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## ARGENTINA DISDAIN FOR TRADE LAW COMMITMENTS, ARBITRAL AWARDS

Argentina's trade and investment policies have crossed the lines of self-restraint into the territory where the rule of law is shunted aside and the international obligations of the sovereign conflict with the governmental policy *du jour*. Those lines govern both international trade and investor

protections and, as discussed below, there are consequences in the form of trade law retaliations for violations of investor protections.

Argentina presents so many violations that, when writing this column, it was not a question of whether there were any notable events, but

rather where to start. Because this is a column on customs and trade law, the discussion starts with what appear to be clear-cut violations of Argentine commitments under the World Trade Organization (WTO).

### Customs Valuation Principles

There is a high degree of harmonization of the rules governing international trade, as

represented by the provisions regulating tariff classification within the Harmonized Tariff System, customs valuation, and rules of origin. These three elements determine the level of customs duties, VAT, and other indirect taxes imposed at the border on imported products. The formal title of the Valuation Agreement, dating to 1979 and reissued in 1994, is the Agreement on Implementation of Article VI of the Gen-

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eral Agreement on Tariffs and Trade 1994 (GATT).<sup>1</sup> The Valuation Agreement marked a radical departure, with its focus on the “price actually paid or payable,” a “positive” as opposed to the “notional” perspective that had characterized the Brussels Definition of Value.<sup>2</sup> A principal feature of the Valuation Agreement, and concomitant with its affirmative direction to look to the actual price in a sale for export, is its insistence that the use of reference prices, minimum prices, or arbitrary or fictitious prices, such as would be pulled from a valuation database, is prohibited.<sup>3</sup>

In practice, the use of reference prices leads to a disregard for the prices negotiated for a given import transaction if that price should fall below the price that has been established in the country's database,<sup>4</sup> and a substitution of the reference price for the price negotiated by the parties. When challenged at the WTO under the Dispute Settlement Understanding, a country with a reference price approach will lose in a disagreement over its appraisal regime, especially if the use of reference prices has been explicitly provided in its legislation. That was the result in Panama's challenge to Colombia's use of “indicative prices.”<sup>5</sup>

In Argentina, dating to 2005, General Resolution 1907/2005 has been aimed at combating tax evasion and under-invoicing through a system in which imported goods are appraised by means of reference values. The reference prices are derived from values of identical or similar merchandise, private and public databases, and specialized “preshipment inspection

companies.” Any imported goods with entered values below the reference price are automatically shunted to a separate, Red Channel route and, if more than 5% below that reference point, the taxpayer will be subjected to a higher income tax rate.

It is a matter of time before the Argentine reference price system is formally challenged. Given the lack of private-sector standing at the WTO, such a challenge will have to be filed by a governmental member or members on behalf of one or more “economic operators,” to use the European term. It is likely that any such a challenge will succeed.

### Argentina's Import Restrictions

In an attempt to preserve hard currency, Argentina has sought to limit imports, since hard currency outflows are restricted if there is no need to pay for imports that have not taken place. The restrictions take the form of non-automatic import license measures, as well as trade balance requirements, such as export commitments and pre-registration and pre-approval of all imports into Argentina. The regulations were augmented in January 2012, resulting in substantial delays of importing into the country, with the effect that the rules operate as a de facto import restriction on all goods. All of these measures are violations of Argentine commitments to free and open trade under GATT.

A forceful “joint statement” was issued by the United States and several other trading partners of Argentina on March 30, 2012, at the WTO's Council for Trade in Goods.<sup>6</sup>

The call was for Argentina to either change its policies or provide detailed explanations of why it believes that it is acting consistently with its WTO commitments. This column will monitor developments.

### Argentina's Disregard of Arbitral Awards

Quite apart from its WTO violations, Argentina has

breached its commitments to abide by the results of arbitration in disputes brought by investors. This has led to Argentina's loss of duty-free access to the U.S. market for those of its products that otherwise would have been eligible for the Generalized System of Preferences (GSP).<sup>7</sup>

The GSP is a unilateral tariff preference program extended by the United States and other



<sup>1</sup> The Valuation Agreement has been incorporated into U.S. domestic law and is codified at 19 U.S.C. section 1401a.

<sup>2</sup> See Neville, “The WCO as Lawmaker,” 23 *JOIT* 20 (January 2012).

<sup>3</sup> Valuation Agreement, Art. 7.2; see 19 U.S.C. section 1401a(f)(2).

<sup>4</sup> A price that is higher than a reference price might also be rejected, as where a country with capital and exchange controls is worried about capital flight.

<sup>5</sup> Colombia—Indicative Prices and Restrictions on Ports of Entry, WT/DS356.

<sup>6</sup> “Joint Statement on Argentina's Import Restricting Policies and

Practices,” [www.ustr.gov/about-us/press-office/press-releases/2012/march/joint-statement-argentina-import-restricting-policy](http://www.ustr.gov/about-us/press-office/press-releases/2012/march/joint-statement-argentina-import-restricting-policy).

<sup>7</sup> 19 U.S.C. section 2462.

<sup>8</sup> These bases for ineligibility for GSP are in 19 U.S.C. section 2462(b)(2).

<sup>9</sup> For the USTR comment on this action, see [www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-president](http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-president).

<sup>10</sup> Presidential Proclamation 8788 of March 26, 2012, 77 Fed. Reg. 18899 (March 29, 2012).

<sup>11</sup> [www.ustr.gov/trade-topics/trade-development/preference-programs/andean-trade-preference-act-atpa](http://www.ustr.gov/trade-topics/trade-development/preference-programs/andean-trade-preference-act-atpa).

developed countries or trading blocs, including the EU, Canada, and Japan, to most developing countries. In the United States, the GSP program was introduced in the Trade Act of 1974, and there are certain "strings" attached to the largesse. A country that wants to be designated a "beneficiary developing country" (BDC) must show, *inter alia*, that it is not a Communist country, does

lion. Argentina alone accounts for the lion's share of cases that have arisen in the World Bank's arbitration body, the International Center for Settlement of Investment Disputes (ICSID). Argentina has acted with impunity to this point, but its string has just been broken.

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At the time of this writing (early May 2012), there is a frantic push by Argentine exporters to get their products out the door and into the United States before the duty-free ride is over at the end of the month. Last year, Argentine exports' benefits from the GSP covered 11% of its exports, totaling \$477 million.

The President's action lies at the intersection of

To emphasize the startling effect of the Argentina actions, the U.S. retaliation came just days before President Obama's April 15, 2012, announcement that the U.S.-Colombia free trade agreement (FTA) was to enter into force on May 15, 2012. That FTA will guarantee bilateral duty-free access between the two nations, a result that is 180 degrees from the results visited on Argentina and its traders.

## Summary

Argentina is a cautionary tale, a G-20 country, but straddling the fence that separates a jurisdiction where the rule of law is alive and well from one where there are no guarantees and where government measures may erase consistency and predictability by *diktat*. Argentina is by no means the only South American nation to have embarked on this course. Venezuelan expropriations are well known, and Bolivia, which took over a local operation of Red Eléctrica, a Spanish-owned electrical transmission company, on May 1, 2012, had already lost its Andean Trade Preference<sup>11</sup> status in October 2008 because it had failed to cooperate with the U.S. fight against drug trafficking.

There are wider lessons here for both potential trading partners and direct foreign investors in the region. Those seeking to source products from countries such as Bolivia and Argentina may not be able to count on duty-free status for their purchases if the United States or the EU suspends trade preferences, and potential investors must weigh the obvious risks of their assets being seized and used as props by faltering state-run economies. ●



not expropriate property of U.S. citizens without payment of "prompt, adequate, and effective compensation," and gives effect to international arbitrations brought by U.S. investors and others.<sup>8</sup>

To recap, Argentina defaulted on its sovereign debts (bonds) in 2001. This led to a host of lawsuits in U.S. federal district courts that Argentina lost, with judgments totaling some \$6 bil-

lion. Argentina alone accounts for the lion's share of cases that have arisen in the World Bank's arbitration body, the International Center for Settlement of Investment Disputes (ICSID). Argentina has acted with impunity to this point, but its string has just been broken. Acting on a recommendation from the U.S. Trade Representative (USTR),<sup>9</sup> President Obama suspended Argentina from the GSP program on March 29, 2012.<sup>10</sup> He determined that Argentina had not acted in good faith when it failed to enforce ICSID arbitral awards of approximately \$300 million in favor of two U.S. citizens who had prevailed in arbitration. The statute calls for a 60-day notice to both Congress and to the BDC, so the ban was to take effect as of May 28, 2012.

trade and investment protections. While it remains to be seen how its handling of the Spanish ownership stake in the oil company YPF will play out—there is probably going to be some retaliation by the EU—the U.S. action shows that the United States will not play the fool's game of allowing Argentina to both flout its legal obligations and obtain trade benefits.