In the World Trade Organization
Before the Appellate Body

ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

(AB-2014-9 / DS438)

Appellee Submission
by the European Union

Geneva, 14 October 2014
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1. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this Appellee Submission, the European Union will rebut Argentina's claims of error with respect to certain findings made by the Panel in this dispute.

2. With respect to the Panel's findings regarding the Restrictive Trade Related Requirements (RTRRs) as a single unwritten overarching measure (i.e. the single RTRRs measure), the European Union notes that Argentina raises two separate lines of arguments.

3. On the one hand, Argentina argues that the single RTRRs measure was not within the Panel's terms of reference. Argentina's arguments are based on an incorrect understanding of the Panel's findings and are also equally without merit on their substance. Contrary to what Argentina assumes, in Section 3.1 of its First Preliminary Ruling the Panel was not determining whether the complainants' consultations requests explicitly identified the RTRRs as a single unwritten overarching measure. That was not Argentina's contention; nor was it the relevant inquiry at that stage, as Argentina wrongly assumes. Simply, the Panel found that the measures so-called "Restrictive Trade Related Requirements" or "RTRRs" included in Section 3 of the complainants' panel requests were sufficiently identified in the complainants' consultations requests and that any difference in language did not broaden the scope or change the essence of the dispute.

4. Indeed, the measure identified in the EU's Panel Request as the RTRRs as an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products squarely fell within the Panel's terms of reference. The complainants' consultations requests referred to the fact that, with a view to advancing its stated policies of re-industrialisation, import substitution and elimination of trade deficits, Argentina often requires importers of goods to undertake certain commitments, and that this measure restricted imports and discriminated between imported and domestic goods in violation of certain

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1 Whilst the Panel referred to the "RTRRs" as "TRRs", in this submission the European Union will continue using the terminology employed by the European Union in its submissions before the Panel. Since Argentina has not appealed the Panel's findings on substantive grounds, should the Appellate Body agree with those findings, this would indicate that the trade related requirements are indeed "restrictive" trade related requirements inconsistent at least with Articles XI:1 and III:4 of the GATT 1994.
provisions of the covered agreements. The complainants' panel requests merely put a name to the measures at issue (RTRRs) and specified, in accordance with the requirements under Article 6.2 of the DSU, how the complainants (and in particular the European Union) challenge the RTRRs (i.e. as an overarching measure with particular objectives as well as 29 measures relating to specific cases of application of RTRRs to specific companies). This reformulation, and in particular, the manner in which the European Union was framing its case, did not broaden the scope or change the essence of the dispute, as the Panel found.

5. Argentina's misunderstanding of the Panel Report equally taints its argument that the nature of the challenge by the European Union in its panel request (an "as such" challenge or something akin to an "as such" challenge against an unwritten measure) when compared to the consultations requests indicated that the EU Panel Request expanded the scope or changed the essence of the dispute. The Panel rightly found that the reformulation in the manner in which the complainants were challenging the RTRRs (as an overarching measure as well as separate measures in the case of the European Union) did not change the essence of the dispute. The Panel also properly rejected Argentina's attempt to impose the same standard when identifying measures and claims in both consultations and panel requests.

6. In any event, should the Appellate Body reverse the Panel's finding and move to completing the analysis, the European Union shows that Argentina's argument is moot and that, regardless, when comparing the consultations requests as well as the EU Panel Request, the only conclusion is that the single RTRRs measure was within the Panel's terms of reference.

7. Therefore, the Appellate Body should reject Argentina's arguments and uphold the Panel's finding that the single RTRRs measure was within its terms of reference.

8. On the other hand, Argentina claims that the Panel made several errors when determining that the single RTRRs measure "exists" and that it was "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994. Argentina's arguments are based on a wrong understanding of how the European Union framed its case against the single RTRRs measure as well as of the actual findings made by the Panel regarding the content and general/prospective application of the single RTRRs measure.
9. Indeed, the European Union did not rely on the "as such" / "as applied" distinction to frame its case against the RTRRs as a single overarching measure or the 23 separate measures where Argentina has imposed RTRRs on specific economic operators. Such characterisation or "label" would have been confusing, as the European Union was not challenging the "application" of the single RTRRs measure in particular instances (23 cases) or each of the RTRRs "individually". In turn, the European Union described the content of the single RTRRs measure with sufficient precision, and also argued and showed that it has general and prospective application.

10. Argentina's arguments are equally based on a wrong understanding of what the Panel actually found. The European Union observes that the Panel Report would be clearer, had the Panel explicitly examined the issue of whether the single RTRRs measure also had general and prospective application as part of its analysis in section 6.2.2.2 of its report. Having determined that the single RTRRs measure had the precise content claimed by the European Union, and that also had general and prospective application, the Panel could have proceeded to examine its conformity with the covered agreements and make findings as requested by each of the Parties.

11. However, the fact that the Panel split its analysis does not amount to a reversible error. In the European Union's view, section 6.2.2.2 as well as sections 6.2.3.4.2.3 and 6.2.3.4.2.4 of the Panel Report should be read together. In fact, quite tellingly, in paragraph 6.320 the Panel explicitly noted that "[t]he European Union and Japan have argued in this regard that the unwritten [R]TRRs measure they are challenging has general and prospective application". Although the Panel then proceeded to examine Japan's request for an "as such" finding against the single RTRRs measure, the European Union understands that the Panel's analysis of the general and prospective application of the measure at issue should be read together with the Panel's determinations regarding the single RTRRs measure in section 6.2.2.2 of its report. The numerous cross-references in sections 6.2.3.4.2.3 and 6.2.3.4.2.4 to findings already made in previous sections, and mainly to findings contained in section 6.2.2.2 of its report, show that the Panel's analysis of the general and prospective application of the single RTRRs measure was not exclusively contained in sections 6.2.3.4.2.3 and 6.2.3.4.2.4 of its report.
12. The European Union thus submits that the Panel did not err in section 6.2.2.2 of its report by not following explicitly the analytical steps mentioned by the Appellate Body in *US – Zeroing (EC)*. Rather, the Panel examined the precise content of the single RTRRs measure and found, although not so explicitly as later on in its report, that the single RTRRs measure also has general and prospective application. This is no different from the substantive inquiry the Appellate Body was setting out in *US – Zeroing (EC)*.

13. In any event, should the Appellate Body agree with Argentina and consider that the Panel made a reversible error, the European Union requests the Appellate Body to complete its analysis on the basis of the uncontested facts on the record as well as the Panel's findings (in particular in section 6.2.3.4.2.3 and 6.2.3.4.2.4), and to find that the single RTRRs measure also has general and prospective application. Since Argentina has not contested the Panel's findings that the single RTRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994, the European Union requests the Appellate Body to ultimately uphold those findings and, consequently, find that the single RTRR measure is inconsistent with those provisions.

14. Argentina further argues that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had established the precise content of the alleged RTRRs measure as well as that it had general and prospective application. The European Union submits that both allegations of error are unwarranted. In fact, the European Union is astonished by Argentina's claims of error under Article 11 of the DSU when Argentina failed to engage with the facts of this case before the Panel. In this respect, the European Union observes that, like at the Panel stage, in these appellate proceedings Argentina equally fails to refer to evidence on the record showing that the Panel was biased or committed a material error when finding that the single RTRRs measure has a precise content and that it has general and prospective application. Thus, Argentina's claim under Article 11 of the DSU appears to be an attempt to recasting the same arguments that Argentina has made with respect to its precedent claims of error, something the Appellate Body has explicitly noted it is not the function of an Article 11 of the DSU.

15. The European Union submits that the Panel went in detail in the preceding sections of its report to determine the precise content of the single RTRRs measures as well
as its general and prospective application in an objective and balanced assessment of the arguments and evidence on the record, none of which were contested by Argentina during the panel proceedings.

16. Consequently, the European Union requests the Appellate Body to reject all the claims of error raised by Argentina and to uphold the Panel's findings with respect to the single RTRRs measure as well as its inconsistency with Articles XI:1 and III:4 of the GATT 1994.

17. Finally, Argentina raises three claims against the Panel's findings regarding the Declaración Jurada Anticipada de Importación (DJAI).

18. First, Argentina alleges that the Panel erred in its assessment of the scope of Article VIII of the GATT 1994. This claim is based on a mischaracterization of the Panel's reasoning. The Panel did not "imply" that the DJAI falls outside the scope of Article VIII of the GATT 1994 merely because it is a "pre-requisite for importing goods". That finding must be read together with the remainder of paragraph 6.433 and in the light of the more detailed analysis contained in paragraphs 6.459 to 6.474. That analysis evidences that the DJAI operates, in essence, as a discretionary system of authorization of imports, by which the Argentine authorities decide on an ad hoc basis whether or not to grant the right to import to each applicant on the basis of criteria not specified in advance. Such discretionary system of authorization of imports is neither a mere formality nor a procedural requirement. Therefore, the Panel made no error by concluding that the aspects of the DJAI challenged by the complainants under Article XI:1 of the GATT 1994 fall outside the scope of Article VIII of the GATT 1994.

19. Second, Argentina claims that Panel failed to establish and apply a proper analytical framework for distinguishing between Articles VIII and IX of the GATT 1994. However, the "analytical framework" postulated by Argentina is not, by its own terms, applicable to the facts of this dispute because, as established by the Panel, the aspects of the DJAI challenged by the complainants under Article XI:1 of the GATT 1994 do not constitute a mere formality or procedural requirement within the scope of Article VIII of the GATT 1994. Therefore, even assuming ad arguendo that such analytical framework was legally correct, the Panel would have made no error by not applying it.
20. In any event, the second component of Argentina's test has the implication that, in order to determine whether "formalities" and "procedural requirements" constitute an import restriction prohibited by Article XI:1 of the GATT, panels would have to apply a different and stricter standard than when they examine a "substantive rule" of importation. This approach has no basis in the text of Article XI:1 of the GATT 1994 and is not necessary in order to ensure a "harmonious" interpretation of Articles VIII and XI:1 of the GATT 1994. Nor is it necessary in order to ensure a "harmonious" interpretation of Article XI:1 of the GATT and Article 10.1.1(c) of the Trade Facilitation Agreement (TFA). The TFA has not been adopted yet by the WTO. Moreover, Argentina wrongly assumes that, on the Panel's interpretation, Article XI:1 of the GATT 1994 would prohibit all the formalities and requirements within the scope of Article VIII of the GATT 1994 and Article 10.1.1(c) of the TFA.

21. Third, Argentina claims that the Panel erred by finding that the DJAI is inconsistent with Article XI:1 because it is not "automatic". This claim is based on the same mistaken assumptions as Argentina's previous claim. The DJAI is not a mere "formality" or "procedural requirement", but instead a discretionary system for authorizing imports. There is no conflict between Article XI:1 of the GATT 1994 and Article 3 of the Agreement on Import Licensing Procedures (ILP Agreement) because it is not impossible to comply simultaneously with both provisions. Nor does the Panel's interpretation of Article XI:1 of the GATT render inutile Article 3 of the ILP Agreement because the GATT 1994 does not prohibit all instances of non-automatic licensing.

22. Therefore, the European Union requests the Appellate Body to reject all the claims of error raised by Argentina and to uphold the Panel's reasoning and findings with respect to the DJAI.

2. **ARGENTINA'S CLAIMS OF ERROR REGARDING THE PANEL'S TERMS OF REFERENCE WITH RESPECT TO THE RTRRs AS A SINGLE OVERARCHING MEASURE**

23. Argentina has appealed one limited finding made by the Panel in its First Preliminary Ruling dated 16 September 2013, i.e. that the unwritten "overarching [RTRRs] measure" was within the Panel's terms of reference. As shown below,
Argentina's claims of errors are unfounded and should be rejected by the Appellate Body.

2.1. ARGUMENTS BEFORE THE PANEL

24. In its first written submission before the Panel Argentina argued, inter alia, that the complainants' consultations requests did not identify as measures the so-called "Restrictive Trade Related Requirements" or "RTRRs" mentioned in their panel requests and that, in any event, the requests for consultations did not provide Argentina with any information about the broad scope of the complainants' claims with respect to these unidentified measures.2

25. More specifically, on the one hand, Argentina argued that nothing in the text of the consultations requests gave any indication that the complainants would be bringing claims in respect of measures related to so-called "Restrictive Trade Related Requirements".3 Argentina argued that the complainants identified no measures in relation to the alleged "RTRRs" in their requests for consultations,4 and that the unwritten measure that the complainants sought to challenge did not bear any relationship to the measures that were identified in their requests for consultations.5

26. On the other hand, Argentina maintained that, in addition to their "as applied" claims, the complainants also referred to broader unwritten measures in their panel requests ("an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products") that are allegedly inconsistent with certain provisions of the covered agreements (Articles III:4, X:1, and XI:1 of the GATT 1994). According to Argentina, the nature of the measure (unwritten) as well as the nature of the complainants' claims ("as such" or something akin to an "as such" claim) added in the complainant's panel requests showed that the complainants broadened the scope of the dispute or changed its essence. According to Argentina, the requirement of clarity with which unwritten measures

2 Argentina's first written submission, para. 122.
3 Argentina's first written submission, para. 128.
4 Argentina's first written submission, para. 137.
5 Argentina's first written submission, para. 144.
should be identified in the context of a complainant's panel request (and more so if "as such" claims or something akin to "as such" claims in respect of an unwritten measure are brought) should equally apply in the context of a complaint's consultations request.⁶

27. In contrast, the European Union showed that the measures included in Section 3 of the EU Panel Request (under the heading "Restrictive Trade Related Requirements") were already covered by the consultations requests. In other words, the EU Panel Request did not add new measures or change the essence of the dispute, but merely defined and delimited the scope of the dispute in accordance with the requirements under Article 6.2 of the DSU whilst preserving the essence of the dispute as reflected in the consultations requests.⁷

2.2. PANEL’S FINDINGS

28. The Panel noted that Argentina’s request raised three main issues with respect to the complainants' claims relating to the alleged RTRRs, namely: (i) whether the RTRRs were identified by the complainants as a measure at issue in their respective requests for consultations; (ii) whether the reference to the RTRRs as an unwritten "overarching measure" in the complainants’ panel requests "expanded the scope" and "changed the essence" of the dispute; and (iii) whether the complainants identified, either in their respective requests for consultations or in their panel requests, the measures that are subject to their claims against the RTRRs "as applied".

29. On 16 September 2013, the Panel issued a preliminary ruling in response to the request filed by Argentina in its first written submission, concluding that: (i) the so-called RTRRs were identified by the complainants as a measure at issue in their respective requests for consultations; therefore, the inclusion of the alleged RTRRs in the complainants’ panel requests was not inappropriate and those measures were within the Panel's terms of reference; and (ii) the characterisation of the alleged

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⁶ Argentina's first written submission, paras. 133 – 144.
⁷ See EU’s response to Argentina’s preliminary ruling request (10 September 2013).
RTRRs as a single "overarching measure" in the complainants' panel requests did not expand the scope or change the essence of the dispute.8

30. More precisely, with respect to (i), i.e. Argentina's contention that the measures so-called "Restrictive Trade Related Requirements" or "RTRRs" included in the complainants' panel requests were not identified by the complainants in their respective requests for consultations and were therefore outside the Panel's terms of reference, the Panel examined the text of the consultations request9 to determine whether there was an explicit reference to the RTRRs therein.10 In its analysis, the Panel observed that the scope of the requests for consultations covered "certain commitments" that Argentina allegedly "requires" importers to undertake. In the Panel's view, the third measure identified in each of the requests for consultations corresponded to the measures identified by the complainants under the heading "Restrictive Trade Related Requirements" in their respective panel requests.11 The Panel thus concluded that the manner in which the RTRRs were described by the complainants in their respective requests for consultations was sufficient to put the respondent on notice that these alleged requirements were part of the measures at issue for the purpose of the consultations.

31. In its analysis the Panel also examined whether the third measure identified in each of the requests for consultations corresponded to the measures identified by the complainants under the heading "Restrictive Trade Related Requirements" in their respective panel requests. In this respect, the Panel noted that comparing the relevant language used in each document, there was a "close identity" between the RTRRs identified in the complainants' panel requests and the third measure identified in the complainants' requests for consultations. According to the Panel, both measures were similarly described, both in terms of the nature of the measure and in terms of the scope of the requirements allegedly imposed by Argentina. Thus, the Panel concluded that the RTRRRs were identified by the complainants as a measure at issue, both in their respective requests for consultations as well as in

8 First Preliminary Ruling by the Panel, Argentina – Import Measures (16 September 2013).
9 WT/DS438/1.
10 First Preliminary Ruling, para. 3.17.
11 First Preliminary Ruling, para. 3.20.
their panel requests; and that the differences in language used by the complainants when describing these measures in their requests for consultations, as compared to their panel requests, were minor and did not expand the scope of the dispute or change its essence.\textsuperscript{12}

32. With respect to (ii), i.e. Argentina's contention that the reference to the RTRRs as a broad unwritten "overarching measure" in the complainants' panel requests expanded the scope and changed the essence of the dispute, the Panel concluded that the characterisation of the RTRRs as a single "overarching measure" in the complainants' panel requests was nothing more than an enunciation in different terms of the complainants' same claims as set out in the requests for consultations. According to the Panel, there was nothing in this reformulation that \textit{per se} expanded the scope or changed the essence of the dispute. The fact that the complainants did not refer to the RTRRs as a single "overarching measure" in their requests for consultations did not entail the conclusion that the claims raised against the RTRRs "viewed as separate measures" (i.e. in the application of the RTRRs in specific cases) and also as a single "overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products" were outside the Panel's terms of reference.\textsuperscript{13}

33. The Panel also indicated that it would not issue a ruling with respect to the third issue raised by Argentina, namely the argument that, in light of their requests for consultations and panel requests, the complainants' claims against the alleged RTRRs "as applied" are outside the Panel's terms of reference. The Panel observed that it was not necessary or appropriate to issue a ruling at that time. The Panel noted that it would consider the matter further in the course of the proceedings, as appropriate, after having heard the parties' arguments.

34. On 20 November 2013, the Panel issued its second preliminary ruling on the outstanding question raised by Argentina. The Panel first examined the complainants' panel requests to determine whether they properly identified the alleged "Restrictive Trade Related Requirements" (RTRRs) as measures at issue in the present dispute in accordance with Article 6.2 of the DSU. In its analysis the

\textsuperscript{12} First Preliminary Ruling, paras. 3.20 – 3.24 and 3.28.

\textsuperscript{13} First Preliminary Ruling, paras. 3.29 – 3.33.
Panel noted that the complainants' panel requests enumerated "certain actions" that, according to the complainants, Argentina requires economic operators to undertake as a condition to be granted permission to import goods into Argentina. The complainants had referred to the requirement on economic operators to undertake those actions as the "Restrictive Trade Related Requirements" (RTRRs). In the circumstances of the present case and in light of the unwritten nature of the challenged measures, the Panel concluded that in their respective panel requests the complainants had identified the alleged RTRRs in a "sufficiently precise" manner so as to "present the problem clearly" and, therefore, those measures were part of the Panel's terms of reference. The Panel also deferred to its final report the issue of whether the arguments and evidence on the record are sufficient to make a prima facie case that the alleged RTRRs are inconsistent with Argentina's WTO obligations either "as such" or "as applied".\textsuperscript{14}

35. Having concluded that the complainants' panel requests properly identified the alleged RTRRs as measures at issue in the present dispute, the Panel proceeded to examine whether those measures were properly identified in the requests for consultations. Referring to its First Preliminary Ruling of 16 September 2013, the Panel recalled that the small differences in language used in describing the RTRRs in the requests for consultations, as compared with the respective panel requests, were insignificant and did not expand the scope nor change the essence of the dispute. Thus, the Panel concluded that the alleged RTRRs were properly identified in the complainants' requests for consultations as well.\textsuperscript{15}

36. Finally, the Panel concluded that the 23 measures described by the European Union in Section 4.2.4 of its first written submission as "specific instances" of application of alleged RTRRs did not constitute "measures at issue" in the present dispute.\textsuperscript{16}

\textsuperscript{14} Second Preliminary Ruling, paras. 4.21 – 4.28.

\textsuperscript{15} Second Preliminary Ruling, paras. 4.29 – 4.33.

\textsuperscript{16} Second Preliminary Ruling, paras. 4.34 – 4.38.
2.3. **ARGENTINA’S ARGUMENTS IN THIS APPEAL**

37. In its appeal, Argentina only takes issue with the Panel's conclusion in its First Preliminary Ruling that the unwritten "overarching [TRRs] measure" was within the Panel's terms of reference. Argentina argues that the Panel's analysis of the issue of whether the complainants' panel requests expanded the scope of the dispute or changed its essence by including the RTRRs as a single overarching measure where such an explicit reference was not contained in the consultations request was fundamentally flawed.17

38. According to Argentina, the Panel ostensibly "concluded" in section 3.1 of its First Preliminary Ruling that the RTRRs were "explicitly identified as a measure at issue" in the complainants' consultations requests without engaging in any analysis of the issue presented, and without confronting Argentina's arguments regarding the need to identify unwritten measures with particular clarity. Argentina posits that the defects in the Panel's analysis in relation to the complainants' identification of a single RTRRs "measure" irreparably taint the Panel's subsequent conclusion that the "overarching measure" was within its terms of reference.

39. More particularly, Argentina argues that while the Panel correctly explained that "[t]he critical point is whether a complaining party has expanded the scope of the dispute or changed its essence through the inclusion of a measure in its panel request that was not part of its request for consultations", the Panel then ignored a key element of Argentina's argument in relation to the complainants' inclusion of the new unwritten "overarching measure", i.e. that the unwritten "overarching measure" impermissibly expanded the scope of the dispute because of the nature of the new "measure" and because of the nature of the complainants' claims in respect of that new "measure". Specifically, Argentina argues that the complainants' introduction of "as such" or equally broad claims in their panel requests with respect to the "overarching measure" impermissibly expanded the scope of the dispute. According to Argentina, like the Panel's reliance on its flawed "conclusion" that the complainants had identified a single RTRRs "measure" in their requests for consultations, the Panel's failure to recognise or address

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17 Argentina's appellant submission, para. 9.
Argentina's argument regarding the complainants' introduction of broad claims in relation to the new measure irreparably taints the Panel's ultimate conclusion that consideration of the RTRRs as a single "overarching measure" was within its terms of reference.

40. In light of these flaws in the Panel's analysis, Argentina submits that the Panel's finding that the "overarching [TRRs] measure" was within its terms of reference is inconsistent with Articles 6.2 and 7.1 of the DSU. Argentina requests that the Appellate Body reverse the Panel's finding in paragraph 4.1(b) of its First Preliminary Ruling, as well as the Panel's ultimate conclusions in paragraphs 7.1(b), 7.5(b), and 7.9(b) of the Panel Report. Argentina further requests that the Appellate Body conclude instead that the unwritten "overarching [TRRs] measure" was outside the Panel's terms of reference in this dispute.

2.4. **LEGAL ANALYSIS**

41. In a nutshell, Argentina argues that the Panel erred by relying on its flawed conclusion that the complainants had "explicitly identified" the RTRRs as "a measure at issue". According to Argentina, on its face the consultations requests did not identify an unwritten "overarching measure" in relation to the so-called RTRRs, and much less any "as such" or other equally expansive claims in respect of this alleged measure. Thus, Argentina maintains that the addition of the "overarching measure" and the broad claims in respect of this measure "expanded the scope of the dispute" and "changed its essence", leaving such a measure outside the Panel's terms of reference.

42. As the European Union will show below, Argentina's arguments are based on an incorrect understanding of the Panel's findings and are also equally without merit on their substance. The measure identified in the EU's Panel Request as the RTRRs as an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products squarely fell within the Panel's terms of reference.

43. As will be shown below, the complainants' consultations requests referred to the fact that, with a view to advancing its stated policies of re-industrialisation, import substitution and elimination of trade deficits, Argentina often requires importers of goods to undertake certain commitments, and that this measure restricted imports
and discriminated between imported and domestic goods in violation of certain provisions of the covered agreements. The complainants' panel requests merely put a name to the measures at issue (RTRRs) and specified, in accordance with the requirements under Article 6.2 of the DSU, how the complainants (and in particular the European Union) challenge the RTRRs (i.e. as an overarching measure with particular objectives as well as 29 measures relating to specific cases of application of RTRRs to specific companies). This reformulation did not broaden the scope or change the essence of the dispute, as the Panel found. Therefore, the Appellate Body should reject Argentina's arguments.

2.4.1. Argentina wrongly assumes that the Panel found that the consultations requests identified the RTRRs as a single overarching measure

44. Argentina maintains that the Panel erred in Section 3.1 of its First Preliminary Ruling when finding that the complainants' consultation request identified the RTRRs as a single unwritten overarching measure. Since in Section 3.2 of the First Preliminary Ruling the Panel relied on its flawed conclusion that the complainants had "explicitly identified" the RTRRs as "a measure at issue" when finding that the unwritten "overarching measure" was a mere "reformulation" of the measure that the complainants had already identified, Argentina maintains that the Panel's conclusion in Section 3.2 was also in error.18

45. Argentina's arguments are based on an apparent misunderstanding of what the Panel actually found in Section 3.1 of its First Preliminary Ruling and its implications for the Panel's ultimate conclusion in Section 3.2 of its First Preliminary Ruling that the inclusion of the RTRRs as a single overarching measure in the complainants' panel requests fell within the Panel's terms of reference.

46. Indeed, Argentina wrongly argues that "the Panel appears to have 'concluded' that the complainants identified the alleged [R]TRRs as a single 'measure' in their consultations requests, and that this single 'measure' corresponded to the plural

18 Argentina's appellant submission, paras. 38 – 50.
[R]TRRs 'measures' identified in the complainants' panel requests".\textsuperscript{19} This is not what the Panel actually found.

47. It is worth recalling that in Section 3.1 of its Preliminary Ruling the Panel was examining Argentina's argument that the inclusion of a measure called "Restrictive Trade Related Requirements" or "RTRRs" in the complainants' panel requests expanded the scope of the dispute or changed its essence because there was no such an explicit reference in the complainants' consultations requests.\textsuperscript{20} The Panel rightly rejected Argentina's allegation.

48. First, the Panel noted that the requirements for identifying the measures at issue in a request for consultations\textsuperscript{21} are less stringent than those for a panel request.\textsuperscript{22}

49. Second, the Panel observed that the three requests for consultations identified the same three broad measures: (a) the alleged imposition by Argentina of a requirement to present for approval an Advance Sworn Import Declaration (\textit{Declaración Jurada Anticipada de Importación}, DJAI) for the importation of goods (paragraph 2 in each of the three requests for consultations); (b) the alleged imposition by Argentina of other licences, such as in the form of Import Certificates (\textit{Certificados de Importación}, CIs) (paragraph 3 in each of the three requests for consultations); and (c) the alleged imposition by Argentina on importers of the requirement to undertake certain commitments including, \textit{inter alia}, to: (i) limit their imports; (ii) balance their imports with exports; (iii) make or increase their investments in production facilities in Argentina; (iv) increase the local content of the products they manufacture in Argentina; (v) refrain from transferring benefits abroad; and/or, (vi) control the prices of imported goods (paragraph 4 in each of the three requests for consultations). Accordingly, the Panel determined that the scope of the requests for consultations covered "certain commitments" that Argentina allegedly "requires" importers to undertake.\textsuperscript{23}

\textsuperscript{19} Argentina's appellant submission, paras. 39 and 42.
\textsuperscript{20} See First Preliminary Ruling, paras. 3.2 and 3.12 – 3.16.
\textsuperscript{21} DSU, Article 4.4 ("…measures at issue…").
\textsuperscript{22} DSU, Article 6.2 ("…specific measures at issue…").
\textsuperscript{23} See First Preliminary Ruling, paras. 3.19 – 3.20.
50. Third, the Panel examined the panel requests and concluded that the third measure identified in each of the requests for consultations corresponded to the measures identified by the complainants under the heading "Restrictive Trade Related Requirements" in their respective panel requests. Specifically, the Panel noted that the complainants' panel requests enumerated "certain actions" that Argentina allegedly "requires" economic operators to undertake. Comparing the relevant language used in each document, the Panel observed that there was a "close identity" between the RTRRs identified in the complainants' panel requests and the third measure identified in the complainants' requests for consultations. According to the Panel, both measures were similarly described, both in terms of the nature of the measure\(^\text{24}\) and in terms of the scope of the requirements\(^\text{25}\) allegedly imposed by Argentina. Therefore, the Panel concluded that the measure called "Restrictive Trade-Related Requirements" or "RTRRs" was identified by the complainants as a measure at issue, both in their respective requests for consultations as well as in their panel requests. In the Panel's view, the differences in language used by the complainants when describing these measures in their requests for consultations, as compared to their panel requests, were minor and did not expand the scope of the dispute or change its essence. In this respect, the Panel noted that consultations may lead to the reformulation of a complaint, since a complaining party may learn

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\(^{24}\) First Preliminary Ruling, para. 3.22 ("In terms of the nature of the measure, both in their requests for consultations and in their panel requests, the complainants assert that Argentina requires economic operators to undertake certain commitments as a condition to be allowed to import goods into Argentina. In their requests for consultations, the complainants refer to "importers of goods" whereas, in the panel requests, they refer to "economic operators". In both sets of documents, however, the target of the measures seems to be similar, as the panel requests refer to economic operators that are requesting "permission to import". In their panel requests, the complainants add that these commitments may be imposed by economic operators on either by having them submit a statement or by having them conclude an agreement with the Argentine Government setting forth the actions the economic operators will take").

\(^{25}\) First Preliminary Ruling, para. 3.23 ("In terms of the scope of the requirements, both in their requests for consultations and in their panel requests, the complainants identify similar commitments allegedly imposed by Argentina on economic operators, namely: (i) to balance the value of imports with exports, which may be done by exporting a certain value of goods from Argentina related to the value of imports; (ii) to limit the volume or the price of their imports; (iii) to refrain from repatriating profits from Argentina to another country, described in the requests for consultations as not to transfer benefits abroad; (iv) to make new investments or increase their current investments in Argentina (including in production facilities), described in the requests for consultations as to make or increase their investments in production facilities in Argentina; and (v) to incorporate local content into domestically produced goods, described in the requests for consultations as to increase the local content of the products manufactured in Argentina").
of additional information or get a better understanding of the operation of a challenged measure.\(^{26}\)

51. In sum, the Panel found that the complainants' requests for consultations explicitly identify the requirements that the complainants subsequently described in their panel requests as the RTRRs as a measure at issue in the present dispute. According to the Panel, the manner in which the RTRRs were described by the complainants in their respective requests for consultations was sufficient to put the respondent on notice that these alleged requirements were part of the measures at issue for the purpose of the consultations. For the Panel, the small differences in language used in describing the RTRRs in the requests for consultations, as compared with the respective panel requests, were insignificant and did not expand the scope nor change the essence of the dispute.\(^{27}\)

52. As can be seen from the above, in Section 3.1 of its First Preliminary Ruling the Panel was not determining whether the complainants' consultations requests explicitly identified the RTRRs as a single unwritten overarching measure. That was not Argentina's contention; nor was it the relevant inquiry at that stage. Indeed, the Panel did not agree with Argentina that, for the single RTRRs measure to fall within its terms of reference, it was necessary that the single RTRRs measure ought to have been identified as well with the same precision in the consultations requests. Simply put, the Panel found that the measure so-called "Restrictive Trade Related Requirements" or "RTRRs" included in Section 3 of the complainants' panel requests was sufficiently identified in the complainants' consultations requests and that any difference in language did not broaden the scope or change the essence of the dispute. Thus, contrary to what Argentina suggests, the Panel made no error in Section 3.1 of its First Preliminary Ruling.

53. The issue of whether the RTRRs as a single overarching measure was within the Panel's terms of reference was specifically examined by the Panel in the following section (Section 3.2) of its First Preliminary Ruling. There, the Panel properly rejected Argentina's contention as follows.

\(^{26}\) First Preliminary Ruling, para. 3.24.

\(^{27}\) First Preliminary Ruling, para. 3.28.
54. First, the Panel started by rightly summarising the relevant question: whether the fact that none of the complainants referred to the RTRRs as a single "overarching measure" in their respective requests for consultations entails a conclusion that the consideration of the RTRRs in such a manner would be outside the Panel's terms of reference. In fact, this statement by the Panel already shows that Argentina's understanding that the Panel found in Section 3.1 of its First Preliminary Ruling that the RTRRs as a single overarching measure was explicitly identified in the complainants' consultations requests is wrong. Had that been the case, the Panel could have simply referred to its previous determination and declare the question moot. However, the Panel did not proceed on that basis.

55. Rather, as second step, the Panel noted that it had determined in Section 3.1 that the measure called "Restrictive Trade Related Requirements" or RTRRs in Section 3 of the complainants' panel requests were explicitly identified as a measure at issue in the complainants' consultations requests. In other words, the Panel noted that the RTRRs as described in the panel requests had been specifically identified in the panel requests as the measures at issue and that their inclusion did not expand the scope of the dispute or change its essence when compared to the complainants' consultations requests.

56. Third, and more fundamentally, the Panel then noted that "Argentina's argument does not refer to the description of the RTRRs as measures, but rather to the manner in which the complainants may frame their claims against the RTRRs". Thus, the Panel proceeded to examine how the complainants had framed their claims against the RTRRs, i.e. that the RTRRs were inconsistent with certain provisions of the WTO agreements, whether analysed separately or together with the DJAI requirement and the CIs requirement, and that the RTRRs were inconsistent with provisions of the WTO agreements, whether analysed in their application in specific cases, as well as when considered as a single overarching measure. Since consultations may lead to the reformulation of a complaint, and a panel request is the opportunity to shape and set out the claims against the measures at issue, the Panel concluded that the characterisation of the RTRRs as a
The European Union agrees with the Panel's finding. Indeed, Argentina seems to confuse the identification of the measures at issue with the manner in which a Member decides to frame its claims against those measures. The consultations requests already identified the RTRRs as the measure at issue, in similar terms as those later reformulated in the panel requests. Then, the panel requests, in order to comply with the requirements under Article 6.2 of the DSU (i.a. "to present the problem clearly") specifies that the European Union was challenging the RTRRs (a) separately or together with the DJAI requirement and the CIs requirement, and (b) whether analysed in their application in specific cases, as well as when considered as a single overarching measure aiming at certain policy objectives.

Therefore, Argentina's allegation that the Panel made an error in Section 3.2 by relying on its findings in Section 3.1 is flawed. The Panel simply found that the RTRRs were mentioned in both documents and that challenging those RTRRs either as a single unwritten overarching measure or when viewed as separate measures did not change the essence of the dispute. According to the Panel, the characterisation of the RTRRs as a single "overarching measure" in the complainants' panel requests was nothing more than an enunciation in different terms of the complainants' same claims as set out in the requests for consultations, and that a precise and exact identity between the measures identified in the requests for consultations and the specific measures identified in the panel requests is not necessary.

30 First Preliminary Ruling, para. 3.33.
31 First Preliminary Ruling, para. 3.33.
32 First Preliminary Ruling, para. 3.17.
2.4.2. The Panel properly rejected Argentina's allegation that the complainants' "as such" or equally expansive challenges to the unwritten "overarching measure" expanded the scope of the dispute

59. Argentina further argues that the Panel failed to address its argument that the complainants' omission of the unwritten "overarching measure" from their consultations requests was particularly problematic given both the nature of the measure (unwritten) and the nature of the complainants' claims in respect of that measure ("as such" or something akin to an "as such" challenge).³³

60. Argentina's allegation is again based on an apparent misunderstanding of the Panel's finding. The Panel did not need to address expressly Argentina's contention since it had already disagreed with it by finding that the challenge to the RTRRs as a single overarching measure was nothing more than an enunciation in different terms of the complainants' same claims as set out in the requests for consultations, and in particular a reformulation in the manner the complainants were challenging the RTRRs (i.e. as an overarching measure as well as separate measures in the case of the European Union).

61. It is worth recalling that under Article 12.7 of the DSU a panel must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations, and that a failure to address a specific argument raised by one of the parties is not per se an error under Article 11 of the DSU. In the present case, Argentina does not even attempt to argue that the Panel's assessment of its argument amounted to an error under any of those provisions, since such argument was so fundamental that led the Panel to make an error. This shows that Argentina's allegation did not affect the application of the relevant standard to the facts of this case. Argentina simply disagrees with the force that the Panel conferred to its argument.

62. Nevertheless, on substance, Argentina's contention is equally without merit for at least three reasons.

63. First, Argentina's argument is based on an assumption that "the unwritten 'overarching measure' introduced in the complainants' panel requests bears no

³³ Argentina's appellant submission, paras. 51 – 58.
relationship to the measures that were identified in their requests for consultations". This is incorrect. In this respect, the Panel noted that comparing the relevant language used in each document, there was a "close identity" between the RTRRs identified in the complainants' panel requests and the third measure identified in the complainants' requests for consultations and, particularly, referred to their nature and scope as being "similar". Moreover, the European Union observes that, as the Panel ultimately found, the single RTRRs measure is composed by one or several of the RTRRs already listed in the consultations requests, and is equally based on the policy objectives mentioned therein. Thus, the European Union considers that the relationship between the measures mentioned in the complainants' consultations requests and the measures identified in the EU Panel Request was manifestly obvious.

Second, Argentina wrongly submits that the standard to identify "as such" claims in panel requests as articulated by the Appellate Body equally applies in the context of consultations requests. The European Union was not required to identify the RTRRs as well as the manner it intended to bring its claims in its consultations request with the same degree of detail as in its panel request. Indeed, with respect to consultation requests Article 4.4 of the DSU refers to the obligation to provide "the reasons for the request, including the identification of the measures at issue and an indication of the legal basis for the complaint". In contrast, Article 6.2 of the DSU requires to "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The language of Article 6.2 of the DSU is thus stricter; and for good reasons since the panel request serves to delimit the jurisdiction of the panel. Moreover, it is well-established that consultations "are but the first step in the WTO dispute settlement process", which "provide the parties an opportunity to define and delimit the scope of the dispute between them", and also to "clarify

34 Argentina's appellant submission, para. 56.
35 First Preliminary Ruling, paras. 3.20 – 3.24.
36 E.g. Panel Report, para. 6.221.
38 Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 54.
the facts of the situation”. Moreover, "information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks the establishment of a panel”. “Precise and exact identity” of measures between the two requests is not necessary, provided that the essence of the challenged measures had not changed. The claims set out in a panel request may also be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Thus, the European Union was not required to identify the measures and the manner it intended to bring its claims against those measures in its consultations requests in identical terms as the European Union did in its panel request. Naturally, consultations assisted the European Union to have a deeper knowledge of the measures at issue as well as Argentina's position on them. This allowed the European Union to shape its panel request accordingly, and in compliance with the requirements under Article 6.2 of the DSU.

Third, in any event, as discussed below, the European Union did not characterise its claim against the single RTRRs measure "as such"; nor did the European Union ask for an "as such" finding against that measure (unlike Japan). Indeed, there was no explicit reference in the EU Panel Request to an "as such" claim (and not even in the EU’s first written submission); rather, the European Union described the elements conforming the unwritten measure and explained why it found them inconsistent with the covered agreements, either when seeing the RTRRs as a single overarching measure (the single RTRRs measure) or as separate measures (i.e. when some RTRRs were applied to particular economic operators).

Consequently, contrary to what Argentina's asserts, the European Union considers that the Panel did not make any error in its Section 3.2 of the First Preliminary

39 Appellate Body Report, Brazil – Aircraft, para. 131.
40 Appellate Body Report, Brazil – Aircraft, para. 132.
41 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 137.
42 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 138.
43 In this respect, it is worth recalling that Argentina has not challenged the fact that the single RTRRs measure was properly identified in the EU Panel Request in accordance with Article 6.2 of the DSU.
Ruling. The Panel was not obliged to reflect Argentina's argument since, in view of its reasoning, it was not necessary to address it expressly in its report.

2.4.3. The RTRRs as an overarching measure was within the Panel's terms of reference

67. In case the Appellate Body were to reverse the Panel's findings contested by Argentina, Argentina further requests the Appellate Body to find that the complainants impermissibly expanded the scope of the dispute by including the "overarching measure", subject to "as such" or equally expansive challenges, in their respective panel requests.44

68. The European Union notes that in Section II.E of its Appellant Submission Argentina recasts the same arguments used to show that the Panel made an error in its Section 3.2 of the First Preliminary Ruling. Therefore, as explained before, the European Union considers that those arguments are entirely unwarranted and so is Argentina's request for completion of the analysis. Indeed, as shown before, the Panel properly applied the legal standard to the facts of this case and, thus, the application of that standard by the Appellate Body should lead to the same result, i.e. that the single RTRRs measure fell within the Panel's terms of reference.

69. In the event the Appellate Body considers that the Panel's finding challenged by Argentina must be reversed, for the reasons contained in the EU's Response to Argentina's Preliminary Ruling Request dated 10 September 2013 (Section 2), the European Union maintains that Argentina waived its objection to a lack of consultations with respect to the RTRRs as an overarching measure. Therefore, the Appellate Body may also find that the issue raised by Argentina again in these appellate proceedings is moot.

70. In any event, for the sake of completeness, the European Union will recall the legal standard to examine the adequacy of consultations requests and will apply such standard, as articulated by the Appellate Body in previous cases, to the case at hand in order to assist the Appellate Body in completing the analysis.

44 Argentina's appellant submission, paras. 59 – 62.
2.4.3.1 **Legal standard**

71. The Appellate Body has found 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". Moreover, the Appellate Body has held that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them". At the same time, the Appellate Body has also confirmed that Articles 4 and 6 do not "require 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". Rather, "[a]s long as the complaining party does not expand the scope of the dispute", the Appellate Body has said that it would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request". In this respect, the terms of reference are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel. Therefore, "precise and exact identity" of measures between the two requests is not necessary, "provided that the 'essence' of the challenged measures had not changed".

72. Whether a complaining party has "expand[ed] the scope of the dispute" or changed the "essence" of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case

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In answering this question, panels and the Appellate Body have, in prior disputes, focused on various aspects of the relationship between the measures included in the panel request and those identified in the consultation request. In certain disputes, they considered whether the additional measures constituted "separate and legally distinct" measures from those which had been consulted upon, in view of the content of the measures, their legal bases, the government agencies that issued them and/or the legal linkages between them. In other cases, they found that the measures added in the panel request fell within the panel's terms of reference because they were similar or sufficiently related to those that had been consulted upon, and because the legal bases of the claims made in respect of the two different sets of measures were identical.

Panels need to examine the texts of consultation request and the panel request in order to determine whether the scope of the dispute has been broadened or changed.

2.4.3.2 Legal analysis

The European Union observes that Argentina does not contest the legal standard followed by the Panel when examining the question of whether the RTRRs as an overarching measure fell within the Panel's terms of reference. Rather, Argentina challenges the manner in which the Panel applied such a standard to the facts of this case. The European Union will show below that when applying the legal standard to the present situation the only conclusion is that the EU's challenge of

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53 Panel Report, US – Continued Zeroing, paras 7.16 – 7.29; Appellate Body Report, US – Continued Zeroing, paras 213 – 236. See also Appellate Body Report, Brazil – Aircraft, paras. 127 – 133, finding that the additional measures (regulatory instruments relating to the administration of the subsidy programme at issue) did not change the essence of the measure consulted upon. In US – Continued Zeroing, the Appellate Body qualified its findings in US – Certain EC Products (additional measure excluded on the basis that it was separate and legally distinct from the measures consulted upon), indicating that the two measures at issue in US – Certain EC Products were not only legally distinct, but "were entirely different and, as a consequence, the matters covered by the consultations request and the panel request were distinct". (Appellate Body Report, US – Continued Zeroing, para. 230).
the RTRRs as a single overarching measure was within the Panel's terms of reference.

2.4.3.2.1 Measures identified in the consultations requests

75. The European Union observes that, contrary to Argentina's erroneous assertions, the panel requests do not introduce new measures that were not previously mentioned in the consultations requests. Indeed, the consultations requests clearly identified three separate sets of measures in its paragraphs 2 to 4.

76. First, paragraph 2 of the consultations requests refers to the DJAI as follows:

Argentina subjects the importation of goods into Argentina to the presentation for approval (validación) of a so-called Declaración Jurada Anticipada de Importación (DJAI). The relevant legal instruments are listed in Annex I.

77. Second, paragraph 3 of the consultations requests identifies other types of licenses, such as the CIs, LAPI and CLCs:

Argentina subjects the importation of certain goods into Argentina to various types of licenses: Licencias No Automáticas de Importación in the form of Certificados de Importación (CIs); Licencias Automáticas Previa de Importación (LAPI); and Certificados de Libre Circulación (CLCs). The legal instruments providing for these measures are listed in Annex II, Annex III and Annex IV, respectively.

78. Third, paragraph 4 of the consultations requests refers to the RTR requirements as follows:

Argentina often requires the importers of goods to undertake certain commitments, including, inter alia, to limit their imports, to balance them with exports, to make or increase their investments in production facilities in Argentina, to increase the local content of the products they manufacture in Argentina, not to transfer benefits abroad and/or to control their prices.

79. This paragraph clearly refers to the RRTRs, when using the term "requires". In other words, that Argentina "requires" importers to undertake certain commitments implies that Argentina imposes certain "requirements". Further, the form of these requirements is also mentioned therein, i.e., commitments, including, inter alia, to limit their imports, to balance them with exports, to make or increase their investments in production facilities in Argentina, to increase the local content of the products they manufacture in Argentina, not to transfer benefits abroad and/or to control their prices. Also, quite tellingly, when compared with the previous two
paragraphs where the legal instruments providing for the measures at issue are
contained, this paragraph does not contain such a reference, thereby indicating the
unwritten nature of the measures at issue.

80. Paragraph 5 of the consultations requests explains, *inter alia*, the relationship
between the two group of measures mentioned in paragraphs 2 and 3 ("LAPIs, CIs and
CLC and the approval of DJIAs") with the measures referred to in paragraph 4
("trade restrictive commitments"):

The issuance of LAPIs, CIs and CLCs and the approval of DJIAs
is being systematically delayed or refused by the Argentinean
authorities on non-transparent grounds. Often the Argentinean
authorities make the issuance of LAPIs, CIs and CLC and the
approval of DJIAs conditional upon the importers undertaking to
comply with the trade restrictive commitments mentioned above.

81. This indicates the separate nature of each of the three types of measures referred to
in paragraphs 2 to 4, and confirms the "trade restrictive" nature of the type of
measures mentioned in paragraph 4 of the consultations requests.

82. Finally, paragraph 6 of the consultations requests describes generally the trade
restrictive nature of all the three types of measures at issue (as restricting imports
("restrict") and discriminating between imported and domestic goods), as well as
their purpose (as aiming at advancing the Argentinean Government's stated
policies of re-industrialisation, import substitution and elimination of trade balance
deficits):

These measures restrict imports of goods and discriminate
between imported and domestic goods. They do not appear to be
related to the implementation of any measure justified under the
WTO Agreement, but instead aimed at advancing the Argentinean
Government's stated policies of re-industrialization, import
substitution and elimination of trade balance deficits.

83. In sum, as part of the dispute at issue, the consultations requests expressly refer to
trade restrictive requirements in the form of commitments, including, *inter alia*, to
limit their imports, to balance them with exports, to make or increase their
investments in production facilities in Argentina, to increase the local content of
the products they manufacture in Argentina, not to transfer benefits abroad and/or
to control their prices. Further, the consultations requests make it clear that such
measures are unwritten and distinct from (although often related to) the other measures, such as the DJAI and the other types of licenses mentioned before. Finally, the consultations requests refer to the trade restrictive nature of the measures at issue as well as their purpose to advance Argentina's stated policies of re-industrialisation, import substitution and elimination of trade balance deficits.

2.4.3.2.2 Measures identified in the panel requests

84. The panel requests (and more particularly the EU Panel Request) follow a similar outline.

85. First, Section 1 of the EU Panel Request identifies the DJAI requirement as a measure at issue. The DJAI was mentioned in paragraph 2 of the EU Consultation Request.

86. Second, Section 2 of the EU Panel Request refers to one of the other types of licenses mentioned in paragraph 3 of the EU Consultation Request, the CIs.

87. Finally, Section 3 of the EU Panel Request refers to the third type of measures the EU Consultation Request mentioned in paragraph 4 of its Consultation Request. In order to do so, the EU Panel Request labels the measures contained therein as "Restrictive Trade Related Requirements". This title aims at summarising the main characteristics of the measures at issue in this part of the dispute, as spelled out in the consultations requests. Indeed, as explained before, the consultations requests employ the terms "requires" and "trade restrictive commitments".

88. Moreover, the EU Panel Request elaborates the description of the measures at issue in this part of the dispute as follows:

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55 Indeed, when comparing paragraph 4 of the consultations request with the previous two paragraphs, where the legal instruments are listed in several annexes, it is obvious that the European Union was complaining about measures that were not published officially. They were inferred from the trade restrictive commitments the Argentine Government was requiring from economic operators and listed in paragraph 4 of the consultations requests. Thus, the European Union indeed identified the RRTRs as having an unwritten nature already in its consultations request. In fact, the consultations requests already included a claim under Article X:1 of the GATT 1994 because of the lack of publication of such measures.
Separately and/or in combination with the above measures described in Sections I and II, Argentina requires economic operators to undertake certain actions with a view to pursuing Argentina's stated policy objectives of elimination of trade balance deficits and import substitution. Those actions include to: 
(1) export a certain value of goods from Argentina related to the value of imports; 
(2) limit the volume of imports and/or reduce their price; 
(3) refrain from repatriating funds from Argentina to another country; 
(4) make or increase investments in Argentina (including in production facilities); and/or 
(5) incorporate local content into domestically produced goods.

89. In other words, like paragraph 5 of the consultations requests, this paragraph confirms that the RRTRs are separate measures from the other two identified before (i.e., DJAI and CIs). Moreover, like paragraph 4 of the consultations requests, this paragraph uses the term "requires" and specifies the form of the requirements in similar manner as those spelled out in paragraph 4 of the consultations requests. Also, like paragraph 6 of the consultations requests, this paragraph refers to the purpose of the measures at issue, as pursuing Argentina's stated policy objectives of eliminating trade balance deficits and import substitution.

90. Finally, the EU Panel Request specifies that the European Union is challenging these requirements as "an overarching measure aiming at eliminating trade balance deficits and/or substituting imports by domestic products, as well as when viewed as separate measures in each of the instances listed in Annex III, and whether analysed separately or together with the measures described in Sections I and II". In other words, the European Union is challenging the existence of an overarching measure which, as mentioned in the EU Panel Request, is "not stipulated in any published law or regulation". The precise content of such an overarching measure is provided in the EU Panel Request, in a similar manner as was made in the consultations requests. In the alternative, should the Panel find that the RRTRs, each on its own or any combination thereof, are not inconsistent with Articles XI:1 and/or III:4 of the GATT 1994 as part of an overarching measure, the European Union challenged as separate measures certain specific instances where Argentina has sought one or more of these requirements from individual economic operators. Those separate measures, identified in Annex III of the EU Panel Request, have the same form, nature and purpose as the ones identified in paragraph 4 of the consultations requests.
2.4.3.2.3 Relationship between measures and claims in view of the essence standard

91. As can be seen from the above, the consultations requests already identified the measures listed in Section 3 of the EU Panel Request as measures distinct from (although often related to) the DJAI and other types of licenses, in particular by specifying their form, nature and purpose. The EU Panel Request merely gives them a title which is identical to the terms used in the consultations requests ("requires", "trade restrictive commitments"), maintains the essence of the form, nature and purpose of those requirements, and challenges them as an overarching measure or as separate measures in specific cases. Consequently, the EU Panel Request did not broaden the scope of the dispute. The essence of the dispute as described in the consultations requests was preserved in the EU Panel Request, whilst defining and delimiting the scope of the dispute in accordance with the requirements under Article 6.2 of the DSU.

92. Indeed, on the one hand, as mentioned before, the consultations requests identifies as measures at issue trade restrictive requirements in the form of specific types of commitments which restrict imports and discriminate between imported and domestic goods with a view to advancing the Argentinean Government's stated policies of re-industrialisation, import substitution and elimination of trade balance deficits.

93. On the other hand, the EU Panel Request identifies the RRTRs as an overarching measure having the same characteristics as those described in the consultations requests and pursuing the same policy objectives. Further, Annex III of the EU Panel Request lists as separate measures specific RRTRs imposed on individual economic operators, again having the same characteristics as those described in the consultations requests. Thus, the measures mentioned in the EU Panel Request are not "legally distinct" measures from those mentioned in the consultations requests. Simply put, they are the same although specifically identified as required by Article 6.2 of the DSU.

94. Consequently, the reference to the RRTRs as an overarching measure does not expand the scope of the dispute or change its essence. Such a reference is meant to specify, as mandated by Article 6.2 of the DSU, the measures at issue which are
part of the terms of reference of the Panel and the manner in which the European Union was framing its case.\footnote{Appellate Body Report, EC – Bananas III, paras. 139 – 144; Appellate Body Report, Brazil – Desiccated Coconut, p. 22; and Appellate Body Report, India – Patents (US), paras. 86 – 96.}

2.5. \textbf{CONCLUSION}

95. In light of the foregoing, the European Union requests the Appellate Body to reject Argentina's arguments and uphold the Panel's finding that the EU's challenge to the RTRRs as a single overarching measure was within the Panel's terms of reference.

3. \textbf{ARGENTINA'S CLAIMS OF ERROR AGAINST THE PANEL'S FINDINGS ON THE RTRRS AS A SINGLE OVERARCHING MEASURE}

96. Whilst not contesting that the single RTRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994, Argentina has appealed the Panel's findings that the single RTRRs measure actually "exists". As shown below, Argentina's claims of errors are unfounded and should be rejected by the Appellate Body.

3.1. \textbf{ARGUMENTS BEFORE THE PANEL}

97. In its second written submission,\footnote{Argentina's second written submission, paras. 98 – 117.} Argentina argued that the complainants had failed to make a \textit{prima facie} case of the existence of the RTRRs as a single overarching measure. Argentina contended that, in accordance with the standard set out by the Appellate Body in \textit{US – Zeroing (EC)}, there was a high threshold to be met by the complainants in order to prove the existence of an unwritten measure such as the alleged RTRRs as a single overarching measure. More particularly, Argentina argued that the complainants had failed to establish (i) the precise content of the RTRRs as a single overarching measure; and (ii) its general and prospective application.

98. With respect to (i), i.e. Argentina's contention that the complainants' characterisation of the measure was "broad, amorphous and ill-defined", thus failing to determine the precise content of the RTRRs as a single overarching measure, Argentina argued that (a) the complainants had provided a non-
exhaustive list of requirements that the RTRRs measure encompasses; and (b) the alleged requirements are not the same for different economic operators.

99. With respect to (ii), i.e. the lack of general and prospective application of the single RTRRs measure, Argentina argued that the evidence provided by the complainants at most demonstrated "a series of unrelated 'one-off' actions that concern a limited number of individual 'economic operators', whose particular content varies greatly and lacks anything resembling the general and prospective application one would expect to find in the operation of an unwritten rule or regulation".\(^{58}\)

100. In turn, the European Union showed that it had identified the RRTRs as a single overarching measure with sufficient precision.\(^{59}\) The European Union also showed that such unwritten measure was not simply a series of distinct and unrelated actions as posited by Argentina; rather, the imposition of RTRRs on economic operators was part of a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives. The European Union argued that those actions were connected in view of the two specific objectives pursued by Argentina and the fact that they all seek to prohibit or restrict the importation of products and/or the use of imported products in Argentina. Indeed, the Argentine Government decides to impose one or more of these RTRRs depending on how the economic operator or sector in Argentina can best contribute to achieving Argentina's trade balance and import substitution objectives. Moreover, the European Union showed that such a systemic approach was not "incidental" but that applied to a wide range of sectors and had become the "rule" for companies doing business in Argentina. The European Union noted that such a "rule" would apply or would likely apply in the future in Argentina, insofar as Argentina continued pursuing its trade balancing and import substitution objectives. This is why the European Union "challenges the overarching measure established by Argentina". Indeed, the European Union

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59 See EU's first written submission, paras. 325 – 327; EU's opening oral statement, first meeting with the parties, para. 34; and EU's second written submission, paras. 112 – 115.
noted that challenging each of the RTRRs as isolated cases (as opposed to as part of a single measure) would not get rid of the problem faced by the EU industry. Thus, in that context the European Union also showed that the single RTRRs measure has general and prospective application.  

3.2. PANEL’S FINDINGS

101. At the outset the Panel observed that, in their panel requests, the complainants had identified a measure that consists of a combination of actions referred to as the "Restrictive Trade-Related Requirements" (RTRRs) (i.e. the RTRRs as a single overarching measure), and that neither the existence nor the nature and characteristics of the alleged measure were contained in any law, regulation, administrative act or official publication (unwritten measure). Recalling previous case-law, the Panel noted that nothing prevents a Member from challenging an unwritten measure through the WTO dispute settlement mechanism. Likewise, on the basis of previous case-law, the Panel observed that when a challenge is brought against an unwritten measure, the very existence and the precise contours of the alleged measure may be uncertain. Thus, the complainants must clearly establish, through arguments and supporting evidence, at least: (a) that the measure is attributable to the responding Member; and (b) its precise content. Additionally, the Panel noted that a determination that a measure has general and prospective application is not essential in all challenges against unwritten measures, but only if a challenge is against the measure "as such".  

102. In view of the above, the Panel assessed whether there was evidence of the existence of the RTRRs as a single overarching measure, as defined by the complainants. In order to do so, first the Panel proceeded to determine the existence of each of the five RTRRs identified by the complainants. The Panel found evidence showing that, at least since 2009, Argentina has required from importers and other economic operators to undertake one or more of the following

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60 EU's second written submission, paras. 111 – 133.
trade-related commitments, as a condition to import goods or to obtain certain benefits: (a) offsetting the value of their imports with, at least, an equivalent value of exports (one-to-one requirement); (b) limiting their imports, either in volume or in value (import reduction requirement); (c) reaching a certain level of local content in their domestic production (local content requirement); (d) making investments in Argentina (investment requirement); and, (e) refraining from repatriating profits from Argentina (non-repatriation requirement). The Panel also found that Argentina has imposed one or more of these five RTRRs in different combinations.\(^6^4\)

103. Having found that one or more of those RTRRs existed in view of the evidence on the record,\(^6^5\) the Panel examined whether the RTRRs operated as a single measure, as defined by the complainants, determined its content and found that it was attributable to Argentina as follows.

104. The Panel observed that the complainants were challenging the existence of a single measure consisting of a combination of one or more of the five RTRRs. Recalling previous case-law, the Panel noted that in cases where panels had been confronted with the need to determine the existence of a single broad measure constituted by a number of individual requirements that work in combination, panels had considered whether a measure consisting of various elements should be examined as a single measure or as separate measures.\(^6^6\) In this assessment, the Panel examined the manner in which the RTRRs operate and how they were related to each other.\(^6^7\)

105. In particular, with respect to the operation of the measure, the Panel found that in many cases Argentina had imposed a combination of RTRRs on economic operators, depending on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits. In the Panel's view, the fact that the RTRRs could be imposed separately did not mean that a single global measure did not

\(^{6^4}\) Panel Report, para. 6.221.

\(^{6^5}\) Panel Report, paras. 6.155 – 6.216.

\(^{6^6}\) Panel Report, para. 6.145

\(^{6^7}\) Panel Report, para. 6.224.
exist. According to the Panel, the RTRRs measure would remain a single measure regardless of the number of requirements imposed in a specific case because, in all instances of application, it implies the imposition of one or more requirements.  

106. In addition, the Panel noted that the RTRRs constitute different elements that contribute in different combinations and degrees – as part of a single measure – towards the realisation of common policy objectives that guide Argentina's "managed trade" policy, i.e. substituting imports and reducing or eliminating trade deficits. Thus, a separate consideration of each of the RTRRs would go against the nature of the measure, namely, its flexibility and versatility.  

107. The Panel also noted that Argentina had failed to rebut the complainants' evidence and arguments regarding the RTRRs as a single overarching measure.  

108. The Panel equally observed that Argentina had not disputed the attribution of the single RTRRs measure. According to the Panel, the evidence showed that Argentina implements a policy of "managed trade" that has been announced in public statements and speeches and on government websites by high-ranking Argentine Government officials, including the President, the Minister of Industry and the Secretary of Trade. The Panel also noted that high-ranking Argentine officials had also referred to the imposition of RTRRs on specific companies and sectors, and that the evidence suggested that these RTRRs will continue to be imposed, until and unless the policy is repealed or modified.  

109. Thus, the Panel concluded 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 RTRRs measure) attributable to Argentina.  

110. The Panel then examined the consistency of the measure at issue with the alleged provisions of the covered agreements and found that the RTRRs as a single
overarching measure was inconsistent with Articles XI:1 and III:4 of the GATT 1994.  

111. Lastly, the Panel examined the arguments raised by the European Union and Japan that the single RTRRs measure has general and prospective application, and proceed to examine Japan's explicit claim against the single RTRRs measure "as such" by applying the three-prong test outlined by the Appellate Body in US – Zeroing (EC) and found, mainly on the basis of the evidence previously discussed, that the single RTRRs measure was attributable to Argentina, was precise enough in its content, and has general and prospective application. Consequently, the Panel found that the single RTRRs measure was also inconsistent with Articles XI:1 and III:4 of the GATT 1994 "as such".

3.3. ARGENTINA'S ARGUMENTS IN THIS APPEAL

112. In the event that the Appellate Body were to find that the RTRRs as a single overarching measure was within the Panel's terms of reference, Argentina claims that the Panel erred in finding that the complainants had established that such "TRRs measure" exists, and that it is inconsistent with Articles XI:1 and III:4 of the GATT 1994.

113. Specifically, Argentina argues that the Panel erred in applying an incorrect legal standard to evaluate the complainants' "joint claims" with respect to the RTRRs as a single overarching measure. According to Argentina, it was clear that all complainants were challenging the RTRRs as a single unwritten measure. Argentina, however, posits that the precise nature of the complainants' claims was unclear. In this respect, Argentina believes that all complainants intended to challenge the alleged measure "as such", although only Japan requested findings on "as such" basis. Argentina relies on the fact that all complainants were seeking prospective relief against the single RTRRs measure and, thus, in all but its name, all complainants indeed were challenging the measure "as such". In view of this, Argentina argues that the Panel should have applied the three-prong test developed

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75 Panel Report, para. 6.343.
by the Appellate Body in *US – Zeroing (EC)* when examining challenges against unwritten measures and where the complainant seeks an "as such" finding of inconsistency. Since the Panel did follow such an analysis, Argentina argues that the Panel's ultimate conclusion about the existence of the RTRRs a single unwritten measure was in error. Thus, Argentina requests the Appellate Body to declare moot and of no legal effect the Panel's findings that the complainants established that such unwritten RTRRs measure "exists", and consequently to reverse its finding that the alleged RTRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994.\(^{76}\)

114. Finally, Argentina maintains that in evaluating Japan's "as such" claim – the only explicit "as such" claim against the alleged TRRs measure – the Panel failed to undertake an objective assessment of the matter in accordance with Article 11 of the DSU in concluding that Japan had demonstrated the existence of the measure that was the subject of its claim. For these reasons, Argentina requests the Appellate Body to reverse the Panel's findings of inconsistency in respect of the single RTRRs measure.\(^{77}\)

3.4. **LEGAL ANALYSIS**

115. In a nutshell, in Argentina's view, the Panel erred by applying the legal standard articulated by the panels in *US – COOL*, *US – Tuna II*, and *Japan – Apples*, concerning the appropriateness and convenience of assessing the WTO-consistency of multiple written measures as if they were a single measure, in order to find that the single RTRRs measure exists. Argentina argues that, since the complainants' claims were all "as such" or something akin to an "as such" challenge, the Panel made an error when failing to apply the correct legal standard as spelled out by the Appellate Body in *US – Zeroing (EC)* in order to determine whether an unwritten "rule or norm" exists. Argentina further notes that the findings reached by the Panel in relation to the complainants' "joint claims" against the single RTRRs measure are indistinguishable from the separate findings that the Panel reached in relation to Japan's additional "as such" claim against the same

\(^{76}\) Argentina's appellant submission, paras. 75 – 120.

\(^{77}\) Argentina's appellant submission, paras. 63 – 202.
measure. According to Argentina, all Panel's findings relate to the single RTRRs measure as a rule or norm of general and prospective application, and imply implementation obligations in relation to that measure that are prospective in nature, and independent of any specific instance of application of the alleged RTRRs measure. Finally, even with respect to Japan's "as such" findings, Argentina argues that the Panel erred in "lightly assuming" the existence of a measure of general and prospective application, and that the Panel's earlier application of the US – COOL factors did not provide a sufficient evidentiary basis from which the Panel could have established the precise content of the single RTRRs measure.

116. As the European Union will show below, Argentina's allegations of error are unfounded.

3.4.1. The European Union did not rely on the "as such" / "as applied" distinction

117. The Appellate Body has already warned that the "as such" and "as applied" distinction is a "heuristic device", useful to clarify the type of challenge and remedy sought with respect to a measure. However, such a distinction does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement.78 Further, such a distinction –like any analytical tool– should not be mechanistically applied.79

118. The European Union notes that the "as such" / "as applied" distinction is not foreseen in the text of the covered agreements. The European Union further considers that there is no legal requirement to indicate in every case expressly that a Member challenges a measure "as such". In fact, most panel requests do not specify so.

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78 Appellate Body Report, US – Continued Zeroing, para. 179 ("We share the Panel's view that the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue").

79 Appellate Body Report, US-Corrosion Resistant Steel Sunset Review, para. 93 ("… as with any such analytical tool, the import of the ‘mandatory/discretionary distinction’ may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion").
119. Before the Panel, the European Union identified a number of actions referred to as the "Restrictive Trade-Related Requirements" (RTRRs) that Argentina requires economic operators to undertake as part of a policy seeking to eliminate trade balance deficits and substitute imports for domestically-produced goods. The European Union also made it clear that the nature of the measures was unwritten (i.e. not published). Further, the European Union specified that it was bringing a challenge against the RRTRs as an overarching measure. In addition, and in the alternative, the European Union also challenged the imposition of certain RRTRs on individual economic operators by Argentina as listed in Annex III of its Panel Request. As discussed below, the European Union also argued and showed before the Panel that the RTRRs as a single overarching measure had general and prospective application. Thus, the European Union precisely identified the contours of the measure it was challenging as the single RTRRs measure and, ultimately, demonstrated its existence.

120. The European Union did not consider it necessary or useful to characterise explicitly its claims against the RTRRs as a single overarching measure as an "as such" claim. In the European Union's view, the use of that terminology could have wrongly suggested that the European Union was challenging the RTRRs as a single overarching measure "as such" and the RTRRs imposed upon certain operators as instances of application of that "as such" measure. However, this is not what the European Union brought before the Panel. In fact, the terms "as such", "as applied" or "application" do not appear in the EU Panel Request; the term "as such" does not appear in the EU's first written submission either. Rather, the European Union identified and challenged the RTRRs as an overarching measure with a precise content, i.e. the combination of any of the actions listed as RTRRs with a view to achieving particular stated trade objectives, and also argued and showed that the single RTRRs measure had general and prospective application. In addition, and in the alternative, the European Union also challenged as separate measures specific instances where the Argentine Government had imposed some RTRRs on individual economic operators. Thus, the claims brought by the European Union were against measures

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80 See EU Panel Request, Section 3.
attributable to Argentina, either in the form of unwritten measures or as actions taken by Argentina against individual operators.  

122. In sum, the European Union did not rely on the "as such" / "as applied" distinction to frame its case against the RTRRs as a single overarching measure or the 23 separate measures where Argentina has imposed RTRRs on specific economic operators. Such characterisation or "label" would have been confusing, as the European Union was not challenging the "application" of the single RTRRs measure in particular instances or each of the RTRRs "individually". In turn, the European Union described the content the single RTRRs measure with sufficient precision, and also argued and showed that it has general and prospective application.

3.4.2. The European Union defined the single RTRRs measure also as having general and prospective application

123. The European Union invites the Appellate Body to read paragraphs 112 – 115 of the EU's second written submission where the European Union summarised the precise content of the single RTRRs measure. There, it can be seen that, although the European Union did not frame its claims against the single RTRRs measure "as such", the European Union argued and showed that the single RTRRs measure also has general and prospective application.

124. Indeed, the issue of whether the RTRR as a single overarching measure had general and prospective application was raised specifically by the European Union as a response to Argentina's arguments about the need to proof such an element in the present case to show the existence of the RTRRs as a single measure. In this

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81 Had the Panel found that the RRTRs as part of an overarching measure were inconsistent with Articles XI:1 and/or Article III:4 of the GATT 1994, the Panel could have refrained from examining the European Union's claims against the separate measures listed in Annex III of its Panel Request. However, this is not the result of an "as such/as applied" claim brought by the European Union (which was not the case), but rather stemmed from the manner in which the European Union had articulated its claims in its first written submission (i.e., in the alternative and secondary manner with respect to the measures listed in Annex III of the EU Panel Request).

82 Argentina wrongly asserts that the European Union challenged the RTRRs individually (see e.g. Argentina's appellant submission, footnote 92 and para. 170). When challenging the RTRRs as a single overarching measure, the European Union noted that since each RTRR was contrary to the GATT 1994, so was the single overarching measure (which was composed of one or more of those requirements). This is quite different from challenging the RTRRs individually in the abstract or "as such".
context, the European Union argued and showed that the imposition of RRTRs on economic operators was part of a systemic approach adopted by Argentina to prohibit or restrict the importation of products and/or the use of imported products in Argentina with a view to achieving its trade balancing and import substitution objectives. The European Union showed that such a systemic approach was not "incidental" or "isolated cases", as Argentina argued (i.e. one-off, unrelated cases). The European Union demonstrated that the single RTRR measure was "overarching", "all-embracing" or "in extended use" in Argentina, since it applied to a wide range of situations, and thus that it was "general" in its application. The European Union also proved that such a systemic approach had become the "rule" for companies doing business in Argentina. In this respect, the European Union noted that such a "rule" would apply or would likely apply in the future in Argentina, insofar as Argentina continued pursuing its trade balancing and import substitution objectives. 

125. Thus, the European Union also showed that the single RTRRs measure has general and prospective application.84

3.4.3. The Panel implicitly followed the analytical steps in US – Zeroing (EC) when making findings about the single RTRRs measure with respect to the "joint claims"

126. In previous cases, the Appellate Body has found that by following a particular analytical approach panels do not commit a legal error.85 In this particular case, the

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84 EU's second written submission, paras. 122 – 129.

85 See e.g. Appellate Body Report, China – Publication and Audiovisual Products, paras. 248 – 249 ("In separating parts of its overall analysis of specific provisions in this way, the Panel may have created some confusion. (…) Yet, a careful reading of the Panel's analysis of the necessity of the State plan requirement, in its entirety, makes clear that the Panel included all relevant factors in its weighing and balancing exercise, including with respect to the alternative measures proposed by the United States. (…) The Panel chose to group together all of the relevant provisions for purposes of certain steps of its analysis but to analyze these provisions individually for purposes of other steps in its analysis. While this was not necessarily the only way that the Panel could have approached its task, we do not see that, in the circumstances of this case, the Panel's approach amounted to error or contradicted the approach set out in previous Appellate Body reports").
Panel followed the analytical approach it consider suitable in view of the circumstances and arguments raised by the Parties.

127. The European Union observes that the Panel Report would be clearer had the Panel explicitly examined the issue of whether the single RTRRs measure also had general and prospective application as part of its analysis in section 6.2.2.2 of its report. Having determined that the single RTRRs measure had the precise content claimed by the European Union, and that also had general and prospective application, the Panel could have proceeded to examine its conformity with the covered agreements and make findings as requested by each of the Parties.

128. However, the fact that the Panel split its analysis does not amount to a reversible error. In the European Union's view, section 6.2.2.2 as well as sections 6.2.3.4.2.3 and 6.2.3.4.2.4 of the Panel Report should be read together. In fact, in paragraph 6.320 the Panel explicitly noted that "[t]he European Union and Japan have argued in this regard that the unwritten [R]TRRs measure they are challenging has general and prospective application". Although the Panel then proceeded to examine Japan's request for an "as such" finding against the single RTRRs measure, the European Union understands that the Panel's analysis of the general and prospective application of the measure at issue should be read together with the Panel's determinations regarding the single RTRRs measure in section 6.2.2.2 of its report. The numerous cross-references in sections 6.2.3.4.2.3 and 6.2.3.4.2.4 to findings already made in previous sections, and mainly to findings contained in section 6.2.2.2 of its report, show that the Panel's analysis of the general and prospective application of the single RTRRs measure was not exclusively contained in sections 6.2.3.4.2.3 and 6.2.3.4.2.4 of its report.

129. With respect to its general application, in paragraphs 6.334 and 6.335 of its report the Panel concluded that the single RTRRs measure has general application namely on the following basis: (a) the single RTRRs measure affects a wide range of sectors (such as foodstuffs, automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing; (b) the measure could affect any economic sector because trade in any good can contribute to achieving a trade balance or surplus and import substitution; (c) the single RTRRs measure seeks to implement a policy announced by high-ranking Argentine Government officials and, thus, is not limited to a
single import or a single importer; and (d) the flexibility of the single RTRRs measure, which allows the Argentine Government to adapt it to the specific characteristics of any economic operator. In making those findings, the Panel explicitly referred to its observations in paragraphs 6.157, 6.158, 6.229 and 6.230. All those paragraphs as well as the same substantive elements where cited by the Panel in section 6.2.2.2 of its report.

130. In particular, in paragraph 6.221, the Panel began its analysis by recalling its previous findings "in the preceding sections" at least since 2009, Argentina has required from certain importers and other economic operators to undertake one or more of the RTRRs as a condition to import goods or to obtain certain benefits. In those sections it was shown that those importers belong to a wide range of sectors.

131. In paragraph 6.225, the Panel noted that "the resulting combination of requirements imposed on individual economic operators at a given time seems to depend on the features of the operator and on the contribution of the requirement to the attainment of Argentina's policy of substituting imports and reducing or eliminating trade deficits". Similarly, in paragraph 6.228 the Panel recalled the "flexibility and versatility" of the single RTRRs measure.

132. In paragraphs 6.228 and 6.230, the Panel refers to Argentina's "managed trade" policy and concludes that the single RTRRs measure implements such a policy.

133. Consequently, section 6.2.2.2 of the Panel Report also contains the principal pillars on which the Panel based its explicit determination that the single RTRRs measure has general application.

134. With respect to the prospective application of the single RTRRs measure, in paragraphs 6.338 – 6.341 the Panel concluded that the single RTRRs measure has prospective application namely on the following basis: (a) the repeated imposition of RTRRs; (b) the "managed trade" policy; and (c) the RTRRs will continue to be imposed unless and until the policy is repealed or modified. The Panel made an explicit reference to paragraph 6.320 (which is in section 6.2.2.2 of its report) to support its findings. Indeed, in paragraph 6.320 the Panel had already found the existence of the "managed trade" policy as well as that the evidence showed that such a policy will continue to be imposed until and unless the policy is repealed or
modified. In paragraph 6.221 the Panel also found evidence of the repeated imposition of RTRRs by Argentina "at least since 2009".

135. Therefore, section 6.2.2.2 also contains findings that the single RTRRs measure has prospective application.

136. In sum, the cross-references to its previous determinations in sections 6.2.3.4.2.3 and 6.2.3.4.2.4, including to the flexibility and versatility of the single RTRRs measure, as well as that the single RTRRs measure implemented a "managed trade" policy by Argentina which will continue until and unless the policy is repealed or modified, indicate that the Panel also found in section 6.2.2.2 that the single RTRRs measure has general and prospective application. Thus, section 6.2.2.2 of the report should not be read in complete isolation from the rest of the report.

137. The European Union thus submits that the Panel did not err in section 6.2.2.2 of its report by not following explicitly the analytical steps mentioned by the Appellate Body in US – Zeroing (EC). Rather, the Panel examined the precise content of the single RTRRs measure and found, although not so explicitly as later on in its report, that the single RTRRs measure also has general and prospective application, as argued by the European Union.

138. This is no different from the substantive inquiry the Appellate Body was setting out in US – Zeroing (EC). Indeed, in that case, the Appellate Body noted that "when bringing a challenge against such a[n unwritten] 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application".86 Surely, if a complaining Member challenges the existence of an unwritten measure with a particular content, and also argues that the measure has general and prospective application, the Member concerned will have to show the existence of the measure at issue, including its general and prospective application.

139. As explained before, in the present case the Panel found that the single RTRRs measure was attributable to Argentina, determined the content of the single RTRRs measure and also found that it has general and prospective application in section 6.2.2.2 of its report. The fact that the Panel then proceed to find that the single RTRRs measure was also "as such" inconsistent with Articles XI:1 and III:4 of the GATT 1994 in accordance with Japan's explicit request, should be distinguished from the characterisation found by the Panel as the single RTRRs measure having general and prospective application, which was explicitly made in sections 6.2.3.4.2.3 and 6.2.3.4.2.4 of its reports by recalling its findings in previous sections of its report.

140. Consequently, the European Union submits that the Panel did not make a reversible error.

3.4.4. Request for completion of the analysis

141. Should the Appellate Body agree with Argentina and consider that the Panel made a reversible error, the European Union requests the Appellate Body to complete its analysis on the basis of the uncontested facts on the record as well as the Panel's findings (in particular in section 6.2.3.4.2.3 and 6.2.3.4.2.4), and to find that the single RTRRs measure also has general and prospective application. Since Argentina has not contested the Panel's findings that the single RTRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994, the European Union requests the Appellate Body to ultimately uphold those findings and, consequently, find that the single RTRR measure is inconsistent with those provisions.

3.4.5. The Panel did not fail to make an objective assessment in accordance with Article 11 of the DSU when examining the general and prospective application of the single RTRRs measure

142. The European Union notes that Argentina argues that the Panel acted inconsistently with Article 11 of the DSU in finding that Japan had established the precise content and general and prospective application of the single RTRRs measure. Whilst Argentina's arguments under Article 11 of the DSU address the

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87 Argentina's appellant submission, paras. 137 – 199.
Panel's findings regarding Japan's explicit "as such" challenge to the single RTRRs measure, the European Union considers it appropriate to address those allegations as well, as it may affect the manner in which the Appellate Body completes the analysis in this case and, as explained before, in essence those findings are a recollection of what the Panel had already found in the previous sections.

143. Argentina argues that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had established the precise content of the alleged RTRRs measure. Argentina also argues that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had established that the alleged RTRRs measure has general and prospective application.

144. The European Union submits that both allegations of error are unwarranted. In fact, the European Union is astonished by Argentina's claim of error under Article 11 of the DSU when Argentina failed to engage with the facts of this case before the Panel. In this respect, the European Union observes that, like at the Panel stage, in these appellate proceedings Argentina equally fails to refer to evidence on the record showing that the Panel was biased or commit a material error when finding that the single RTRRs measure has a precise content and that it has general and prospective application. Thus, Argentina's claim under Article 11 of the DSU appears to be an attempt to recasting the same arguments that Argentina has made with respect to its precedent claims of error, something the Appellate Body has explicitly noted it is not the function of an Article 11 of the DSU.\textsuperscript{88}

145. In any event, the European Union will recall below the "high" standard that the Appellate Body has set out when bringing claims under Article 11 of the DSU. Then, the European Union will show that Argentina has failed to meet such standard with respect to its allegations about the precise content and general/prospective application of the single RTRRs measure.

3.4.5.1 Legal standard under Article 11 of the DSU

146. As the Appellate Body has pointed out in several occasions, Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that

\textsuperscript{88} See e.g. Appellate Body Report, \textit{China – Rare Earths}, para. 5.173.
At the same time, panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties". In this respect, "the Appellate Body will not 'interfere lightly' with a panel's fact-finding authority, and will not 'base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding'". Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the initial trier of facts. As the initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning", and must base its finding on a sufficient evidentiary basis. Moreover, a participant must identify specific errors regarding the objectivity of the panel's assessment. A participant claiming that a panel disregarded certain evidence must also 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.
3.4.5.2 Argentina's allegations about the precise content of the single RTRRs measure

147. Argentina argues that the Panel "lightly assumed" the content of the single RTRRs measure, and that the complainants failed to specify with sufficient precision the content of the single RTRRs measure.\(^{95}\)

148. The European Union strongly disagrees. The Panel determined the precise content of the single RTRRs measure in view of the arguments and evidence on the record which, as the Panel also noted, Argentina had failed to rebut.\(^{96}\) To recall, in paragraph 6.327 the Panel summarised its previous findings as follows: "the available evidence provides it with sufficient elements to establish the existence and the precise content of the challenged measure, notwithstanding the fact that the measure is unwritten". Although the Panel did not recall its previous findings about the precise content of the single RTRR measure in section 6.2.3.4.2.2 and, indeed, the report could have benefited from a cross-reference to its previous sections in this respect, the European Union does not consider that such an omission amounts to a reversible error under Article 11 of the DSU. Even Argentina admits\(^{97}\) that in that paragraph the Panel was referring to the precise content as found before in its report.

149. As mentioned before, the Panel had already established the content of the single RTRRs measure in section 6.2.2.2.2 of its report as well as in other sections of its report. Following the arguments and evidence adduced by the complainants, the Panel found that "at least since 2009, Argentina has required from importers and other economic operators to undertake one or more of the following trade-related commitments, as a condition to import goods or to obtain certain benefits: (a) offsetting the value of their imports with, at least, an equivalent value of exports (one-to-one requirement); (b) limiting their imports, either in volume or in value (import reduction requirement); (c) reaching a certain level of local content in their domestic production (local content requirement); (d) making investments in Argentina (investment requirement); and, (e) refraining from repatriating profits

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\(^{95}\) Argentina's Appellant Submission, paras. 144 – 148 and 168.

\(^{96}\) Panel Report, para. 6.229.

\(^{97}\) Argentina's appellant submission, para. 182.
from Argentina (non-repatriation requirement). The Panel also found that "Argentina has imposed one or more of these five RTRRs in different combinations". The Panel further confirmed that the single RTRRs measure was unwritten that covered a broad range of economic sectors and economic operators and applied to a wide range of situations. The Panel also confirmed the flexibility and versatility of the single RTRRs measure and its contribution to Argentina's "managed trade" policy, which will continue until and unless such a policy is repealed or modified.

150. Thus, when reading the report in its totality, the Panel did not "lightly assume" the content of the single RTRR measure; rather, the Panel made findings in view of the arguments and evidence on the record, despite of the fact that Argentina chose not to contest such evidence in this case.

151. Argentina further criticises the Panel's statement that "[w]ere panels to request an extremely high level of detail in the definition of the content of unwritten measures, this could make it almost impossible in practice to challenge such types of measures". In the European Union's view, contrary to what Argentina asserts, the Panel did not mean that when challenging unwritten measures the standard of proof is somehow diminished; rather, the opposite. The Panel was well aware of that and, hence, focused on stressing that both a panel and the respondent party should have a clear understanding of the components and the operation of the challenged measure (i.e. having due process concerns in mind). In any event, throughout the report, the Panel examined many pieces of evidence in their totality to come up with a balanced assessment of the facts indicating the existence and content of the single RTRRs measure. Once more, Argentina did not dispute those facts before the Panel.

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98 Panel Report, para. 6.221.
99 Panel Report, para. 6.221.
101 Panel Report, para. 6.158.
102 Panel Report, para. 6.159.
105 Argentina's appellant submission, paras. 169 – 170.
152. Argentina further argues that the alleged measure was "amorphous and ill-defined" because the list of RTRRs was non-exhaustive and because the complainants put forward elements of the single RTRRs measure that were not the same, noting that the Panel ultimately found that some of the RTRRs were not imposed in isolation, but combined with other RTRRs.\(^{106}\) The European Union disagrees that in cases of unwritten measures a panel may only make findings with respect to the precise elements as outlined by the complainant. By definition, an unwritten measure is based on the observation of how the alleged measure is applied and, from that application as well as other available elements, the existence and content of the unwritten measure is inferred. Evidence and arguments are then made to show the existent of such unwritten measure with the alleged content. As the Panel noted, where one of the purported characteristics of the challenged measure is precisely its lack of transparency and the broad discretion that the authorities have in its implementation, requiring a perfect match could affect the right of WTO Members to bring a challenge against a measure under the DSU.\(^{107}\) In any event, in the present case, the single RTRRs measure found to exist by the Panel is almost a perfect match when compared to the description of such a measure by the European Union. Thus, Argentina's contention is inapposite.

153. Argentina also repeats its arguments here that the Panel could not have determined the existence of the single RTRRs measure with a precise content in section 6.2.2.2 of its report since there the Panel was not following the standard set out by the Appellate Body in *US – Zeroing (EC)* for determining the existence of an unwritten norm of general and prospective application.\(^{108}\) The European Union has already shown before that Argentina misunderstands the scope of the findings made by the Panel in that section. Furthermore, the Panel found that the single RTRRs measure is attributable to Argentina, has a precise content and has general and prospective application. Thus, Argentina's argument must also be rejected.

154. Finally, Argentina argues that the complainants should have demonstrated that, in order to establish that the alleged single RTRRs measure exists, the complainants

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\(^{106}\) Argentina's appellant submission, paras. 171 – 178.

\(^{107}\) Panel Report, para. 6.325.

\(^{108}\) Argentina's appellant submission, para. 183.
were under an obligation to demonstrate that it has normative content that is 
distinct from any of the individual "requirements" that allegedly constitute it.\textsuperscript{109} In 
this respect, the European Union notes that the single RTRRs measure has a 
different content than each of the RTRRs individually. Indeed, the imposition of 
one RTRR (e.g. the one-to-one requirement), as a measure is \textit{different} from the 
allegation that there is a measure that permits Argentina to choose the most 
suitable requirement to be imposed on economic operators in order to achieve its 
stated policy objectives of eliminating trade deficits and increasing import 
substitution. The content of the two measures is manifestly unlike. This is 
precisely why the Panel examined the complainants' allegations that the RTRRs 
work as a part of single measure and properly found the existence of such a single 
RTRRs measure.

155. Consequently, the European Union submits that Argentina's allegation of error 
under Article 11 of the DSU with respect to the precise content of the single 
RTRRs measure should be rejected. The Panel went in detail in the preceding 
sections of its report to determine its precise content in an objective and balanced 
assessment of the arguments and evidence on the record, none of which were 
contested by Argentina during the panel proceedings.

3.4.5.3 Argument's allegations about the general application of 
the single RTRRs measure

156. Argentina argues that there was insufficient evidence for the Panel to conclude that 
the alleged RTRRs measure was "general" in its application within the ordinary 
meaning of that term and as understood in prior disputes challenging unwritten 
norms of purported general application. In Argentina's view, the alleged RTRRs 
measure does not apply to all imports, to all importers, or to all economic 
operators in Argentina, and the alleged potentiality on which the Panel relied on 
(i.e. that the single RTRRs measure could affect any economic sector or can apply 
to any economic operator) is not sufficient to find that a measure has general

\textsuperscript{109} Argentina's appellant submission, para. 184.
application. Accordingly, Argentina maintains that the Panel failed to make an objective assessment of the matter.\textsuperscript{110}

157. The European Union observes that, once again, Argentina raises an Article 11 DSU allegation of error when, in reality, Argentina complains against the legal interpretation followed by this Panel when determining that the single RTRRs measure had general application. This is not the function of an Article 11 DSU challenge and, thus, the Appellate Body should reject accordingly.

158. In any event, on substance, the European Union agrees with the Panel that a measure (unwritten or not) does not need to apply in all cases for a measure to have general application. And indeed the European Union did not define the single RTRRs measure as being imposed to all imports, all importers and all economic operators. In this respect, the Panel properly relied on Article X:1 of the GATT 1994 as relevant context to support its characterisation that the single RTRRs measure was general. Indeed, for a measure to be of "general application" it is not necessary that such a measure applies to all goods in Argentina. In this respect, the panel in \textit{US – Underwear} found that insofar as the restraint at issue affected an unidentified number of economic operators, the administrative order was a measure of general application.\textsuperscript{111} In the present case, the European Union showed

\textsuperscript{110} Argentina's appellant submission, paras. 186 – 192.

\textsuperscript{111} Panel Report, \textit{US – Underwear}, para. 7.65 (cited with approval by the Appellate Body in \textit{EC – Poultry}, para. 113) ("The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application"). See also Panel Report, \textit{Japan – Film}, para. 10.385 (agreeing with the Panel Report in \textit{US – Underwear}); Panel Report, \textit{EC – IT Products}, para. 7.159 ("[W]e consider that the CNEN amendments at issue in this dispute are of 'general application' because the application of a CNEN is not limited to a single import or a single importer. Rather, they set forth rules or norms that are intended to have general and prospective application. The objective of the CNEN is to ensure the uniform application of the Common Customs Tariff to all products falling under a specific CN code upon importation into the EU"); and Panel Report, \textit{US – Countervailing and Anti-Dumping Measures (China)}, paras. 7.32 – 7.36 (noting that that "two aspects are usefully distinguished when assessing whether a law or another relevant measure is of 'general application' within the meaning of Article X:1: (i) its subject-matter or content; and (ii) the persons or entities to whom it applies, or the situations or cases in which it applies". As to subject-matter, the panel considered that the mere fact that a relevant measure is "narrowly drawn (e.g., regulates only one or a few named products from one or a few named countries)" or has a "narrow regulatory scope" would not demonstrate that the measure is not generally applicable. As to the second aspect, the panel considered that "a relevant measure that applies to a class or category of people, entities, situations, or cases, that have some
that the single RTRRs measure applies to many economic operators and sectors in Argentina (such as automobiles, auto parts, motorcycles, trucks, tires, metallurgical products, agricultural machinery, retail apparel, books and other publications), which are required to comply with one or more of the RTRRs. Argentina has never denied the existence of any of them or its application to several entities and sectors in its economy; and yet in these appellate proceedings Argentina fails to indicate any evidence on the record showing otherwise.

159. Argentina equally disregards an important feature of the single RTRRs measure, as found by the Panel: "its flexibility and versatility". Indeed, the single RTRRs measure permits Argentina to choose the most appropriate RTRR in view of the particular circumstances of the importer or economic operators at hand and its contribution to achieving the "managed trade" policy objectives of eliminating trade deficits and achieving import substitution. If Argentina considers that one operator is e.g. too small to meaningfully contribute to those objectives, it may only be logical that Argentina does not impose any RTRR at all. The opposite is also true, i.e. should an operator be crucial for achieving Argentina's stated policy objectives, Argentina may seek to impose one or more of those RTRRs. This does not mean in turn that the measure lacks general application. The discretion embedded in the essence of the single RTRRs measure should not be an obstacle to find that the measure has general application, as the Panel properly found.

160. Therefore, the European Union submits that Argentina's argument should be rejected.

3.4.5.4 Argentina's allegations about the prospective application of the single RTRRs measure

161. Argentina also takes issue with the Panel's findings that the single RTRRs measure applies prospectively. Argentina considers that the evidence on which the Panel relied to find the existence of a "deliberated policy" was insufficient. Argentina questions the Panel's reliance on one exhibit containing the statement of a high-

attribute in common would, in principle, constitute a measure of general application". By contrast, "a relevant measure that applies to named or otherwise specifically identified persons, entities, situations, or cases would not be a measure of general application, but one of particular application").

112 Panel Report, para. 6.228.
rank official that the policy of "managed trade" would continue to be applied in the future as per the instructions from the President of Argentina.\(^{113}\)

162. In the European Union's view, Argentina does not pay lip service to the Panel's assessment of the evidence, as recounted in the Panel Report. Contrary to what Argentina asserts, the Panel did not merely rely on one exhibit to show the existence of a deliberate "policy" in this case. To recall, in paragraphs 6.161-6.162, the Panel already referred to the existence of the "managed trade" policy as evidenced in numerous official documents. Likewise, the Panel confirmed that totality of the evidence also confirmed that at least as of 2009 Argentina is imposing RTRRs with a view to achieving its "managed trade" policy objectives.\(^{114}\) The Panel also referred to the statement contained in Exhibit JE-759 to support its findings, which was indeed very telling about Argentina's policy and its continuation in the future. In addition to the deliberated policy, the Panel pointed to the fact that repetition can create an expectation that a particular behaviour will continue in the future.\(^{115}\) The Panel also found the existence of at least 29 agreements signed between specific economic sectors and the Argentine Government as well as letters addressed by economic operators to the Argentine Government all reflecting RTRRs.\(^{116}\) As a matter of fact, those agreements signed between economic operators and the Argentine authorities as well as the commitments provided by many economic operators all require a prospective course of action. Indeed, as the Panel found, they all require the economic operators concerned to undertake e.g. to even out their trade balance in a future period of time (including the current year), to replace imported products by domestic products (e.g. auto parts) or achieve a particular threshold of local content (e.g. motorbikes, electronic goods) in a particular period of time in the future, or to make a series of investments in the future. Thus, the Panel properly

\(^{113}\) Argentina's appellant submission, paras. 195 – 199.

\(^{114}\) E.g. Panel Report, para. 6.221.


\(^{116}\) Panel Report, para. 6.156.
supported its findings on the basis of the evidence on the record, none of which was contested by Argentina.

163. Argentina equally fails to point where in the record there was evidence pointing to the opposite conclusion found by the Panel. The European Union recalls that a claim under Article 11 of the DSU cannot be based on mere allegations, but must be substantiated to show that the Panel committed a material error and that it was biased in the assessment of the facts. The fact that Argentina considers that the totality of the evidence before the Panel indicated otherwise\(^{117}\) is not sufficient for the Appellate Body to uphold Argentina's contention, without distorting the Panel's assessment as the trier of facts.

164. Therefore, the European Union submits that Argentina's argument should be dismissed.

3.5. **CONCLUSION**

165. In view of the foregoing, the European Union requests the Appellate Body to reject Argentina's claims of error.

4. **ARGENTINA'S CLAIMS OF ERROR AGAINST THE PANEL'S FINDINGS ON THE DJAI**

166. Argentina has appealed certain limited aspects of the Panel's findings and conclusions with respect to the DJAI relating to the interpretation and application of Articles VIII and XI:1 of the GATT 1994.

167. Specifically, Argentina claims that the Panel made the following three errors:

- first, the Panel erred "in its assessment of the scope of Article VIII, and in particular in the implication that Article VIII does not encompass import procedures that are a 'necessary pre-requisite for importing goods'"\(^{118}\);

- second, the Panel erred "in not establishing and applying a proper analytical framework for distinguishing between the scope and disciplines of Article VIII, on the one hand, and the scope and disciplines of Article XI:1, on the other"\(^{119}\); and

\(^{117}\) See e.g. Argentina's appellant submission, para. 198 ("At most, that evidence reflects....").  
\(^{118}\) Argentina's appellant submission, para. 206.  
\(^{119}\) Argentina's appellant submission, para. 206.
third, the Panel erred "in its conclusion that the DJAI procedure is inconsistent with Article XI:1 based on its findings that the approval of a DJAI application is not automatic". 120

168. As shown below, all the three claims of error asserted by Argentina are unfounded and should be rejected by the Appellate Body.

4.1. **CLAIM THAT THE PANEL ERRED IN ITS ASSESSMENT OF THE SCOPE OF ARTICLE VIII**

4.1.1. **Background**

169. Before the Panel Argentina claimed that the DJAI was a "customs" or "import formality" within the scope of Article VIII of the GATT 1994. Argentina further alleged that Articles VIII and IX:1 of the GATT 1994 are mutually exclusive. Therefore, according to Argentina, the DJAI was not subject to the latter provision.

170. The Panel found that, contrary to Argentina's allegations, the DJAI was not a "formality" within the scope of Article VIII of the GATT 1994. The relevant reasoning and findings are set out in paragraphs 6.432 and 6.433 of the report, which state:

According to the ordinary meaning of the word, a "formality" is "[a] small point of practice that, though seemingly unimportant, must [usually] be observed to achieve a particular legal result". 121 More generally, a "formality" is related to "[c]onformity to rules, propriety; rigid or merely conventional observance of forms". 122 In the context of Article VIII of the GATT 1994, a formality can be considered to include all requirements that, although in appearance directed at a mere observance of forms, must be usually observed in connection with the importation or the exportation of goods.

Even if the Panel were to accept that the DJAI procedure is used by AFIP as a "customs risk assessment tool", that is not the only manner in which the DJAI procedure is used. The Panel has noted that a DJAI in exit status is a necessary pre-requisite for importing goods into Argentina. It has also noted that a DJAI application may be subject to "observations" that will prevent the application from proceeding to exit status. In such case, the prospective importer will have to contact the agencies concerned and provide the information that may be required. In some cases, the

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120 Argentina's appellant submission, para. 206.
prospective importer may have to undertake certain trade-related commitments as a condition for the agency to lift the observation and to complete the DJAI procedure. Accordingly, the DJAI procedure is not directed at a mere observance of forms; it is not a mere formality imposed by Argentina in connection with the importation of goods. Rather, it is a procedure by which Argentina determines the right to import.

171. In its appeal, Argentina claims that the Panel "erred in its assessment of the scope of Article VIII of the GATT 1994, and in particular in the implication that Article VIII does not encompass import procedures that are a 'necessary pre-requisite for importing goods".\footnote{Argentina's appellant submission, para. 206.}

172. In support of this claim, Argentina alleges that the various types of formalities and requirements listed in Article VIII:4 of the GATT 1994 "may very well constitute pre-requisites to importation or procedures by which a Member determines the right to import"\footnote{Argentina's appellant submission, para. 215.} and cites a series of examples.\footnote{Argentina's appellant submission, para. 214.}

173. Argentina further contends that the Panel focused exclusively on the ordinary meaning of term 'formality' and disregarded that Article VIII of the GATT 1994 also applies with respect to "requirements imposed in connection with importation".

4.1.2. Legal analysis

174. Argentina's claim is based on a mischaracterization of the Panel's reasoning. Contrary to Argentina's assertions, the Panel did nowhere "imply" that the DJAI falls outside the scope of Article VIII of the GATT 1994 merely because it is a "pre-requisite for importing goods".\footnote{Argentina's appellant submission, para. 215.}

175. As observed by Argentina, in paragraph 6.433 of the report the Panel did note that "a DJAI in exit status is a necessary pre-requisite for importing goods". But this was just the starting point for the Panel's analysis. The Panel went on to note in the same paragraph that a DJAI application may be subject to "observations". In that event the importer will have to submit the required information and in some cases may have to undertake trade-related commitments as a condition for the authorities
to lift the observation. The Panel concluded from this that the DJAI was not
directed at securing the mere "observance of forms", but is rather "a procedure by
which Argentina determines the right to import". 126

176. Paragraph 6.433 must be read together with the more detailed analysis of the
operation of the DJAI regime made by the Panel in paragraphs 6.459 to 6.474 of
the report. There the Panel concluded that the participating agencies have "broad
discretion to enter and lift observations" 127 and noted that, sometimes, they use
such discretion to impose trade-restrictive requirements. 128 These findings
evidence that the DJAI operates, in essence, as a discretionary system of
authorization of imports, by which the Argentine authorities decide on an ad hoc
basis whether or not to grant the right to import to each applicant on the basis of
criteria not specified in advance.

177. Whereas the DJAI regulations do provide for certain formalities and procedural
requirements, the complainants' claims under Article XI of the GATT 1994 were
not concerned with such formalities or procedural requirements. Instead they
addressed the DJAI regime in so far as it provides for a discretionary system of
authorization of imports. Such discretionary system of authorization of imports is
not a mere formality or procedural requirement and, therefore, falls outside the

178. In the various examples mentioned by Argentina 129, the formalities and procedural
requirements are simple means to verify compliance with a substantive import
rule. As observed by Argentina, the exercise of the right to import conferred by the
substantive import rule may well be conditional upon the observance of such
formalities or procedures. But, unlike in the case of the DJAI, the right to import is
not "determined" by the implementing authorities as part of such procedures.
Instead, that right is "determined" in the substantive import rule. If, through the
observance of the formalities or procedural requirements, the importer shows that
it complies with the applicable substantive import rule, the implementing

126 Panel Report, para. 6.433.
127 Panel Report, para. 6.469.
129 Argentina's appellant submission, para. 214.
authorities have no discretion to object to the importation. In contrast, in the case of the DJAI, the importer's right to import does not pre-exist the DJAI procedure but is rather accorded discretionally on an ad hoc basis by the agencies participating in the DJAI system in the course of such procedure pursuant to unidentified criteria.

179. The Panel's analysis focuses on the analysis of the term "formalities" because throughout the panel proceedings Argentina had consistently characterized the DJAI as a "customs" or "import" formality. As noted now by Argentina, Article VIII:4 of the GATT 1994 also refers to "requirements … imposed in connection with importation" in addition to "formalities". But, contrary to Argentina's suggestions, this does not call into question the Panel's finding that the DJAI is not subject to Article VIII of the GATT 1994.

180. Article VIII:4 of the GATT 1994 refers to "requirements", without further specification. However, it cannot be the case that each and every requirement relating to the importation of goods is subject to Article VIII. Article VIII:4 must be read together with the other provisions of Article VIII which precede it. Article VIII: 1 c) alludes to "documentation requirements". In turn, Article VIII:3 refers to "procedural requirements". No other provision of Article VIII refers to "requirements". Article VIII:4 purports to define the scope of Article VIII and does not prescribe any legal obligations of its own. The fact that Article VIII:4 refers to "requirements" without more cannot have the consequence of extending the scope of the obligations that Article VIII: 1 c) and Article VIII:3 impose specifically with regard to "documentation" and "procedural requirements", respectively, to any other type of requirements. Accordingly, it must be concluded that the requirements alluded to in Article VIII:4 are exclusively "documentation" or "procedural" requirements.

181. While the DJAI regulations do provide for some "documentation" or "procedural" requirements, they do more than that. To repeat, the DJAI regime operates as a discretionary system for authorizing imports. The complainants' claims under Article XI:1 of the GATT were not concerned with the "documentary" or

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130 Argentina's appellant submission, paras. 216-217.
"procedural" requirements imposed by the DJAI regulations in connection with that discretionary system for authorizing imports, but instead with the discretionary system itself. That system is neither a mere "formality" nor a "documentation" or "procedural requirement" and, therefore, falls outside the scope of Article VIII of the GATT 1994.

4.1.3. Conclusion

182. For the above reasons, the European Union requests the Appellate Body to reject this claim of error and to confirm the Panel's finding that the aspects of the DJAI challenged by the complaining parties under Article XI:1 of the GATT 1994 fall outside the scope of Article VIII of the GATT 1994.

4.2. Claim that Panel Failed to Establish and Apply a Proper Analytical Framework for Distinguishing between Articles VIII and IX of the GATT

4.2.1. Background

183. As recalled above, Argentina argued before the Panel that the DJAI was a "customs" or "import formality" within the scope of Article VIII of the GATT 1994 and that Articles VIII and IX:1 of the GATT 1994 are mutually exclusive. Therefore, according to Argentina, the DJAI was not subject to the latter provision.

184. Having determined that the DJAI was a not an "import" or "customs formality", the Panel went on find that, even assuming \textit{ad arguendo} that the DJAI could be considered as a formality within the scope of Article VIII of the GATT 1994, this would not exclude \textit{per se} the applicability of Article XI of the GATT 1994 because the two provisions are not mutually exclusive.\textsuperscript{131}

185. Argentina does not appeal the Panel's finding that Articles VIII and XI:1 of the GATT are not mutually exclusive. Nonetheless, Argentina argues that those two provisions must be interpreted in a "harmonious" manner\textsuperscript{132} and claims that the Panel "erred in not establishing a proper analytical framework for distinguishing between the scope and disciplines" of each of them.

\textsuperscript{131} Panel Report, para. 6.434.

\textsuperscript{132} Argentina's appellant submission, para. 222.
186. More specifically, according to Argentina, the Panel should have applied the following two-step test:\footnote{133}

In Argentina's view, if an import formality or requirement is to constitute a prohibited quantitative restriction under Article XI:1, in its own right, then it must be shown that: (1) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (2) this separate and independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. This is the only way to reconcile the categorical prohibition of Article XI with the fact that import formalities and requirements are both necessary and expressly contemplated by Article VIII.

187. In support of this claim, Argentina invokes certain findings of the panel reports in 
\textit{Korea – Various Measures on Beef} and \textit{China – Raw Materials}\footnote{134}, as well as Article 10.1.1 c) of the Trade Facilitation Agreement.\footnote{135}

\textbf{4.2.2. Legal analysis}

188. The "analytical framework" postulated by Argentina is not, by its own terms, applicable to the facts of this dispute. Therefore, even assuming \textit{ad arguendo} that such framework was legally correct, the Panel would have made no error by not applying it.

189. Indeed, Argentina contends that its proposed "analytical framework" is to be applied in order to determine whether an import formality or requirement within the scope of Article VIII of the GATT 1994 constitutes a prohibited restriction under Article XI:1 of the GATT 1994. Yet, as recalled above, the Panel found that the aspects of the DJAI challenged by the complainants under Article XI:1 were not a mere formality subject to Article VIII. Accordingly, there was no need for the Panel to apply the analytical framework devised by Argentina.

190. In any event, the first part of Argentina's test requires distinguishing and separating the restrictive-trade effects of the "formalities" or "procedural requirements" from those of the underlying "substantive rule of importation". Yet,

\footnote{133}{Argentina's appellant submission, para. 223.}
\footnote{134}{Argentina's appellant submission, paras. 224-229.}
\footnote{135}{Argentina's appellant submission, paras. 230 and 235.}
in the case of the DJAI, it is impossible to make such a distinction because the DJAI operates as a discretionary system for authorizing imports. To recall, the Panel found that the participating agencies have a broad discretion to enter and lift observations on a DJAI and may condition an applicant's ability to import "upon compliance with a number of unidentified criteria". Given that the underlying criteria are not known, it would have been impossible to distinguish and separate the restrictive effects of those criteria from those of the DJAI system as a whole.

191. In this regard, it should be noted that the findings of the panel reports in Korea – Various measures on Beef and China – Raw materials cited by Argentina concerned a very different type of measure and do not support Argentina's assertions. Those two reports stand for the proposition that the procedural and documentary requirements applied by a Member in order to administer a quota do not necessarily add to the restrictive effects of the quota itself. In the present case, however, the relevant restrictive effects identified by the Panel do not result from measures taken by Argentina for administering a quota or other underlying substantive import rule. Rather, they result from a self-standing discretionary system for authorizing imports. For that reason, as discussed in connection with the previous claim of error, the Panel found that, unlike the measures at issue in Korea – Various measures on Beef and China – Raw Materials, the DJAI is not a mere formality or requirement within the scope of Article VIII of the GATT 1994.

192. The second component of Argentina's test has the implication that, in order to determine whether "formalities" and "procedural requirements" constitute an import restriction prohibited by Article XI:1 of the GATT 1994, panels would have to apply a different and stricter standard than when they examine a "substantive rule" of importation. This dualistic approach to the interpretation of Article XI:1 has no basis whatsoever in the text of that provision, which makes no distinction between "substantive" and "formal" or "procedural" provisions, and is not necessary to ensure a "harmonious" interpretation of Articles VIII and XI:1 of the GATT 1994.

193. Nor is that approach necessary to ensure a "harmonious" interpretation of Article XI:1 of the GATT and Article 10.1.1 c) of the Trade Facilitation Agreement. In essence, Argentina argues that, on the Panel's interpretation, all the import formalities and requirements within the scope of Article 10.1.1 c) of the TFA would be prohibited by Article XI:1 of the GATT 1994, notwithstanding the fact that Article 10.1.1 c) of the TFA allows those formalities and requirements, provided that they are the "least trade restrictive". Article 10.1.1 c) of the TFA, however, does not seek to "allow" any import formalities or requirements. Its purpose is rather to impose some disciplines on import formalities and requirements. Those disciplines apply irrespective of whether the formalities and requirements concerned are inconsistent with any other WTO provision, including Article XI:1 of the GATT 1994.

194. Moreover, Argentina wrongly assumes that, on the Panel's interpretation, Article XI:1 of the GATT 1994 would prohibit all the formalities and requirements within the scope of Article 10.1.1 c) of the TFA. In the first place, Argentina overlooks that in some cases those formalities or requirements may be equivalent to those applied by Members with respect to the marketing of domestic products (e.g. those related to conformity assessment procedures or sanitary inspections, to mention just two of the examples of "formalities" and "procedural requirements" cited by Argentina itself) and, as such, fall outside the scope of Article XI:1 of the GATT 1994. Even when those formalities and requirements fall in principle within the scope of Article XI:1, this does not mean that they are necessarily prohibited by the GATT 1994. In many cases, those formalities and requirements will be justified under any of the various exceptions to Article XI:1, including in particular Article XX d) of the GATT 1994. In practice, the necessity test incorporated into that exception will lead to a similar outcome as the "least trade restrictive" language in Article 10.1.1 c) of the TFA.

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137 The TFA has not been adopted by the WTO. Argentina has not specified on what basis it could be considered as relevant for the interpretation of the WTO Agreement.

138 Cf. the examples cited in Argentina's appellant submission, para. 214 and para. 222.

4.2.3. Conclusion

195. For the above reasons, the European Union requests the Panel to reject this ground of appeal and to uphold Panel's reasoning in paragraphs 6.435 to 6.445.

4.3. Claim that the Panel erred by finding that the DJAI is inconsistent with Article XI:1 because it is not "automatic"

4.3.1. Background

196. Having determined that the DJAI is subject to Article XI:1 of the GATT 1994, the Panel went on to examine whether the DJAI constitutes a restriction on the importation of goods. The Panel summed up its findings as follows in paragraph 6.474 of the report:140

In sum, the Panel finds that the DJAI procedure has a limiting effect on imports, and thus constitutes an import restriction, because it: (a) restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic; (b) creates uncertainty as to an applicant's ability to import; (c) does not allow companies to import as much as they desire or need without regard to their export performance; and, (d) imposes a significant burden on importers that is unrelated to their normal importing activity.

197. Previously, the Panel had made the following findings with regard to the first factor cited in paragraph 6.474.141

Under the relevant Argentine law, a DJAI in exit status is necessary for obtaining authorization from the Central Bank of Argentina to make payments in foreign currency and for clearing customs. The immediate effect of a DJAI in exit status is that it grants importers the right to import goods into Argentina. A DJAI will attain exit status if either: (a) no agency of the Argentine Government enters an observation within the prescribed time period; or, (b) when an agency has entered an observation on a DJAI, the observation is lifted by the agency concerned following information provided by and/or action taken by the declarant or prospective importer.

Accordingly, on its face the DJAI procedure affects the opportunities for the importation of goods into Argentina. The requirement to obtain a DJAI in exit status is a necessary condition to import goods into Argentina in most cases. The attainment of such status is not automatic. This results in a restriction on the access of imports into the Argentine market.

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Panel Report, para. 6.474 (underlining added).
198. Argentina claims that the Panel erred by finding that the DJAI is inconsistent with Article XI:1 because it is not "automatic". Argentina complains that the Panel failed to elaborate upon what it meant by "automatic". Nonetheless, Argentina goes on to argue that many import formalities or requirements are not "automatic" in the sense given to that term by the Panel. According to Argentina, it cannot be the case that all such import formalities and requirements are prohibited by Article XI:1 of the GATT 1994. Argentina notes that Article 3 of the ILP Agreement contemplates that some import licensing procedures will not be automatic. In view of that, reading Article XI:1 of the GATT 1994 as prohibiting non-automatic import licensing procedures would create a "conflict" between that provision and Article 3 of the ILP Agreement.

199. For the above reasons, Argentina requests the Appellate Body to reverse the Panel's finding that the DJAI restricts imports because it is not automatic.

200. Argentina does not challenge any of the other grounds cited by the Panel in paragraph 6.474 in support of its finding that the DJAI restricts imports. Nonetheless, Argentina request the Appellate to reverse also the Panel's ultimate conclusion that the DJAI is inconsistent with Article XI:1 of the GATT 1994.

4.3.2. Legal analysis

201. From the explanations provided by the Panel it emerges clearly that the Panel considered that the approval of the DJAIs was not "automatic" in the sense that the competent authorities may decide not to put a DJAI "in exit status" even when the DJAI has been timely filed and meets all the formal requirements prescribed by the DJAI regulations.

202. That the non-approval of a DJAI application may have a limiting effect on the imports covered by such application is beyond dispute. Indeed Argentina does not
even seek to deny the trade limiting effects of the lack of automaticity of the DJAI system. Instead Argentina's core contention is that most, if not all, import formalities or procedural requirements are likewise non-automatic and have similar trade limiting effects. In Argentina's view, "it cannot be the case"\(^{148}\) that all such import formalities and requirements are prohibited by Article XI:1 of the GATT 1994. Argentina's claim is thus based on its own preconceived ideas about what should be the proper scope of Article XI:1 of the GATT, rather than on an analysis of the terms of that provision in accordance with the applicable rules of interpretation. In turn, Argentina's pre-conceptions are based on the same mistaken assumptions as Argentina's previous claim.

203. First, the DJAI is not a mere "formality" or "procedural requirement", but instead a discretionary system for authorizing imports.

204. Second, in any event, Argentina is wrong to assume that, on the Panel's interpretation, most import "formalities" or "procedural requirements" would be prohibited by Article XI:1 of the GATT 1994. As recalled above, the formalities or requirements enforced at the border are often equivalent to those applied by Members with respect to the marketing of domestic products and, as such, fall outside the scope of Article XI:1 of the GATT 1994. Moreover, even when the formalities and requirements fall in principle within the scope of Article XI:1 of the GATT 1994, they may be permitted under another WTO provision, including in particular Article XX (d) of the GATT 1994.

205. Third, for similar reasons, Argentina's argument based on Article 3 of the ILP Agreement is equally groundless. A "conflict" between two provisions arises only where it is impossible for a Member to comply simultaneously with the obligations imposed by each of them.\(^{149}\) Argentina does not even allege that the obligations imposed by Article XI:1 of the GATT 1994 and those imposed by Article 3 of the ILP Agreement cannot be complied with simultaneously. Instead, Argentina's contention appears to be that the Panel's interpretation of Article XI:1 of the GATT would eviscerate and render inutile Article 3 of the ILP by prohibiting the same non-automatic import licensing procedures which the latter provisions

\(^{148}\) Argentina's appellant submission, para. 239.

\(^{149}\) See e.g. Panel Report, Indonesia – Autos, footnote 649.
purports to regulate. This argument, however, relies on the mistaken premise that, on the Panel's interpretation, Article XI:1 of the GATT would prohibit all instances of non-automatic import licensing procedures. For the reasons explained above, however, just like any other types of "formalities" and "procedural requirements", in some cases non-automatic licensing procedures will fall outside the scope of Article XI:1 of the GATT 1994, while in some other cases they will be subject to that provision, but justified under Article XX(d) of the GATT 1994 or other relevant exceptions. Article 3 of the ILP Agreement, nevertheless, applies to all non-automatic import licensing procedures, regardless of whether they are prohibited by Article XI:1 of the GATT 1994 or any other WTO provision. The Panel's interpretation of Article XI:1 of the GATT 1994 does not, therefore, render ineffective Article 3 of the ILP Agreement.

4.3.3. Conclusion

206. For the above reasons, the European Union requests the Appellate Body to reject this claim and to uphold the Panel's finding that the DJAI restricts imports and is inconsistent with Article XI:1 of the GATT 1994.

5. CONCLUSIONS

207. As shown in this submission, as well as in the European Union's submissions before the Panel, the European Union submits that Argentina's claims of error are without merit. Therefore, the European Union requests the Appellate Body to reject them entirely and to uphold the Panel's findings that the single RTRRs measure and the DJAI are inconsistent with Argentina's obligations under the GATT 1994.