

<b>1 ARTICLE 3.....</b>	<b>1</b>
1.1 Text of Article 3.....	1
1.2 Relationship with other WTO Agreements .....	3
1.2.1 Concurrent claims under the GATT 1994, the Agreement on Agriculture and Article 3 of the Import Licensing Agreement.....	3
1.3 Article 3.2.....	4
1.4 Article 3.5(a).....	5
1.5 Article 3.5(h).....	6
1.6 Article 3.5(i).....	6
1.7 Article 3.5(j).....	6

## **1 ARTICLE 3**

### **1.1 Text of Article 3**

#### **Article 3**

##### *Non-Automatic Import Licensing*

1. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2.
2. Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.
3. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.
4. Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published under paragraph 4 of Article 1 as well as information on how to make such a request and, to the extent possible, an indication of the circumstances under which requests would be considered.
5. (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning:
  - (i) the administration of the restrictions;
  - (ii) the import licences granted over a recent period;
  - (iii) the distribution of such licences among supplying countries;
  - (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account;
- (b) Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of

quotas, and any change thereof, within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(c) in the case of quotas allocated among supplying countries, the Member applying the restrictions shall promptly inform all other Members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall publish this information within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(d) where situations arise which make it necessary to provide for an early opening date of quotas, the information referred to in paragraph 4 of Article 1 should be published within the time-periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;

(e) any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reason therefor and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing Member;

(f) the period for processing applications shall, except when not possible for reasons outside the control of the Member, not be longer than 30 days if applications are considered as and when received, i.e. on a first-come first-served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period;

(g) the period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements;

(h) when administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of quotas;

(i) when issuing licences, Members shall take into account the desirability of issuing licences for products in economic quantities;

(j) in allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members;

(k) in the case of quotas administered through licences which are not allocated among supplying countries, licence holders<sup>6</sup> shall be free to choose the sources of imports. In the case of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries;

*(footnote original)*<sup>6</sup> Sometimes referred to as "quota holders".

(l) in applying paragraph 8 of Article 1, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

## 1.2 Relationship with other WTO Agreements

### 1.2.1 Concurrent claims under the GATT 1994, the Agreement on Agriculture and Article 3 of the Import Licensing Agreement

1. In *Canada – Dairy*, the Panel addressed the United States' claim that Canada was in violation of Article II of the GATT 1994 and Article 3 of the Licensing Agreement because it restricted access to tariff quotas to certain cross-border imports by Canadians. Having found that the restriction was inconsistent with Article II:1(b) of the GATT 1994, the Panel did not find it necessary to examine whether in so doing, Canada also violated Article 3 of the Licensing Agreement.<sup>1</sup>

2. Similarly, the Panel in *Turkey – Rice* did not find it necessary to examine claims under Articles 3.5(a), 5.1, 5.2, 5.3 and 5.4 of the Agreement, as it had found that Turkey's failure to grant Certificates of Control to import rice outside of the tariff rate quota substantively violated Article 4.2 of the Agreement on Agriculture.<sup>2</sup> The Panel in *Turkey – Rice* also declined to rule on a US claim under Article 3.5(h) of the Import Licensing Agreement as it had ruled that the measure at issue violated Article III:4 of GATT 1994.<sup>3</sup>

3. In several cases, including *Argentina – Import Measures* and *Indonesia – Import Licensing Regimes*, the panels found violations of Article XI:1 of the GATT 1994 and proceeded to exercise judicial economy in respect of claims under Article 3 of the Import Licensing Agreement.<sup>4</sup> In *Argentina – Import Measures*, the Appellate Body stated:

"Similarly to these disputes, the complainants in *EC – Bananas* made claims under provisions of the GATT 1994 and the Import Licensing Agreement. In that case, the Appellate Body considered that a panel should apply first the agreement that 'deals specifically, and in detail,' with the matter at issue. (Appellate Body Report, *EC – Bananas III*, para. 204) As the Panel's decision to start its examination with the claims under Article XI:1 is not appealed, we neither endorse nor reject the Panel's approach in this regard. (See Panel Reports, paras. 6.358-6.361 and 6.448) In addition, we recall that the Panel examined the consistency of the DJAI procedure with Article XI:1 of the GATT 1994, irrespective of whether the DJAI procedure constitutes an import licensing procedure, and subsequently refrained from making any findings under the Import Licensing Agreement. (Ibid., paras. 6.479, 6.505, 6.511, 6.517, 6.523, 6.529, 6.535, 6.540, and 6.543) As the Panel's approach, in this regard, is not appealed, we neither endorse nor reject it. Moreover, since the Panel made no finding as to the consistency of the DJAI procedure with the Import Licensing Agreement, we do not opine on the general relationship between the GATT 1994 and the Import Licensing Agreement."<sup>5</sup>

4. The Panel in *Indonesia – Chicken* was confronted with the question of the order of analysis between claims under Article 3.2 of the Import Licensing Agreement, on the one hand, and Article XI:1 of the GATT 1994 and Article 4.2 of Agreement on Agriculture, on the other hand. The Panel decided to address the claims under the substantive provisions before proceeding to the claim under the Import Licensing Agreement, for the following reasons:

"We consider that the most appropriate manner to structure our analysis is by first assessing Brazil's claims under Article XI:1 or Article 4.2, as relevant. We will then examine Brazil's claims under Article 3.2 of the Import Licensing Agreement. In our view, this approach provides a logical sequence for the following reasons.

<sup>1</sup> Panel Report, *Canada – Dairy*, para. 7.157.

<sup>2</sup> Panel Report, *Turkey – Rice*, para. 7.292.

<sup>3</sup> Panel Report, *Turkey – Rice*, para. 7.301; see para. 12 above.

<sup>4</sup> See e.g. Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.870.

<sup>5</sup> Appellate Body Report, *Argentina – Import Measures*, fn 666.

First, we note that Article XI:1 of the GATT 1994 imposes a substantive obligation on Members to refrain from imposing prohibitions or restrictions on the importation or the exportation of goods. In contrast, Article 3.2 of the Import Licensing Agreement deals with the administration of import licensing procedures. Regarding which of these provisions is *lex specialis*, previous panels have considered that provisions of the covered agreement that deal with the substantive content of a measure, such as Article XI:1 of the GATT 1994, are more specific than those that deal with the application and administration of a measure, such as Article 3.2 of the Import Licensing Agreement. These panels reached this conclusion when confronted with claims under these two provisions."<sup>6</sup>

5. The Panel distinguished this situation from the situation that arose in *EC – Bananas III*, and noted that the Appellate Body's pronouncement in the latter case concerned the relationship between two claims regarding the administration of measures, and not their substantive content:

"Second, we note that the Appellate Body in *EC – Bananas III* referred to the decision of the panel in that dispute to begin its analysis of the claims raised by the complainants under Article X:3(a) of the GATT 1994 before assessing those raised under the Import Licensing Agreement. The Appellate Body observed that 'the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures'. We consider the situation in that dispute to be different from the one before us. In *EC – Bananas III*, the Appellate Body was confronted with a situation where the complainants raised claims under provisions that govern the administration and application of measures, rather than their substantive content. In particular, the Appellate Body dealt with claims under Articles X:3(a) of the GATT 1994 and 1.3 of the Import Licensing Agreement. We are examining a different situation. Brazil has raised claims under provisions that set out substantive obligations, such as Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture, as well as under provisions pertaining to the administration and application of measures, such as Article 3.2 of the Import Licensing Agreement."<sup>7</sup>

### 1.3 Article 3.2

6. In *China – Raw Materials*, the Panel considered China's argument that the Import Licensing Agreement provides useful context to inform which licensing requirements may be permitted under Article XI:1 of the GATT 1994. The Panel stated that it agreed:

"[T]hat the Import Licensing Agreement informs the meaning of the terms 'automatic' and 'non-automatic' (as a residual category of 'automatic' licenses) in the context of import licensing systems. However, that Agreement does not address *export* licensing systems. Nor for that matter does it set out in precise terms which *import* licences would be WTO-inconsistent, although it does provide that import licences should be in conformity with all 'relevant' provisions of the GATT 1994 'as interpreted by [the Import Licensing Agreement]'. Hence, the Panel considers that the Import Licensing Agreement itself provides only limited assistance in the task of interpreting Article XI:1."<sup>8</sup>

7. In *Argentina – Import Measures*, the Appellate Body referred to Article 3.2 of the Import Licensing Agreement in the context of interpreting Article XI:1 of the GATT 1994. As regards Article XI:1, the Appellate Body stated that "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products".<sup>9</sup> In this context, the Appellate Body observed that:

"We note that our understanding of Article XI:1 of the GATT 1994 is supported by two provisions of the Import Licensing Agreement that suggest that certain import

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<sup>6</sup> Panel Report, *Indonesia – Chicken*, paras. 7.352-7.353.

<sup>7</sup> Panel Report, *Indonesia – Chicken*, para. 7.354.

<sup>8</sup> Panel Report, *China – Raw Materials*, para. 7.911.

<sup>9</sup> Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

licensing procedures may result in some burden without themselves having trade-restrictive effects on imports. Footnote 4 of the Import Licensing Agreement provides that 'import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of [Article 2]', which deals with automatic import licensing. In addition, Article 3.2 of the Import Licensing Agreement provides that, while '[n]on-automatic licensing shall not have trade-restrictive ... effects on imports additional to those caused by the imposition of the restriction', such procedures 'shall be no more administratively burdensome than absolutely necessary to administer the measure.'<sup>10</sup>

8. Elsewhere in its Report, the Appellate Body noted that:

"If, consistent with the first sentence of Article 3.2 of the Import Licensing Agreement, a non-automatic licensing procedure itself has no trade-restrictive effects on imports, this would appear to support – rather than conflict with – a conclusion that such non-automatic licensing procedure has no restrictive effects on importation. This conclusion, however, can only be made on a case-by-case basis in the light of all relevant facts."<sup>11</sup>

#### 1.4 Article 3.5(a)

9. In *EC – Poultry*, Brazil asserted that traders could not determine which consignments were being imported within or outside the TRQ, and argued that this fact meant that the EC was not administering the licensing system in a transparent manner, thereby violating Article 3.5(a)(iii) and (iv). The EC responded that it had provided the relevant information when requested.<sup>12</sup> The Panel rejected Brazil's claim because Brazil had not demonstrated that there had been any case where the EC had failed to provide the required information despite a request by Brazil, and found:

"Article 3.5(a) addresses specific situations in the operation of an import licensing scheme, subject to requests from Members. It is clear that Article 3.5(a) does not obligate Members to provide voluntarily complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values."<sup>13</sup>

10. In *EC – Poultry*, Brazil argued on appeal that the Panel had erred in restricting Brazil's "comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement" to an analysis of Article 3.5(a) of the Licensing Agreement. Brazil's argument was that "the administration of import licences in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement." The Appellate Body, however, upheld the Panel's approach and the Panel's finding that the European Communities measure was not inconsistent with Article 3.5(a) of the Agreement:

"Brazil's notice of appeal contained no reference to a general issue of transparency in relation to the Licensing Agreement. However, Brazil argued in its appellant's submission that the Panel erred in restricting Brazil's 'comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement' to an analysis of Article 3.5(a) of the Licensing Agreement. The contention of Brazil is that 'the administration of import licenses in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement'.

Brazil argued before the Panel that 'underlying the Licensing Agreement was the principle of transparency.' Brazil submitted, in particular, that the European Communities was obliged under either Article 3.5(a)(iii) or (iv) of the Licensing Agreement to provide complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. According to Brazil, the European Communities failed to fulfil this obligation. The Panel found that Brazil had not demonstrated that the European Communities had violated either

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<sup>10</sup> Appellate Body Report, *Argentina – Import Measures*, fn 598.

<sup>11</sup> Appellate Body Report, *Argentina – Import Measures*, fn 711.

<sup>12</sup> Panel Report, *EC – Poultry*, para. 264.

<sup>13</sup> Panel Report, *EC – Poultry*, para. 265.

Article 3.5(a)(iii) or (iv) of the Licensing Agreement. In the light of the existence of express provisions in Article 3.5(a) of the Licensing Agreement relating to transparency on which the Panel did in fact make findings, we do not believe that the Panel erred by refraining from examining Brazil's 'comprehensive' claim relating to a general principle of transparency purportedly underlying the Licensing Agreement."<sup>14</sup>

### 1.5 Article 3.5(h)

11. In *EC – Poultry*, Brazil claimed that speculation in licences discouraged full utilization of the poultry TRQ in violation of Articles 3.5(h) and 3.5(j). The European Communities responded that licences awarded under the regulation at issue were non-transferable, so as to avoid such speculation. The Panel rejected Brazil's claim:

"While it may be true that Brazilian exporters have had additional difficulties in exporting to the EC market due to the speculation in licences, we note that the licences allocated to imports from Brazil have been fully utilized. In other words, the speculation in licences has not discouraged the full utilization of the TRQ. Thus, we do not find that the EC has acted inconsistently with Articles 3.5(h) or 3.5(j) of the Licensing Agreement in this regard."<sup>15</sup>

12. In *Turkey –Rice*, the United States claimed that Turkey discouraged full utilization of the tariff rate quota on rice by requiring license applicants to comply with a domestic purchase requirement. The Panel declined to rule on the US claim under Article 3.5(h) as it had ruled that the domestic purchase requirement violated Article III:4 of GATT 1994.<sup>16</sup>

### 1.6 Article 3.5(i)

13. In *EC – Poultry*, Brazil claimed that the allocation of licences where each applicant received a licence allowing imports of about 5 tonnes was inconsistent with Article 3.5(i) regarding issuance of licences in economic quantities. As a related matter, Brazil claimed that the absence of a newcomer provision in the regulation regarding the operation of the poultry TRQ was inconsistent with Article 3.5(j). The European Communities responded that licences for the quantity of about 5 tonnes were indeed being issued to newcomers and that the allocation of licences in small quantities was made in response to an ever increasing number of importers. The Panel rejected Brazil's claims under Article 3.5(i) and (j) and found:

"We note Brazil's argument that its exporters are facing difficulties in dealing with licences for small quantities, which is echoed in Thailand's third-party submission also. While the decline in the average quantity per licence may cause problems for traders, we note at the same time that the total TRQ has been fully utilized. The very fact that the licences have been fully utilized suggests to us that the quantities involved are still 'economic', particularly in combination with the significant amount of the over-quota trade."<sup>17</sup>

### 1.7 Article 3.5(j)

14. The Panel in *EC – Poultry*, examined Brazil's claim that the European Communities allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the Licensing Agreement. While the Panel opined that "the requirement of export performance for the issuance of import licences on its face does seem unusual", it nevertheless held that "the provision of Article 3.5(j) in this regard is hortatory and does not necessarily prohibit the consideration of other factors than import performance".<sup>18</sup>

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<sup>14</sup> Appellate Body Report, *EC – Poultry*, paras. 129-130.

<sup>15</sup> Panel Report, *EC – Poultry*, para. 259.

<sup>16</sup> Panel Report, *Turkey – Rice*, para. 7.301.

<sup>17</sup> Panel Report, *EC – Poultry*, para. 262.

<sup>18</sup> Panel Report, *EC – Poultry*, para. 255.