentine affiliate was first contacted by SCI regarding the observation by means of a telephone message left by an SCI representative on the voicemail of the General Manager of the Argentine affiliate.⁴⁰

c. How are applicants informed of any additional information or documents that are required to have a DJAI observed status changed to exit status?

33. As discussed in response to Question 22(b), it is difficult in practice for importers to find effective means of contacting agency representatives in order to determine what additional information or documents are necessary to obtain approval of a DJAI application. This is despite the fact that, according to Article 4 of Resolution 3252, the importer must contact the relevant agency “in order to rectify the situation”, i.e., to learn what further information or documentation is necessary to have the “observed” status changed to “exit.”

34. In addition, there appears to be little uniformity or rationality in the treatment by Argentine officials of importers with pending “observed” DJAI applications.

35. First, there is great variance in the disposition of “observed” DJAI applications. For example, nearly one in four respondent companies in the USCC survey who had applied for licenses to import products into Argentina received approval for fewer than one out of every ten applications submitted, while other companies experienced higher (albeit still unacceptably low)

³⁷ *Japan Industry Survey* at 2 (JE-312).

³⁸ *AFIP Resolution 3252*, Art. 4 (JE-15).

³⁹ *See VP of Company Y Affidavit Revision*, paras. 8, 10 (JE-752) (“Nor was our Argentine Company able to find anyone within the government to provide guidance regarding how to obtain approvals of the “observed” applications. . . . Representatives from our Argentine Company tried visiting the Secretary of Commerce’s office on numerous occasions to obtain an explanation, but were never received and had no alternative means of contacting a government representative who could answer their questions.”).

⁴⁰ *See VP of Company X Affidavit Revision* at 1-3 (JE-751).

rates of DJAI approvals.⁴¹ As explained by the Vice President of Company Y, “there seemed to be no logic or distinguishable pattern explaining why some DJAIs were ‘approved’ and others ‘observed.’ This variance was further evidenced by the fact that our Argentine Company resubmitted a number of ‘observed’ DJAIs, with no changes, and obtained subsequent approvals for such shipments.”⁴² Similarly, an Argentine customs broker explained, “[t]here doesn’t seem to be criteria,” noting that some of his applications are approved in 12 hours, others in 15 days, and a full 60 percent are rejected.⁴³

36. Second, there is also great variance in the amount of time that importers must wait to be contacted by Argentine officials, or otherwise secure resolution of pending “observed” DJAI applications.⁴⁴

37. Third, when importers are contacted by agencies seeking commitments as a condition of releasing “observed” DJAI applications, agencies exercise their broad discretion in an unreasonable manner – continuing to withhold such release notwithstanding prior governmental commitments to release the “observed” applications if certain conditions were met. For example, two thirds of companies responding to the USCC survey reported that had attempted to satisfy Argentine official demands imposed during the “observation” process reported that, thereafter, Argentina only approved a portion – not all – of their pending “observed” DJAI applications.⁴⁵

30. (To Argentina) With reference to Argentina's statement at the first substantive meeting that "the DJAI in 'exit' status can automatically be converted into a customs clearance procedure", please explain:

a. Once a DJAI application has reached exit status, what additional information, if any, needs to be provided to import and clear goods into Argentine territory, and what additional steps need to be completed?

38. The “exit” status in the DJAI system is not customs clearance and is not sufficient to satisfy Argentina’s customs clearance procedures. There are several additional steps which an importer must complete in order to import and clear goods into Argentine territory.

39. First, once an importer Argentina obtains the exit status, it must enter the DJAI number into Argentina’s Foreign Exchange Transaction Monitoring System, in order to access foreign exchange for the transaction.⁴⁶

40. Second, all importers must also comply with separate customs procedures, which are governed by Argentina’s Customs Code, Law No. 22.415, March 2, 1981, and its implementing

⁴¹ See *U.S. Chamber of Commerce Report* at 1-3 (JE-56).

⁴² See *VP of Company Y Affidavit Revision*, para. 9 (JE-752).

⁴³ Ian Mount, Argentina’s International Trade Disaster, *BUSINESSWEEK*, November 8, 2012 (JE-281).

⁴⁴ See generally Selected Evidence Supporting GATT Article X:3(a) Claim (US-1).

⁴⁵ See generally Selected Evidence Supporting GATT Article X:3(a) Claim (US-1); *U.S. Chamber of Commerce Report* at 7 (JE-56); *VP of Company X Affidavit Revision* (JE-751).

⁴⁶ *AFIP Resolution 3252*, Art. 6 (JE-15). See also *Comunicación A 5274 del Banco Central de la República Argentina* [Communication A 5274 from the Central Bank of Argentina] January 30, 2012, 1.a, 1.d (JE-40).

guidance and regulations. AFIP provides instructions for importers to complete a *Despacho de Importación* and submit documentation for customs clearance on its website.⁴⁷

41. According to AFIP, the *Despacho de Importación* includes “among other data, the tariff of the goods and their nature, species, condition, weight quality, price, place of destination and every element necessary to allow a correct tariff classification and valuation of the goods.”⁴⁸ The information provided through the DJAI Requirement is insufficient to verify the correct tariff classification and valuation of goods.⁴⁹ The *Despacho de Importación* is printed and used for validation by the Customs service under a clearance number generated for that purpose (which is separate from the DJAI number).⁵⁰

42. In addition, for customs clearance, the importer must provide a “a commercial invoice, transport documentation (bill of lading or airway bill or consignment note, depending on the route used), certification of third party agencies or certification of origin, if applicable, and other documentation required for the merchandise in question.”⁵¹

43. Third, importers must separately comply with any product-specific certificate or license requirement administered by the various agencies of the Argentine government.

b. To which agency or agencies is the information under subparagraph (a) above to be provided?

44. AFIP indicates on its website that the documentation for customs clearance is provided to the Customs service,⁵² *i.e.*, the Directorate-General of Customs (*Dirección General de Aduanas* or “DGA”), a component of AFIP.⁵³ DGA is “responsible for implementing the legislation related to the import and export of goods, as well as the traffic control of goods entering and leaving the customs territory.”⁵⁴

c. Can the Central Bank of Argentina authorize a payment in foreign currency for an import transaction related to a DJAI that has not attained exit status?

45. No, according to National Communication A 5274 issued by the Central Bank of Argentina, financial institutions handling foreign payments for imports of goods must ensure that the DJAI transaction has a “salida” or “exit” status.⁵⁵

⁴⁷ AFIP Consultas y Respuestas Frecuentes ID 5518396 (JE-240).

⁴⁸ AFIP Consultas y Respuestas Frecuentes ID 5518396 (JE-240).

⁴⁹ That information includes information regarding shipping and arrival dates, import filer information, tax identification code, tariff information, and description, type, quality, grade, FOB unit value and condition of imported products. AFIP Resolución 3255, Updated Annex, Section E (JE-16).

⁵⁰ AFIP Consultas y Respuestas Frecuentes ID 5518396 (JE-240).

⁵¹ AFIP Consultas y Respuestas Frecuentes ID 5518396 (JE-240).

⁵² AFIP Consultas y Respuestas Frecuentes ID 5518396 (JE-240).

⁵³ AFIP, *Aduana*, <http://www.afip.gob.ar/aduanaDefault.asp> (last visited February 1, 2013) (Arg.) (JE-60).

⁵⁴ AFIP, *Aduana*, <http://www.afip.gob.ar/aduanaDefault.asp> (last visited February 1, 2013) (Arg.) (JE-60).

⁵⁵ *Comunicación A 5274 del Banco Central de la República Argentina* [Communication A 5274 from the Central Bank of Argentina] January 30, 2012, 1.d(i) (JE-40) (“The institution handling the operation must verify that the following requirements are satisfied before processing it: (i) The “Advance Import Affidavit” (DJAI) established by

31. (To the European Union, the United States and Japan) Concerning the survey commissioned by the Government of Japan (JE-312):

- a. How many applications and which sector(s) were covered by the survey?*
- b. Identify the selection criteria used to choose the sample.*
- c. Approximately, how much trade (in percentage terms) did the 10 respondent companies represent of the overall imports of Japanese companies into Argentina at the time of the survey?*
- d. Approximately, what percentage did the 10 respondent companies represent of the total number of DJAIs submitted by Japanese companies at the time of the survey?*
- e. Please provide the questionnaire that was sent to the participating companies.*
- f. In relation to the number of applications that were considered in the survey, how many DJAI applications suffered delays due to an observation?*

46. The United States incorporates by reference the response of Japan to Panel Question 31.

32. (To the European Union, the United States and Japan) Concerning the survey commissioned by the American Chamber of Commerce (AmCham) (JE-56):

47. To clarify, the survey at JE-56 was conducted by the U.S. Chamber of Commerce (USCC). This entity is distinct from, although affiliated with, the American Chamber of Commerce in Argentina (“AmCham Argentina”). The two are separately organized and have distinct memberships. Certain surveys conducted by AmCham Argentina were also submitted by complainants as exhibits (JE-719, JE-720, and JE-726). These answers will address the survey conducted by the USCC at Exhibit JE-56.

a. How many applications and which sector(s) were covered by the survey?

48. The survey asked respondents how many DJAI applications they had submitted since the DJAI system was put in place within five different ranges.⁵⁶ Twenty-one (21) companies indicated that they had submitted more than 100; three companies indicated that they had submitted between 75 and 100; six companies indicated that they had submitted between 50 and 75; no company indicated that it had submitted between 25 and 50; and the remainder submitted less than 25. As a result, in total, respondents applied for a minimum of 2,650 DJAI approvals.

49. Companies that responded to the survey indicated that they were from the following sectors: agricultural and food products; automotive; books, music, and films; chemicals and oil/gas; consumer electronics; consumer products; healthcare, including pharmaceuticals and

the AFIP in General Resolution No 3252/12 and supplementary provisions, has “Salida” status, in all cases where that affidavit is a requirement for registration of the definitive classification as importation for home use.”)

⁵⁶ U.S. Chamber of Commerce, THE U.S. CHAMBER OF COMMERCE’S SURVEY ON ARGENTINA’S DJAI SYSTEM (Mar. 4, 2013) Question 3 (JE-750).

medical devices; industrial machinery, farm and construction equipment; mining and metals; and textiles.⁵⁷

b. Identify the selection criteria used to choose the sample.

50. The survey was sent to the USCC membership, comprised of more than three million businesses of all sizes, sectors and regions.

c. What percentage of the total member companies of AmCham in Argentina do the respondents represent?

51. As noted above, the survey at Exhibit JE-56 was sent to members of the USCC, not AmCham Argentina. The USCC has over three million members, some of which export to Argentina, and some do not. Of the recipients of the survey request, 45 companies provided feedback.

d. Approximately, how much trade (in percentage terms) did the 45 respondent companies represent of the overall imports of AmCham members into Argentina at the time of the survey?

52. As noted, the survey at Exhibit JE-56 was sent to members of the USCC, not AmCham Argentina. The survey did not request information on the volume of the imports of the respondent companies in Argentina.

e. Approximately, what percentage did the 45 respondent companies represent of the total number of DJAIs submitted by AmCham members at the time of the survey?

53. As noted, the survey at Exhibit JE-56 was sent to members of the USCC, not AmCham Argentina. The survey did not obtain information on the total number of applications submitted by USCC members.

f. Please provide the questionnaire that was sent to the participating companies.

54. The questionnaire is provided at JE-750.

g. In relation to the number of applications that were considered in the March 2013 AmCham survey, how many DJAI applications suffered delays due to an observation?

55. Because respondents provided ranges numbers of DJAI applications and percentages of applications that were delayed, the survey responses cannot be translated into a precise number of applications that suffered delay.

34. (To all parties) In paragraph 18 of its first written submission, Argentina states that "the DJAI procedure ... implements Argentina's commitments under the WCO SAFE Framework". Does the WCO SAFE Framework impose obligations on countries or instead provide a set of voluntary standards and best practices?

⁵⁷ U.S. Chamber of Commerce Report at 1 (JE-56).

56. The SAFE Framework provides a set of voluntary standards and best practices. It does not impose mandatory obligations on WCO member countries.

57. The United States disagrees with Argentina’s assertions that the DJAI system is “an advance electronic information customs formality specifically designed in accordance with the” WCO’s SAFE Framework.⁵⁸ The DJAI system and the SAFE Framework have nothing to do with one another. The SAFE Framework is designed to protect the global supply chain against vulnerabilities to terrorist exploitation while facilitating trade. The DJAI system is not such a supply chain security program and it does not facilitate trade; rather it is a discretionary licensing system that operates as a restriction on imports, in order to facilitate economic policy goals, such as “import substitution.”

36. (To all parties) Does Argentina export goods to the European Union, the United States and Japan that follow the WCO SAFE Framework standards (i.e. by providing an advanced electronic importation/exportation declaration)? If so, are advanced exportation declarations provided for all shipments or only for some? If only for some shipments, in which cases?

58. The United States has adopted advanced goods declaration requirements that are consistent with the SAFE Framework. These requirements apply to imports from Argentina to the United States.⁵⁹ Submissions are generally required for all shipments, although certain very limited exemptions apply.

37. (To all parties) Do exports of the European Union, the United States and Japan to Argentina follow the WCO SAFE Framework standards (i.e. by providing an advanced electronic importation/exportation declaration)? If so, are advanced exportation declarations provided for all shipments or only for some? If only for some shipments, in which cases?

59. The United States has adopted advanced goods declaration requirements that are consistent with the SAFE Framework.⁶⁰ These requirements apply to exports from the United States to Argentina.⁶¹ Submissions are generally required for shipments when any one commodity contained therein exceeds \$2,500 in value, and for shipments regardless of value in certain other cases, such as shipments of munitions or other such controlled items.⁶²

⁵⁸ Argentina’s First Written Submission, para. 192.

⁵⁹ See generally U.S. Customs and Border Protection, Advance Electronic Cargo Information, Section 343 - Trade Act of 2002, Table 2 – Summary of Rule by Mode, available at www.cbp.gov/linkhandler/cgov/trade/trade_outreach/advance_info/transport_matrix.ctt/transport_matrix.xls (US-5).

⁶⁰ See generally U.S. Customs and Border Protection, Advance Electronic Cargo Information, Section 343 - Trade Act of 2002, Table 2 – Summary of Rule by Mode, available at www.cbp.gov/linkhandler/cgov/trade/trade_outreach/advance_info/transport_matrix.ctt/transport_matrix.xls (US-5).

⁶¹ See U.S. Customs and Border Protection, CBP Info Center, When to apply for an Electronic Export Information (EEI), available at: [https://help.cbp.gov/app/answers/detail/a_id/292/~when-to-apply-for-an-electronic-export-information-\(eei\)](https://help.cbp.gov/app/answers/detail/a_id/292/~when-to-apply-for-an-electronic-export-information-(eei)) (US-4).

⁶² See U.S. Customs and Border Protection, CBP Info Center, When to apply for an Electronic Export Information (EEI), available at: [https://help.cbp.gov/app/answers/detail/a_id/292/~when-to-apply-for-an-electronic-export-information-\(eei\)](https://help.cbp.gov/app/answers/detail/a_id/292/~when-to-apply-for-an-electronic-export-information-(eei)) (US-4).

41. (To the European Union, the United States and Japan) Please comment on the observations to exhibits submitted by the complainants noted in Annex 5 to this list of questions.

60. The United States incorporates by reference the response provided by the European Union to Panel Question 41.

Tables of Exhibits

Exhibit No.	Description	Short Title
JE-749	MINISTERIO DE INDUSTRIA, PLAN ESTRATEGICO INDUSTRIAL 20 20 [STRATEGIC INDUSTRIAL PLAN 20 20] (October 4, 2011), <i>available at</i> http://www.sic.gob.ar/webindustria/secplanestrategico/plan-estrategico.html (Arg.)	<i>Strategic Industrial Plan 20 20</i>
JE-750	U.S. Chamber of Commerce, THE U.S. CHAMBER OF COMMERCE’S SURVEY ON ARGENTINA’S DJAI SYSTEM (Mar. 4, 2013).	<i>U.S. Chamber of Commerce Survey Questions</i>
JE-751	Vice President of Company X Signed Affidavit, July 12, 2012 (Revision of Redaction, JE-306)	<i>VP of Company X Affidavit Revision</i>
JE-752	Vice President of Company Y Signed Affidavit, April 10, 2013 (Revision of Redaction, JE-307)	<i>VP of Company Y Affidavit Revision</i>
JE-753	Despachantes Argentinos, Sample of nota de pedido	
JE-754	Ministry of Economy, Trade and Industry, The Government of Japan, Survey with regard to Argentine Import Restrictive Measures (29 September, 2012)	<i>Survey Questionnaire</i>

Exhibit No.	Description	Short Title
US-2	US - Argentina Imports and Exports	
US-3	Motor Vehicles Analysis	
US-4	U.S. Customs and Border Protection, CBP Info Center, When to apply for an Electronic Export Information (EEI), <i>available at</i> https://help.cbp.gov/app/answers/detail/a_id/292/~/when-to-apply-for-an-electronic-export-information-(eei)	<i>CBP Info Center, When to apply for an EEI</i>
US-5	U.S. Customs and Border Protection, Advance Electronic Cargo Information, Section 343 - Trade Act of 2002, Table 2 – Summary of Rule by Mode, <i>available at</i> www.cbp.gov/linkhandler/cgov/trade/trade_outreach/advance_info/transport_matrix.ctt/transport_matrix.xls	<i>CBP, Advance Electronic Cargo Information</i>