Business Law International

Business Law International is a journal of the International Bar Association Legal Practice Division. It is published three times a year.

Founding Editor
J William Rowley QC, 20 Essex Street, London, UK

Editors
Wayne McArthur, Gibson Dunn & Crutcher, London, UK
Audley Sheppard, Clifford Chance, London, UK

Editorial Board
Nelson Enongchong, Birmingham Law School, The University of Birmingham, UK
Gwendoline Godfrey, Partner, Banking & Finance, DMH Stallard, UK
Kimmo Miettälä, Krogerus, Helsinki, Finland
Klaus Reichert, Law Library/Brick Court Chambers, Dublin, Ireland
Philip Smith, Allen & Overy, London, UK
Jennifer Wheeler, Proskauer Rose, London, UK
Philip Wood, Allen & Overy, London, UK
W Iain Scott, Faculty of Law, Western Ontario University, Canada

Geographical Advisory Board
Almudena Arpón de Mendivil, Gómez-Acebo & Pombo Abogados, Spain
Hasan Al Arif, Al Tamimi & Company, Dubai
Michael Blakeneys, University of Western Australia, Australia
Neil Campbell, McMillan, Toronto, Canada
Hans van Houtte, Institute of International Trade Law, Leuven University, Belgium
Osvaldo Marzorati, Allende & Breu, Buenos Aires, Argentina
Ajit Mishra, Fox Mandal Little, London, UK
Michael J Moser, O’Melveny & Myers, Hong Kong
Colin Ong, Dr Colin Ong Legal Services, Bandar Seri Begawan, Brunei
Mark Standen, Minter Ellison, Sydney, Australia
Gabrielle H Williamson, Heuking Kühn Lüer Wojtek, Brussels, Belgium/Düsseldorf, Germany

Editorial
Director of Content: James Lewis
Content Commissioning Editor: Paul Crick
Managing Editor: Tom Bangay
Web Editor: Tom McQuaid
Content Editor: Ed Green
Junior Sub-Editor: Hannah Caddick

Contributions to Business Law International are welcome, and should be sent to the International Bar Association at editor@int-bar.org or to the Content Commissioning Editor Paul Crick at paulcrick@mac.com.
Guidelines for authors interested in submitting articles are available from editor@int-bar.org.

Review Books
Books for review should be sent to the Managing Editor at the IBA address.

Advertising
Head of Advertising and Sponsorship: Andrew Webster-Dunn
For details of advertisement and insertion rates please contact the International Bar Association at advertising@int-bar.org.

Subscriptions
Free to members of the Legal Practice Division.
Annual subscription for non-members, including index:
2011 prices:
£215 ($344) full year; £80 ($130) single issue.

Postal Information
Periodicals postage paid at Rahway NJ.
This journal is published three times a year.
Postmaster: send corrections to:
Business Law International
c/o Mercury Airfreight International Ltd Inc
365 Blair Road, Avenel, NJ, 07001, USA
© IBA Legal Practice Division 2012
All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior written permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.
The views expressed in this journal are those of the contributors, and not necessarily those of the International Bar Association.
CONTENTS

Speedread 119

2012 London Olympics: Dispute Resolution in a Commercial Context 123
Richard McLaren

FATCA and Funds – Where Are We Now? 143
Jennifer Wheater

WTO Rules and Argentina’s Import Controls 163
Gustavo L Morales Oliver

Social Media Usage in the Workplace Around the World – Developing Law and Practices 195
Daniel Ornstein

Case Note: Trade War in the Skies: Air Transport Association of America and others v Secretary of State for Energy and Climate Change 209
Ines Litzenberger

Case Note: Vodafone International Holdings BV (Vodafone NL) 223
G Mahadevan

Book Reviews 235

Index 239
Call for submissions

Business Law International, published by the Legal Practice Division of the IBA, is the leading law journal devoted to issues of relevance to the international commercial, legal and academic community.

Business Law International welcomes submissions from potential contributors. Articles should deal with commercial law topics that have a multijurisdictional or cross-border flavour. Submissions should be 3,000–10,000 words long, although submissions may be considered if they are below or above this word length. Full guidelines for contributors can be found on the inside back cover of this journal. All articles are peer-reviewed.

Business Law International articles break new ground on legal issues, provide an in-depth discussion of current developments and timely issues, particularly those with a cross-border focus, and offer a survey of the law in areas of particular interest to our international readership.

Articles should be sent, as a Word document, to the Content Commissioning Editor (paulcrick@mac.com).

Business Law International is published three times a year, in January, May and September; to be considered for a particular issue an article must be received no later than four months before the publication month.

Contributors should note that submission of articles to Business Law International does not guarantee their publication.
2012 London Olympics: Dispute Resolution in a Commercial Context
Richard McLaren (pp 123–142)
The world eagerly awaits the commencement of the 2012 Summer Olympic and Paralympic Games in London, United Kingdom. This article describes the multiplicity of contracts and legislation that interlace the structure and fabric of the London Olympics. In describing the types and scope of contracts and legislation used, it discusses the applicable law and dispute resolution mechanisms used in a host of commercial contracts for the London Olympics.

FATCA and Funds – Where Are We Now?
Jennifer Wheater (pp 143–162)
This article examines the current position in relation to FATCA as it affects the investment fund industry. The article analyses the key concepts that will be applicable to funds and that the global fund industry will need to understand and address going forward. It also reviews the areas of FATCA that remain unclear in ways that could have an impact on the funds market and considers potential solutions to these issues. Finally, the article gives a list of the key dates that relate to the implementation of FATCA and thus advises investment funds of a timeline for their own actions.
**WTO Rules and Argentina’s Import Controls**

Gustavo L Morales Oliver (pp 163–194)

During the last decade Argentina has developed a broad import control system, adopting multiple measures that have stacked up on top of each other. As a result, Argentina has become one of the most protectionist countries in the world according to Global Trade Alert.

- Is there a pattern in the evolution of these measures?
- Were all of them WTO compliant?
- What is the purpose of this import control system?
- Why is it that no WTO consultations or disputes were initiated in connection with this matter?
- Is it possible to do business in Argentina in this context?

This article aims at introducing this case to scholars and practitioners in the international community by describing the evolution of Argentina’s current import control system – including the reactions of importers and other nations – providing preliminary answers to the questions raised above, and providing a forecast of Argentina’s international trade policy for the near future.

---

**Social Media Usage in the Workplace Around the World – Developing Law and Practices**

Daniel Ornstein (pp 195–208)

There is an ongoing and rapid proliferation of social media use in the workplace. As a result, businesses need to be attuned to ensuring social media is used responsibly. This article addresses social media use at work through an analysis of:

- employment-law issues raised by increasing social media usage in the workplace and the developing legal frameworks for addressing them around the world;
- ways in which employment case law related to social media is developing illustrated through decisions from England, France and the United States on the rights of employers to sanction employees for derogatory comments made via social media; and
- steps businesses are taking to deal with social media use at work, based on a survey recently carried out by the author’s firm of over 120 businesses.
CASE NOTE
Trade War in the Skies
Ines Litzenberger (pp 209–222)
Since 1 January 2012, all aircraft arriving or departing from an airport in the European Union have had to participate in the European Union Emissions Trading System (ETS). This has caused considerable uproar throughout the world. Preceding recent discussions was the European Court of Justice’s judgment concerning the ETS, which held that the system is compatible with the Chicago Convention, the Kyoto Protocol, the US–EU Open Skies Agreement, as well as customary international law. Since then, opposing states have tightened their economic threats against the EU to pressure it into abolishing the system.

CASE NOTE
Vodafone International Holdings BV (Vodafone NL)
G Mahadevan (pp 223–234)
In Vodafone International Holdings BV, the Supreme Court of India held that the transfer of shares in an offshore entity between two non-resident persons/entities cannot be taxed in India only on the plea that the underlying assets determining the value of the shares was in India.
The WTO, as the evolution of GATT 1947, seeks to promote international trade free of non-tariff restrictions, except for those allowed under WTO agreements.

Currently, more than 150 countries are members of the WTO and Argentina is one of them. Therefore, Argentina must abide by WTO rules, which, to a large extent, relate to import and export restrictions.

During the last decade, Argentina has developed an import control system, which has seen significant enhancements since 2008. The Argentine authorities have regularly adopted new import control rules, which have piled up on top of each other. Why is this? Is there a pattern in the evolution of these measures? Were all these measures WTO compliant? What has been the purpose of this import control system? Is it possible to do business in Argentina in this context?

As a result of this policy, Argentina has become one of the most protectionist countries in the world according to Global Trade Alert (GTA),
an independent network of 750 researchers from several universities.³ However, no WTO consultations or disputes have been initiated in connection with Argentina’s import control system. Why is this? Is it possible to implement substantial import control measures during almost a decade while also complying with WTO rules? Do WTO rules give room for such a tight import control system?

Argentina will most probably become a case study for anyone interested in cross-border trade controls, free international trade and WTO rules. This article aims to introduce this case to scholars and practitioners in the international community. It describes the evolution of Argentina’s current import control system – including the reaction of importers and nations – and provides preliminary answers to the questions raised above. Additionally, it provides a forecast of Argentina’s international trade policy in the near future.⁴

Evolution of import control measures in Argentina during the last decade

Background: Argentina’s economy during the 1980s, 1990s and 2000s

Argentina’s economy has acted like a roller coaster during recent decades, moving from outstanding growth to severe crisis, almost in spasms.⁵ During that time, the foreign exchange rate for the Argentine peso versus the US dollar⁶ and the inflation rate have been significant factors in Argentina’s economic plans. However, in the last decade a third element has gained strong relevance: import controls.⁷

³ See Global Trade Alert 10th Report, November 2011: ‘Since protectionist acts can affect different numbers of products, sectors, and trading partners, there is no single metric to identify the worst-offending nations. The GTA reports four indicators of harm... On three of the four metrics, Argentina, Germany, India, Indonesia, and the Russian Federation are in the top ten worst-offending nations. See Table 5 [titled] Which countries have inflicted the most harm?’ available at www.globaltradealert.org/sites/default/files/GTA10_0.pdf. See also www.lanacion.com.ar/1377553-la-argentina-lidera-el-ranking-de-paises-mas-proteccionistas. See also www.lanacion.com.ar/1457522-la-argentina-con-record-de-medidas-proteccionistas-en-el-mundo.

⁴ Other than a legal analysis of Argentina’s import control system and WTO rules, this article is not aimed at producing an economic analysis, a comparative analysis or a political analysis of Argentina’s case.


⁶ Argentine citizens have learned that devaluation is a widely used tool in domestic economic policy. Therefore, over time they have lost confidence in their own currency and gained an appreciation for the US dollar as a more stable one.

⁷ In previous decades (e.g., the 1980s) import restrictions were also in place (see www.lanacion.com.ar/1459296-vuelven-las-recetas-del-pasado-la-sintonia-fina-se-inspira-en-viejos-gobiernos). However, their impact was somehow different since Mercosur and the WTO were not in place at the time. Additionally, hyperinflation and other economic circumstances gained more attention at that time.
In the mid-1980s, hyperinflation was devastating the nation. In the 1990s a solution was found: ‘importing’ US inflation rates by means of the ‘dollarisation’ of Argentina’s economy. This meant that a fixed exchange rate between the Argentine peso and the US dollar was established by law. No import controls or foreign exchange controls existed at that time. This open economy sometimes made it easier to import goods than to produce them locally. This plan was effective for a decade but in the early 2000s, Argentina was trapped in a cycle of continuously borrowing funds from the international capital markets and multilateral financial entities (eg the International Monetary Fund) to finance large and growing budget deficits. By December 2001, borrowed funds were not enough to overcome increasing unemployment and a run on the banking system. Consequently, a major crisis took place including massive riots, President de la Rúa’s resignation on 22 December, Argentina’s default on its sovereign debt and a strong devaluation of Argentina’s currency.

In 2003, Néstor Kirchner took office as President, laying emphasis on national production as a means to reach low unemployment rates and surplus in the balance of payments. The latter was closely related to keeping the foreign exchange rate of the Argentine peso versus the US dollar under control. Néstor was succeeded by Cristina Kirchner, who took office as President in December 2007. Under Cristina Kirchner’s presidency, imports were put under close surveillance as a supplementary measure to achieve the goals described above. This strategy became the main driver of Argentina’s economic plan and is still in place. Kirchner was re-elected in late 2011 for a second four-year period in office. When initiating her second term in office, Kirchner said in Congress that her second four-year term would entail a fine tuning of Argentina’s current economic model.

---


9 See [www.guardian.co.uk/world/2001/dec/20/argentinal](https://www.guardian.co.uk/world/2001/dec/20/argentinal). See Decree 214/2002: by means of devaluation, the fixed exchange rate between the US dollar and the Argentine peso was terminated; devaluation was asymmetric (ie debts in US dollars were transformed into debts in Argentine pesos at a rate of 1 to 1, while credits in US dollars were transformed into credits in Argentina pesos at a rate of 1 to 1.40).

10 Kirchner obtained more than 50 per cent of the votes, which is among the highest figures ever achieved by a candidate running for President in Argentina.

According to official figures, Argentina has achieved interesting growth rates since 2003 (eg eight per cent and nine per cent annual GDP growth several times\(^\text{12}\)), while keeping inflation rates under control, although the government’s statistics have been seriously challenged.\(^\text{13}\) Some say that this growth is a consequence of the economic plan. Others allege that it is mainly a side effect of the high international price of commodities exported by Argentina (eg soya beans\(^\text{14}\)).

The main import control measures established by Argentina during recent years are described in Figure 1 in chronological order.

Figure 1: Evolution of import controls in Argentina
First stage of import measures (1999–2007): reference values and automatic import licensing

Automatic import licences

The automatic import licensing system was established in Argentina in 1999. The list of products falling under this system was often increased by the authorities. Currently, more than 2,100 tariff lines require automatic import licences.

According to WTO rules: ‘import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.’  

Automatic import licensing is defined as import licensing where approval of the application is granted in all cases.  

Reference values, as with all other trade remedies permitted under WTO rules, must not be administered in such a manner as to have a restrictive effect on imports.

As described in the regulation, automatic import licences are in force in Argentina to provide the government with statistical information about imports in advance to the historical records that are created once an import is made. This information is to be used for analysing the potential need for implementing trade remedies without any delays that may harm local production.

This system is the least harmful of those described in this article since it only allows the government to collect data and run statistics.

Automatic import licences have caused no relevant complaints by importers in Argentina.

Reference values

In 2001, reference values were imposed to avoid under-invoicing in imports. The list of products to which reference values are applied by the Argentine customs authorities was regularly increased by the authorities. Currently, reference values apply to more than 9,000 tariff lines.

---

15 See [www.wto.org/english/docs_e/legal_e/23-lic_e.htm#top](http://www.wto.org/english/docs_e/legal_e/23-lic_e.htm#top).
16 Ibid.
17 Ibid.
18 Resolution 17/1999 of the Ministry of Economy.
This measure allows the government to control the price at which an import is considered for the purposes of import duties. If the price declared by the importer is below the reference value, the importer may pay customs duties calculated on the basis of the reference value or challenge the reference value with the authorities so long as a bond is provided to secure the difference in customs duties. Additionally, the Red Channel would apply to those goods in order to clear customs. Thus, both a review of the documents and a physical inspection of the goods take place.

Reference values are established by the analysis division of the Argentina Customs Valuation Bureau, based on information derived from the values declared by other importers for identical or similar goods; public or private databases; or specialised companies. Following a WTO Panel decision, *Colombia – Indicative Prices and Restrictions on Ports of Entry – DS366*, it has been argued that Argentina’s reference value system is not WTO compliant as it follows none of the valuation methods set out in the Valuation Agreement of the GATT. Nonetheless, no major complaints have been noted in connection to reference values in Argentina.


**Anti-dumping**

In 2008, the government amended existing anti-dumping regulation to speed up investigations by reducing the time frame for several steps in the procedure. An anti-dumping investigation may not take more than ten months. However, this period may be extended up to 18 months in light of the

---

20 General Resolution 1907/2005 of the AFIP.


22 Argentina joined the GATT in 1967, thus adhering to GATT’s anti-dumping regulation. In 1992, Argentina’s local anti-dumping provisions, included in the Customs Code, were replaced by Law 24176, which adopted the Tokyo Round Anti-Dumping Code. In 1994, Argentina enacted Decree 2121/94, establishing detailed rules for anti-dumping and subsidies proceedings. In 1995, Argentina passed Law 24425 approving the GATT Uruguay Round Agreements, including the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 – the ‘AD Agreement’. In 2001, Argentina enacted Decree 1088/01, amending the rules in order to speed up anti-dumping investigations. In 2006, Argentina enacted Decree 1219/06, setting out the rules for anti-dumping investigations dealing with products whose origin are non-market-economy countries. In 2008, Argentina enacted Decree 1393/08 to further amend procedural rules, again to speed up anti-dumping investigations.
complexity of the relevant investigation. Actually, most anti-dumping investigations in Argentina take approximately 18 months.

After increasing 350 per cent during the interval 2007–2009, initiations of anti-dumping investigations in Argentina have fallen sharply. While 28 anti-dumping investigations were initiated in 2009, 14 were initiated in 2010 and only four in 2011.

Figure 2:

---

23 See Decree 1393/2008.
24 As at 30 April 2012, only one anti-dumping investigation has been initiated by Argentina in 2012.
Between 2003 and 2011, Argentina initiated 109 anti-dumping investigations and imposed anti-dumping duties in 87 of them. This shows a trend of anti-dumping duties imposed in approximately 80 per cent of Argentina’s anti-dumping investigations.

Asian products were a regular target between 2007 and 2010. Most of the time, when Chinese products were investigated, Brazil was chosen as the surrogate country whose market economy was be considered for the purposes of calculating the normal value.25

Anti-dumping investigations are usually initiated because of a formal petition from a significant portion of the local industry of the product to be investigated. The government is allowed to initiate anti-dumping investigations ex officio26 but it has rarely done so.

Anti-dumping investigations involve all importers and exporters of the product under investigation who decide to participate in the proceedings, which are conducted by two separate government agencies. The final decision is made by the Minister of Economy of Argentina and it may be grounded both on legal and international trade policy reasons.

Products falling under anti-dumping investigations require certificates of origin in order to be imported into the country, irrespective of their origin. This requirement adds cost and time to these imports.

Anti-dumping allows the government to influence the price of the imports of the products under investigation. However, a long and complex investigation is required to achieve that goal and the group of affected goods is usually small.

Although specific issues may be raised with regard to Argentina’s implementation of anti-dumping regulation (ie the permanent suitability of Brazil as an appropriate surrogate country for non-market economies almost all the time), this regulation complies in general with the requirements of WTO rules.

No relevant complaints have been raised with regard to Argentina’s anti-dumping regulation.

Non-automatic import licensing (and the initial version of a trade balancing requirement?)

Non-automatic import licensing is allowed under both WTO rules and sections 632 and 609 of the Argentine Customs Code, provided that specific conditions are met.

---

25 See www.wto.org/english/tratop_e/adp_e/adp_info_e.htm. See also Decree 1219/2006.
26 See Decree 1393/2008.
Under WTO rules, non-automatic import licences may or may not be granted by the authorities. Non-automatic import licensing must not have trade restrictive or distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures are required to correspond in scope and duration to the measure they are used to implement and must be no more administratively burdensome than is absolutely necessary to administer this measure. Agencies handling non-automatic licences should not take more than 30 days to deal with an application or 60 days when all applications are considered at the same time. Further, non-automatic licences must be equally administered.

Non-automatic import licences were imposed in Argentina around the mid-2000s. The number of products falling under this requirement has been regularly increased by the authorities. Currently, imports of goods such as home appliances, shoes, tyres, toys, textiles, motorcycles, metallic products and automobiles require companies to obtain non-automatic import licences in advance (also known as import certificates) in order for the products to be imported into Argentina. More than 1,000 tariff lines currently fall under the non-automatic import licence system.

According to the press, no specific pattern exists on how import licences are granted. It seems that certain products are granted import licences faster than others, depending on the needs of both the local industry and the local economy. It has been reported in the press that higher scrutiny applies to imports of products that are produced and that can be produced in Argentina (eg BlackBerry phones, books).

Obtaining these licences has proved more difficult for importers since 2008. In some cases, importers who depended on a regular inflow of products from abroad (eg large retailers) filed complaints with the courts alleging that the government was in breach of WTO rules, for instance, when granting import licences within time frames of 90, 180 days and more. The courts repeatedly decided in favour of the importers and ordered that the government should immediately grant the import licences involved in each lawsuit. These judicial decisions were based mainly on the following grounds:

---

27 See www.wto.org/english/docs_e/legal_e/23-lic_e.htm#top.
28 Ibid.
29 Ibid. See Art 3.2 of the Agreement on Import Licensing Procedures.
30 See note 27 above.
32 Both administrative claims and court actions (ie summary actions – ‘Acción de amparo’ – declarative actions and injunctions) may be filed against formal import restrictions. Court actions appear to be more effective since administrative claims would not suspend the application of the relevant import controls.
• proceedings to obtain non-automatic import licences were arbitrarily delayed by the government;\textsuperscript{33}
• non-automatic import licences are aimed only at assessing the international commercial flow of goods;\textsuperscript{34} and
• non-automatic import licences apply to industrial supplies and, therefore, interfere with local production.\textsuperscript{35}

However, after some time, even the most active plaintiffs realised that they could not sustain their businesses on the basis of continuous requests to the courts. Therefore, they settled to accept – rather than continue fighting – the government’s implementation of non-automatic licensing. To that end, importers decided to be flexible and adjust their operations to make them fit with the reality of Argentina’s position, for instance, by starting import procedures earlier.

In May 2010, Argentina was questioned at the WTO Committee on Import Licensing.\textsuperscript{36} Canada, China, the European Union, Japan, Mexico, Peru and the United States asked the following: ‘Some companies report that they have been told that their import licence application will not be approved unless the company agrees to trade balancing requirements established by the Secretary of Domestic Trade. ... Could Argentina please provide an explanation for these measures, along with copies for the Committee of the laws and regulations that authorize and implement these requirements?’

Trade balancing means that the importer is allowed to import goods provided that he exports goods\textsuperscript{37} for the same value as those imported. This measure compensates outflows of funds caused by payment of imports with inflows of funds caused by collection of exports. Therefore, it has a direct impact on the balance of payments of both the country and the companies.

Argentina’s reply was short and concise: ‘Argentina is unable to provide an explanation for such measures since they do not exist and there are consequently no laws or regulations in this respect.’ This answer was correct and remains correct since no formal measure (ie regulation published in the official gazette) sets out a trade balancing requirement in Argentina.

\textsuperscript{33} Federal Administrative Court of Appeal, Chamber II, \textit{In re ‘Multiscope SÀ’} (8 April 2008);
Federal Administrative First Instance Court No 8, \textit{In re ‘SHK SÀ’} (March 2011) and \textit{In re ‘Litchytex SÀ’} (February 2011). See \url{www.lanacion.com.ar/1392391-aumenta-la-cantidad-de-productos-importados-varados-en-la-aduana}.

\textsuperscript{34} Federal Administrative Court of Appeal, Chamber V, \textit{In re ‘Yamana’} (8 May 2008).
\textsuperscript{35} Federal Administrative Court of Appeal, Chamber III, \textit{In re ‘Textil Rio Grande’} (12 May 2009).

\textsuperscript{36} G/LIC/Q/ARG/11.

\textsuperscript{37} Exports of services may also be considered for the purposes of trade balancing requirements.
Therefore, if proven to exist, the trade balancing requirement could be construed as a de facto (ie informal) measure. By the time of the above-mentioned questioning at the WTO, the press was suggesting that some kind of trade balancing requests were being made by the authorities to high-profile companies in private meetings. During the first semester of 2011, public announcements were made that several companies had committed to export goods in order to reduce the imbalance between their imports and exports as a means of securing their flow of imports. Porsche committed to export wine and olive products. Volkswagen committed to reduce its imbalance between imports and exports by 70 per cent. Peugeot committed to balance imports and exports by increasing its exports while Alfa Romeo committed to reach the same goal by exporting biofuels. Goodyear committed to substituting imported supplies with local ones. Ford committed to increasing exports in order to balance its imports and exports. Hyundai Argentina became involved in exporting soy products, biodiesel, wine and peanuts. According to the press, negotiations to obtain these commitments were hard and diplomats were involved in

---


42 Ibid.

43 See Resolution 116/2011 of the Secretary of Industry and Commerce, approving an investment plan proposed by Peugeot within the framework of Decree 774/05 (Regime of Incentives to Competitiveness in the Automobile Industry). See also Resolution 248/2011.


some cases. These commitments were not public documents so it was not possible to know their exact content other than by press reports. They are deemed to be unilateral commitments by the companies.

In most of these cases, the exports were exports previously made by other companies. Therefore, no exports were added to the total exports of Argentina – only the exporter’s name changed – and the net effect with regard to the balance of payments was zero. However, this initial approach to trade balancing allowed the government to introduce the idea to the local market.

No specific information is available on how effective these commitments were in order both to reduce the imbalance between the exports and imports of each company and secure the possibility of importing goods, but the automobile companies continue doing business regularly in Argentina.

GATT Article X requires members to publish promptly laws, regulations, judicial decisions and administrative rulings of general application, including those pertaining to requirements on imports or exports and to administer them in a uniform, impartial and reasonable manner.

Uncertainty on regulations applicable to imports may enhance the authorities’ power to reject import petitions on their own discretion, facilitating implementation of trade restrictive measures. Additionally, lack of formal published rules makes any challenge with the courts substantially more difficult – although not impossible – since the plaintiff would be required to provide evidence that a requirement is made by the authorities although it has not been formally enacted by them. Additionally, the authorities may deny the existence of such a requirement.

No relevant court claims have been initiated with regard to this first version of the non-written trade balancing requirement, which was only applied to a small group of big companies, most of them from the automotive industry.

A similar balancing requirement was analysed in 2001 by a WTO Panel on Dispute DS146 (India – Measures Affecting the Automotive Sector). The Panel concluded that:
India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing on automotive manufacturers an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles (‘indigenisation’ condition).

India had acted inconsistently with its obligations under Article XI of the GATT 1994 by imposing on automotive manufacturers an obligation to balance any importation of certain kits and components with exports of equivalent value (‘trade balancing’ condition).

India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing, in the context of the trade balancing condition, an obligation to offset the amount of any purchases of previously imported restricted kits and components on the Indian market, by exports of equivalent value.

India appealed this Panel Report but later withdrew its appeal as a result of the introduction of its new auto policy. The Dispute Settlement Body (DSB) proceeded with the adoption in full of the Appellate Body and Panel Reports. On 6 November 2002, India informed the DSB that it had complied fully with the recommendations of the DSB in this dispute by issuing Public Notice No 31 on 19 August 2002 terminating the trade balancing requirement. India also stated that it had earlier removed the indigenisation requirement by Public Notice No 30 on 4 September 2001.

The WTO Panel on Dispute DS175 (India – Measures Affecting Trade and Investment in the Motor Vehicle Sector) was required to analyse the same legal issues described above for DS146 and the result was identical.

By 2010, the initiation of anti-dumping investigations in Argentina was dramatically decreasing while non-automatic import licences combined with an alleged trade balancing requirement were becoming the primary focus of Argentina’s import control programme.  

**Third stage (2012): the catch-all system**

In December 2011, Cristina Kirchner took office for a second term as President of Argentina and reaffirmed the government’s international trade policy. A few days later, by means of a presidential decree, she established that the government agencies for both local and international trade matters should be under the Ministry of Economy and Finance. Those areas were previously shared between the Ministry of Economy and the Ministry of Foreign Affairs. The stated purpose for this measure was to achieve faster implementation of

---
52 Later in this article the author provides a thesis on why this change took place.
the government’s trade policy measures.\textsuperscript{54} In fact, this amendment meant a concentration of power in the hands of the Secretariat of Interior Commerce, which is part of the Ministry of Economy and makes all decisions regarding both Argentina’s domestic commerce and international trade activity.\textsuperscript{55}

**Prior sworn import statement (and the advanced version of a trade balancing requirement?)**

On 1 February 2012, a new requirement applicable to almost all imports in Argentina became effective: the Prior Sworn Import Statement (‘Declaración Jurada Anticipada de Importación’ or ‘DJAI’).\textsuperscript{56}

The DJAI must be filed in advance to issuing a purchase order and must describe the typical elements of an import transaction (eg FOB price, quantity). This filing is made through the website of the Federal Revenue Agency (‘AFIP’), who gives notice to other government agencies that participate in this system.\textsuperscript{58} These agencies may raise objections to the relevant import if they see fit.

It is not clear on what grounds these agencies may object. However, the regulation establishes that these agencies are allowed to participate in the DJAI system on the basis of their jurisdiction and, therefore, it seems reasonable to assume that any objections should be limited to the scope of the relevant agency’s field.

If objections are raised, the import procedure will not continue until the importer provides all explanations and documents required directly to the agency raising the objection. Importers must solve the objections by dealing directly with the agency raising them. No time frame is established by the


\textsuperscript{56} The Prior Sworn Import Statement applies to almost all imports for consumption in Argentina except for those falling under the following import regimes, among others: imports for replacing defective goods, reimported goods, imports for donations, imports for samples, diplomatic imports, courier imports, postal service imports and imports related to production plant constructions under specific circumstances.

\textsuperscript{57} General Resolution 3252/2012 by the AFIP.

\textsuperscript{58} General Resolution 3252/2012 by the AFIP does not specify whether ‘entities’ refers to public, private (eg associations of local producers), or both kinds of entities. The original word in Spanish is ‘organismos’, which could be translated into English as entities, organisations or agencies, depending on the context. As at April 2012, only public agencies participate in the DJAI system.
regulation for the authorities to decide the importer’s petition for dismissal of the objection.

Only if the objections are solved or if no objections are raised may the proposed import transaction proceed.

So far, the main agencies that have signed up for the DJAI system are the National Administration for Food, Drugs and Medical Technology (ANMAT), the National Agency for Health and Quality in Food and Agriculture (SENASA), the National Institute for the Wine Industry and the Secretariat of Interior Commerce. The latter is the leading government agency in terms of international trade in Argentina and has a 15-day period to raise objections once a DJAI is filed.

In late April 2012, a strike by port employees took place alleging that import-related work had seriously decreased in the light of the recently imposed DJAI system. The Secretary of Domestic Commerce was able to solve this strike personally.

The DJAI easily resembles a non-automatic import licence applicable to almost all imports of goods since it constitutes a mandatory filing, which allows the authorities to object to the proposed import transaction. As mentioned in ‘Automatic import licences’ above, Article 1 of the WTO Agreement on Import Licensing Procedures defines import licensing ‘as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member’. Further, Article 2.1 provides that ‘Automatic import licensing is defined as import licensing where approval of the application is granted in all cases…’ and Article 3.1 establishes that ‘Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2’.

---

60 Resolution 1/2012 by the Secretariat of Interior Commerce.
61 Ibid.
If the DJAI is deemed to be a non-automatic import licence, the following aspects of the WTO Agreement on Import Licensing Procedures may raise concerns:63

- According to Article 1.6, ‘Applicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies’. The DJAI system establishes that the filing is to be made with one agency (AFIP) but if any objections are raised by other agencies taking part in the DJAI system, the importer must directly approach each one of them in order to solve those objections. If more than two agencies raise objections, the three administrative bodies threshold would be breached. This situation may also conflict with the ‘single window’ mechanism proposed by the World Customs Organization through the SAFE Framework of Standards, which is mentioned as a goal for the DJAI system according to AFIP’s General Resolution 3255. Further, the fact that the DJAI may be objected could be deemed incompatible with SAFE since SAFE promotes anticipated information but it does not relate to the possibility of objecting to an import.

- A non-automatic licensing requirement is WTO incompatible unless it is necessary to implement measures that are imposed in conformity with the relevant WTO rules and does not have trade-restrictive or trade-distortive effects on imports beyond those caused by the underlying restriction.64 As disclosed in the regulation, the purpose of the DJAI system is to provide the government with anticipated information about future imports. No specific underlying measure seems to be applied through the DJAIs but agencies involved in the system may prevent specific imports from being made. This may be construed as incompatible with the Agreement on Import Licensing Procedures and GATT Article XI.

- Requiring duplicate filings for an import may be construed as opposite to the ‘single window’ goal and as more burdensome than is necessary under WTO rules. For instance, an import may require filing a DJAI, the Nota de Pedido form (see ‘Form to be filed with the Secretariat of Interior Commerce’ below) and an automatic or non-automatic import licence. This may be deemed incompatible with SAFE and WTO rules.

There are no official statistics with regard to objections raised by the agencies to the DJAIs. However, by March 2012, the local Chamber of Importers

---

63 Under local regulation, it may be arguable that it is not the AFIP but the Executive Branch that is entitled to enact import control measures.

(CIRA)\(^{65}\) stated that approximately 50 per cent of the DJAIs were objected to.\(^{66}\) As reported by the media and by the Association of Customs Brokers,\(^{67}\) importers whose DJAIs are objected are required to submit the following information to the Secretariat of Interior Commerce,\(^{68}\) by means of a sworn statement executed by the importer’s legal representative:

1. details of the price of their products in the local market in 2010, 2011 and 2012, indicating inter-annual price increases;\(^{69}\)
2. estimated imports and exports for 2012 in US$ values; and
3. a unilateral commitment to balance imports and exports in 2012.

There is no formal rule requiring companies to file this information and, specifically, requiring this advanced version of the trade balancing requirement applicable to all importers facing objections to their DJAIs. Therefore, if proven to exist, this filing and the updated trade balancing requirement\(^{70}\) could be construed as a de facto (also known as an informal) measure.

When dealing with informal requirements, companies must be especially careful with regard to internal company rules and compliance policies. Further, they must consider that no formal guarantees exist that compliance will provide the desired effects.

In order to achieve a balance between imports and exports, the following alternatives may be considered in export commitments:

- **Increasing exports.** Some importers may increase their exports by adjusting internal operations but other importers may need to engage in business with third parties (ie current or prospective exporters). These engagements may involve joint ventures or simply having importers acquiring the merchandise from exporters in order to export it themselves later. The case of joint ventures or other kinds of business associations should be carefully analysed since contingencies may arise (ie joint liability) under tax law, corporate law, labour law and others. In order to export, a company must be registered as exporter with customs and must have exporting activities.

\(^{65}\) See http://comex.iprofesional.com/notas/131166-Estiman-que-el-80-de-las-declaraciones-juradas-que-se-presentaron-recibieron-luz-verde.


\(^{67}\) See Centro de Despachantes de Aduanas, Bulletin BID No 9866 – Buenos Aires, 5 March 2012. See also G/C/W/667.


\(^{70}\) See www.ambito.com/diario/noticia.asp?id=630256. See also http://comex.iprofesional.com/notas/134548-El-Gobierno-le-exige-a-Volkswagen-que-sustituya-con-produccion-nacional-autopartes-de-Brasil.
within the corporate purpose in its by-laws. Adding exporting activities
to the company’s business in its by-laws may not be easy if the company is
incorporated with the Public Registry of Commerce of Buenos Aires since
this Registry generally objects to companies having business purposes
that involve several unrelated activities (ie importing cars and exporting
furniture). In those cases, it may be necessary to set up a separate company
to run the export business. Lately, the government has stated that in order
for the exports of a company to count towards its imports under the trade
balancing requirement, they must be new exports (ie exports that were not
previously in the hands of other local exporters). This criteria has not been
strictly implemented yet since expecting all importers to develop enough
new export businesses in the short term seems to be asking too much of
their ability as business people and of Argentina’s economy. However, it
is expected that the government will increasingly use this criteria in the
approval or rejection of export commitments by importers. In most cases,
companies claim that developing export businesses may take months or
years depending on the targeted value in US$.

- **Substituting imports for local products.** Local products may be produced
directly by the importer or by a third party operating in the local market.
In many cases, companies maintain that developing local production of the
goods that they import may take several months, depending on how large
and sophisticated the local production should be. They also allege that in
some cases the local market is not equipped with the kind of technology
required for producing some goods.

- **Capital increase.** In some cases, capital increases for the value of the
imbalance between imports and exports may be an alternative. This option
may be especially useful for companies having dividends yet unpaid to
their shareholders located abroad and facing trouble transferring those
funds abroad because of local foreign exchange restrictions. However,
this alternative does not seem to be a long-term solution.

Given the government interest in keeping unemployment rates low, direct
or indirect creation of jobs would be a great advantage to any export
commitment. Some companies have attempted to use Mercosur’s system
for the payment of exports/imports in local currency (ie in Argentine pesos

71 See [http://comex.iprofesional.com/notas/134610-Cristina-lo-hizo-los-chocolates-Milka-
sern-made-in-Argentina](http://comex.iprofesional.com/notas/134610-Cristina-lo-hizo-los-chocolates-Milka-
sern-made-in-Argentina).
or in Brazilian real, but not in US$). However, the government has not accepted this tool as a way to sidestep import controls yet.

Some of the recent export commitments announced in the press involve Pirelli exporting honey and Newsan exporting fish. Also according to the press, mining companies may be the next in big hit export commitments.

It is unclear what will happen in 2013 to those importers who committed to make exports for a specific amount in 2012 and did not comply. In principle, it may be difficult to enforce unilateral commitments in court since no bargained for exchange exists. However, these commitments have somehow been relayed to government, which may construe them as a promise to the nation and then those importers could be charged with breaching said promise. In any case, although no formal sanction exists, it is expected that in 2013 the government will audit compliance with export commitments.

**Form to be filed with the Secretariat of Interior Commerce**

In January 2012, the Argentine Chamber of Importers (CIRA) and the Argentine Chamber of Commerce (CAC), following specific instructions by the Secretariat of Interior Commerce, informed their members that a form named ‘nota de pedido’ should be filed in advance to all imports by e-mail at notadepedido@mecon.gob.ar. This form includes a description of the main aspects of the transaction (eg price, products, quantity). No written rule was published by the government establishing this requirement. Therefore, this could be construed as a de facto (also known as an informal) measure.

The information required by the form ‘nota de pedido’ is similar to that required by the DJAI. However, the DJAI is to be filed with the Federal

---

Revenue Agency while the form is to be filed with the Secretariat of Interior Commerce.

The idea of requiring duplicate filings with similar information goes against the purpose stated by the government for the DJAI system: implementing the ‘single window’ mechanism recommended by the World Customs Organization and against WTO rules for adding unnecessary administrative requirements to imports.

Prior Sworn Services Statement

In April 2012, some imports of services (ie services rendered by non-residents to residents\(^\text{77}\)) became subject to a Prior Sworn Services Statement\(^\text{78}\) (‘DJAS’). The DJAS procedure is similar to that of the DJAIs and is also grounded on the World Customs Organization idea of a ‘single window’.\(^\text{79}\)

According to Article 1 of AFIP’s General Resolution 3276, the DJAS system is applicable both to imports and exports of services. However, Annex A to that Resolution describes the data to be required at the time of implementing the DJAS and it only refers to imports of services. Therefore, exports of services seem to be currently outside the scope of the DJAS.

The DJAS must be filed through the AFIP’s website describing all information related to the services that will be rendered (eg date of the contract, price, term). As explained in the following sub-section, the DJAS is directly related to foreign exchange regulation. Consequently, not filing the DJAS will render an obstacle for transferring funds abroad as payment for the relevant import of services.

For the DJAS requirement to apply:
1. the services must be rendered by a non-resident to a resident;
2. the services must be rendered after 1 April 2012;
3. the price to be paid for those services must be unspecified, equal to or above US$100,000, or the installments equal to or above US$10,000; and
4. the services must fall under specific categories such as information and computing services, trademark and patents, royalties, copyright, guarantees for exports of goods and services, professional services, technology transfers.\(^\text{80}\)

\(^{77}\) For purposes of this regulation, the concept of ‘resident’ is the one established under the Argentine Income Tax Law.

\(^{78}\) General Resolution 3276 by the AFIP.


\(^{80}\) These classifications are established by foreign exchange regulation enacted by the Central Bank of Argentina.
Foreign exchange controls

Foreign exchange regulation was imposed in Argentina after the 2001 crisis. Specific rules apply depending on the kind of transaction (e.g., payment of imports, repatriation of funds collected abroad for payments of exports, capital contributions, financings, derivatives and others).

The most recent update to the foreign exchange regulation applicable to payments of imports took place in early 2012, on the DJAI and the DJAS systems entering in force. By means of Communications A 5274 and 5295, the Central Bank of Argentina established that the DJAI and the DJAS are a requisite for certain payments of imports of goods and services respectively.82

Previously, in October 2011, the AFIP established a new system under which all individuals or companies willing to purchase foreign currency in Argentina are subject to a prior control by said agency.83 This control involves an analysis by the AFIP of the petitioner’s income and expenses as reported by means of tax returns and other sources of information in order to verify if the petitioner has enough economic capacity to make the desired purchase of foreign currency. Whenever the purchase of foreign currency is related to an import of goods or services to which the DJAI or the DJAS respectively applies, the ID number for the relevant DJAI or DJAS must be submitted together with the petitioner’s information (e.g., name, tax ID number) for the purposes of running the above-mentioned analysis of economic capacity.

Preliminary analysis of Argentina’s import control policies

As mentioned before, this article describes the evolution of Argentina’s current import control system and provides preliminary answers to the questions raised in the introduction. This section looks into each of those questions and provides some additional analysis.

In less than ten years, Argentina developed a broad import control system and climbed to the top of the rankings of protectionist countries. However, no WTO consultations or disputes were initiated in this regard. Why?

82 Describing Argentina’s foreign exchange regulation is beyond the scope of this article.
83 General Resolution 3210/2011 by the AFIP.
Uruguay, the United States, the European Union, Italy, Colombia, Mexico, Chile and the UK have often complained in the media about Argentina’s import control regime. 

Brazil has also complained. However, Brazil has always had a close trade relationship with Argentina and negotiations are held on a regular basis with regard to both countries’ import controls (eg restrictions on their respective automotive industries).

---


India openly announced that it would decrease its purchases of Argentine products as a protest against Argentina’s import controls.\textsuperscript{93} China slowed down its purchases of Argentina soya beans when Chinese products became a regular target in Argentina’s anti-dumping investigations.

At meetings of the WTO Committee on Import Licensing,\textsuperscript{94} countries such as Mexico, Japan, Switzerland, the United States, Korea, Peru, Canada and others have raised their concerns about Argentina’s import control measures (see 2.2.3 above). At those meetings, Argentina provided, among others, the following remarks:

- ‘The implementation of automatic import licensing... was the result of changes in international trade flows in recent years.’
- ‘Resolution 45/2011 which... was notified by Argentina on 21 March 2011, extended the coverage of products subject to licensing to 581; however, tariff lines subject to non-automatic licensing only represented seven per cent of the total number of tariff lines in Argentina’s Schedule of Concessions.’
- ‘The application of non-automatic licensing did not, in any way, lead to incompatibility with Argentina’s commitments in the G-20 and in the WTO since this was a valid trade policy measure as provided for in Article 3.3 of the Agreement.’
- ‘Importation of products subject to NAL indicated that the system was not ultimately intended to protect national domestic industry by controlling imports’; ‘if the imports trends of products subject to NAL were compared to those which are not subject to such licences the following conclusions could be drawn: (i) in 2009, as a result of the international economic crisis, there was a decrease in imports both in terms of total numbers and for those subject to NAL; (ii) in 2010, the total increase in imports also saw an increase in the number of imports subject to NAL as a result of the recovery of the world economic activity and; (iii) imports subject to NAL increased by 110 per cent in 2010 in comparison with 2006, whilst there was a 65 per cent increase of total imports over the same period. Therefore, NALs did not operate as a protective trade measure to favour domestic industry.’
- ‘The predictability and transparency of the NAL system had enabled normal trading flows to continue.’

\textsuperscript{94} G/LIC/M/33 and G/LIC/M/34. G/LIC/M/30 to 34 and G/LIC/Q/ARG/10 and 11, available at www.wto.org/english/tratop_e/implic_e/implic_e.htm.
• ‘All imports subject to NAL, regardless of their origin, received the same
treatment when applying the measures; the same requirements and
processing time were also applied for requests and renewals thereof.’
• ‘Processing of applications did not exceed 60 days according to the period
set for in Article 3.5(g) and (h) of the Agreement.’
• No trade balancing requirement is imposed by law in Argentina.

On 30 March 2012, the most relevant international complaint against
Argentina’s import control system took place. At a meeting of the WTO
Council for Trade in Goods,95 a joint statement was made by Australia,
the European Union, Israel, Japan, Korea, Mexico, New Zealand, Norway,
Panama, Switzerland, Chinese Taipei, Thailand and the United States. It is
interesting to see that no Mercosur members – especially Brazil – signed
this public statement.

The statement briefly describes allegations relating to Argentina’s import
control system and requests that Argentina:
1. terminates all import-restrictive measures and practices, or
2. provides a detailed written explanation of why in its view these measures
   and practices are consistent with WTO rules.

The main parts of this joint statement are as follows:
• ‘Trade-restrictive measures taken by Argentina,... are adversely affecting
   imports into Argentina from a growing number of WTO Members.’
• ‘These measures include the overly broad use of non-automatic import
   licensing trade balancing requirements, and pre-registration and pre-
   approval of all imports into Argentina.’
• ‘Companies... report that Argentina’s non-automatic import licensing
   scheme has a trade-restrictive effect on imports and that there are long
delays in the issuance of import licenses,... In some instances, companies
   are denied import licenses altogether, without justification or explanation.’
• ‘The lack of transparency in Argentina’s implementation and
   administration of its import licensing regime creates profound uncertainty
   both for exporters and potential exporters to Argentina, as well as for
   investors in Argentina.’
• ‘In January 2012, Argentina announced regulations that went into effect
   on 1 February, requiring pre-registration, review and approval of each
   and every import transaction... creating long delays and resulting in huge
costs.... It appears that this new system is operating as a de facto import
restricting scheme, on all products.’
• ‘Argentina has made clear through public government statements
   that it has also adopted an informal “trade balancing” policy, whereby

95 G/C/W/667.
companies seeking to import products must agree to export, dollar for dollar, goods of an equal or greater value or establish production facilities in Argentina. Many companies have reported receiving telephone calls from Argentine government officials in which they are informed that they must agree to undertake such trade balancing commitments prior to receiving authorization to import goods. The Ministry of Industry’s website is replete with press releases announcing these trade balancing and domestic production arrangements. These arrangements include well known automakers agreeing to export products such as wine, olive oil, and soy meal, and requiring companies across a number of sectors to undertake production in Argentina without reference to the economics of doing so. Argentina may claim that companies enter into these arrangements voluntarily, but many of the Members supporting this statement share concerns that it may be operating otherwise. We are not aware of any official directive or resolution setting out these trade balancing or investment requirements. However, high level Argentine government officials have been quoted in the Argentine press as saying quite clearly that the purpose of these requirements is to improve its trade balance by restricting imports and promoting exports.’

- ‘Many of the Members that support this joint statement today have previously raised concerns about Argentina’s increasingly protectionist measures both bilaterally and multilaterally beginning in 2008 when Argentina began progressively expanding the number of products subject to its non-automatic import licensing requirements. Concerns have been raised and questions have been directed to Argentina in the Committee on Import Licensing, the Committee on Agriculture, and in this Council. However, Argentina has failed to adequately address these concerns or respond to Members’ questions. Indeed, rather than eliminating these import-restrictive measures and practices, Argentina has introduced new measures, and the existing measures have become increasingly problematic for our exporters.’

- ‘The import-restrictive measures and practices that Argentina has put in place are unbefitting any WTO Member, particularly a member of the G-20 who has committed to refrain from raising new barriers to trade and investment. In light of the shared goal of making every effort to sustain global economic growth, Argentina’s measures, which clearly limit the growth-enhancing prospects for trade, are particularly troubling.’
Argentina replied to the joint statement by means of a press release, which included the following arguments:96

- Major trade partners of Argentina, including Mercosur members, China, Russia and India, did not sign the joint statement.
- The nations signing the joint statement have increased their exports into Argentina by 25 per cent.
- This year, Argentina was the G-20 member with the highest increase in imports.
- No specific cases in which Argentina was in breach of WTO rules were presented.
- Only ‘vague’ allegations by the local press are the grounds for the joint statement.
- Argentina will continue to promote trade policies that provide outstanding economic growth while also complying with WTO rules.

Many theories may arise about why no WTO consultations or disputes have yet been initiated with regard to Argentina’s import control system.97

While the European Union and United States are focused on dealing with hard economic situations since the 2008 global financial crises, Brazil and some Asian nations are focused on maintaining outstanding growth rates. However, it seems difficult to conclude that WTO members have no time or resources to initiate a WTO complaint against Argentina if they see fit.

Argentina is not among the largest economies in the world. However, countries having economies smaller than Argentina’s have been subject to WTO disputes.

WTO dispute settlement proceedings take time. Nonetheless, they are regularly used by nations to solve trade disputes.

The European Union may be interested in not harming the negotiations for a free trade agreement with Mercosur, which have been developed in recent years.98

Following Argentina’s Government official statements in the press, it may be the case that many of the complaining nations have surplus in their

---


97 This is the situation up to 30 April 2012 and the author mainly refers to non-automatic import licences, de facto measures, the DJAI and the DJAS systems. Mercosur regulation is not within the scope of this article. However, Mercosur rules are similar to those of the WTO and they seek to avoid trade restrictive measures. No Mercosur disputes have been initiated with regard to Argentina’s current import control system.

balance of payments with Argentina and they do not want a WTO dispute to threaten that situation.

In several recent opportunities Argentina has not complied with international rules and rulings, including the following: Argentina’s sovereign debt commitments (ie 2001 default); rulings in New York jurisdiction related to Argentina’s 2001 default; ICSID rulings and UNCITRAL rulings. Based on these facts, it may be the case that a feeling exists in the international community that Argentina may not comply with a potentially adverse decision by a WTO Panel in connection with its import control regime.

In the end, each nation takes the course of action most suitable to its needs: complaints, negotiations or trade pressure. It remains to be seen if WTO dispute proceedings take place in the future.

Argentina authorities regularly adopted new import control rules that piled up on top of each other during the last decade. Why? Is there a pattern in the evolution of those measures?
The Argentine authorities regularly adopted new measures that were more convenient than the previous ones to implement their policy. Each new tool had a broader scope than the previous one. Since the new measures did not replace the pre-existing ones, they all work together now as a comprehensive system.

Initially, automatic import licences provided the government with advanced information about the inflow of imports. Later, reference values

---

99 The policy reasons and convenience behind Argentina’s behaviour in these matters are beyond the scope of this article.


101 National Grid.

and anti-dumping duties allowed the authorities to discuss the price of specific imports (although in the case of anti-dumping, long and complex investigations are required). Subsequently, non-automatic import licences affected the inflow of goods, for example when licences were not granted or when proceedings were delayed. Finally, the DJAI system extended the effects of non-automatic import licensing to almost all imports. In addition, foreign exchange regulation is in place.

There are elements to consider in relation to Argentina’s move in recent years towards a system that allows control over both the price and flow of imports, where it is necessary to obtain permission (or to obtain ‘absence of objections’) in advance for an import to be made.

**Is it possible to run a strong full scope import control system under WTO rules? Were all of Argentina’s measures WTO compliant?**

Running a comprehensive analysis of the several tools used in Argentina’s import control system would require a much longer than this one, involving both deep theoretical analysis and large statistical data to verify the actual impact of Argentina’s import controls on its international trade flows. Notwithstanding that, several issues were raised in the previous sections to analyse whether or not some of Argentina’s import controls comply with specific WTO rules.

In essence, the two main issues to be discussed in order to decide whether Argentina’s import control system is WTO compliant or not are the following:

- the requirement that the implementation of trade measures should not have trade-restricting effects; and

- the requirement that all import control measures should be published promptly in such a manner as to enable governments and traders to become acquainted with them (Article X.1 of GATT 1947).

On one hand, Argentina claims that none of these principles has been breached by its import control system. On the other hand, several other nations have repeatedly alleged that Argentina is in breach of these two main aspects of WTO rules, among others.

**What has been the purpose of Argentina’s import control measures?**

According to formal regulations, Argentina’s import control measures are aimed at implementing a WTO-compliant import licensing system, implementing the ‘single window’ mechanism proposed by the World Customs Organization and obtaining statistical information in order to better plan Argentina’s trade policies.

---

If the informal (de facto) measures are deemed real, the trade balancing requirement – which is allegedly measured in terms of value (ie money) and not in terms of products – may be evidence that further purposes are behind Argentina’s measures, such as control over inflows and outflows of funds due to international trade (ie the balance of payments). To that end it is relevant to consider that a capital increase using dividends that were supposed to be paid to shareholders abroad means that those funds will remain in the country, substituting imports by local products means that a lower amount of funds will be transferred abroad to pay for imports, and increasing exports means that a higher amount of funds will be brought into the country.

If Argentina’s foreign exchange regulation is added to the formula, especially considering its link with the DJAI and the DJAS systems, it seems that reaching a surplus in the balance of payments may be the main goal for Argentina.

According to the press, the government’s goal is to obtain a surplus of US$10,000 million per year in its balance of payments. Decreasing unemployment rates, fostering local production and keeping the foreign exchange rate of the Argentine peso and the US dollar under control would be a consequence of that policy.

Understanding the goals behind Argentina’s import control system should allow a better understanding of the decisions adopted by its government both at the macro and micro level.

From an economic perspective, several questions may arise. How will Argentina battle against inflation? What if a decrease in imports of supplies affects the local industry? What if, in the mid- and long term those nations that complain about Argentina by means of press releases decide

---

104 The Argentine Government has denied this.
106 See www.cronista.com/economia/policia/Boudou-la-sustitucion-de-importaciones-apunta-a-la-defensa-de-la-produccion-20120330-0135.html.
107 Other than import controls, no major plans have been developed by Argentina to foster its local industry (eg tax benefits plans, financings). Other countries such as Brazil show additional measures. See www.ambito.com/noticia.asp?id=628844, www.telam.com.ar/nota/18987 and www.clarin.com/mundo/Brasil-programa-reactivacion-fuerte-impuestos_0_675532603.html.
to retaliate? Is this a sustainable long-term policy for Argentina? Will this policy cause a decrease in imports? The answers are uncertain and should be addressed by economists and politicians. However, it seems that achieving a surplus in the balance of payments is at the core of Argentina’s economic policy and this policy is not expected to change for as long as the current government officials remain in office.

The balance of payments was and always will be a significant issue in international trade policy. The best evidence of its relevance is that Article XII of GATT 1947 specifically establishes that ‘in order to safeguard its external financial position and its balance of payments, [Argentina] may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article’. Trade restrictions imposed under Article XII should exceptional, temporary and removed as soon as the situation is solved.

**Is it possible to do business in Argentina in this context?**

Doing business in Argentina has never been – and may never be – easy. As mentioned above in the introduction, Argentina’s economy is always challenging and changing.

According to the press, only a few high-class clothing brands have decided to leave the country because of the imports control system. However, the press has also stated that many companies are struggling to secure their flow of imports, especially those in the electronics business (eg Mac, Sony),

---


111 See *supra* lxxxv.


and that some companies reported improvements under Argentina’s current trade policy.115

Several layers of import controls are now in force in Argentina. The main ones are described above but there are other measures in place that are not detailed in this article (eg new customs proceedings to run a more strict verification of imported goods when arriving at ports116).

Although importers know that they may have grounds to challenge import controls with the courts, they tend to see judicial actions as a last resort. Companies do not like running a business on the basis of legal actions. Additionally, they do not like entering into a conflict with the government on a topic that is at the top of the government’s agenda (ie trade policy). Therefore, they choose to be flexible and adapt their operations – as much as possible – to the import control system in force. Scania,117 Phillips118 and Syngenta119 are examples of this.

In the end, companies tend to run a return/risk analysis. Since Argentina’s recent growth rates have provided strong consumption, most companies have achieved rates of return that justify dealing with the many import control measures in place. It would be interesting to see what companies would do if Argentina’s economy were to slow down and rates of return were to fall.120 Obviously, the investment horizon121 of a company is a key additional element in this analysis. Many companies have operated in Argentina for decades and they know that in Argentina policies tend to change from time to time.122

---


120 See www.lanacion.com.ar/m2/1456167-la-argentina-ante-el-fantasma-de-la-recesion.

121 The total length of time an investor expects to hold an investment. The investment horizon is used to determine the investor’s income needs and desired risk exposure.

122 Under Argentina’s National Constitution, two consecutive periods as President are the maximum allowed. Since Cristina Kirchner was re-elected as President in 2011, she may not be able to run for President again in 2015.
Final remarks

The financial and economic crisis initiated in 2008 after the falling of Lehman Brothers raised concerns in the international community about a possible 'return to nationalism'\textsuperscript{123} in many nations and regions. Some nations such as Brazil and Argentina have been charged with running protectionist policies in recent years.\textsuperscript{124} Indeed, Argentina is at the top of Global Trade Alert's ranking of protectionist nations\textsuperscript{125} and it is reasonable to expect that its current policies will continue, at least until the end of Cristina Kirchner’s second term in office as President, in December 2015.

A final decision on whether Argentina is in breach of WTO rules would require extensive analysis focused on the actual implementation of Argentina's measures.

Argentina is an active WTO member, which construes all its import controls as WTO compliant.

In any case, it is clear that Argentina’s international trade policy has evolved towards a scheme based on broad ex ante import controls applicable to almost all imports.

This story is around ten years old but it is still too early to make a final judgment. Close follow-up by stakeholders (eg practitioners, scholars, government officials and traders) will certainly enrich the analysis and lead to conclusions that may be of use for other nations in the future.

Argentina will most probably become a case study for anyone interested in cross-border trade controls, free international trade and WTO rules. This article is an introduction to and a preliminary analysis of this case study.

\textsuperscript{123} See www.economist.com/node/13061443. See also www.time.com/time/business/article/0,8599,1872565,00.html. See also www.globaltradealert.org/gta-analysis/did-wto-restrain-protectionism-during-recent-systemic-crisis.


\textsuperscript{125} See supra i.
Index

Argentina
  import controls 120, 163-194
  advanced version of trade balancing requirement 176-181
  anti-dumping 168-170
  automatic import licences 167
  capital increase 180
  case study, as 194
  catch-all system 175-183
  doing business in Argentina, and 192-193
  economy during 1980s, 1990s and 2000s 164-166
  evolution of 164-183
  first stage 1999–2007 167-168
  foreign exchange controls 183
  form to be filled with Secretariat of Interior Commerce 181-182
  hyperinflation, and 165
  increasing exports 179-180
  initial version of trade balancing requirement 170-175
  Nestor Kirchner, and 165
  non-automatic import licensing 170-175
  pattern in evolution of measures 189-190
  preliminary analysis 183-194
  prior sworn import statement 176-181
  prior sworn services statement 182
  purpose of 190-192
  reference values 167-168
  second stage 2008–2011 168-175
  substituting imports for local products 180
  third stage 2012–06–17 175-183
  trade balancing 172-175
  WTO Committee on Import Licensing 178, 185-188
  WTO compliance, and 190
  WTO consultations or disputes 183-189
  WTO rules, and 120, 163-194

Directors’ Liability and Indemnification: A Global Guide review 235

Emissions Trading System 209-234
  Chicago Convention, and 214-215
  customary international law, and 217-220
  ECJ judgement 220-221
  ECJ opinion 213
  economic sabre-rattling, and 209-211
  history of 211
  judicial review proceedings 211-221
  Kyoto Protocol, and 215-216
  Open Skies Agreement, and 216-217
  opposing position 211-220
  questions referred by High Court 212-213

FATCA 119,143-162
  affected vehicles 145-146
  compliance with 155-158
  administration 158
  entity accounts 157
  existing individual 156-157
  individual accounts 156
  US accounts 156
  US indicia 158
  documents 161
  exempt beneficial owners 151-152
  FFIs 145
  deemed compliant 146-147, 151-152
  exceptions 146-147
  foreign passthru payments 153-154
  funds, and 119, 143-162
  grandfathering 159-160
  intermediary issues 160-161
  international developments 159
  need for 144
  NFFEs 146
  non-profit organisations 151
  non-reporting members of participating affiliated groups 147-148
  outstanding issues 159-161
  payee issues 160-161
  payments subject to 152-154
  qualified collective investment vehicle 148
  registered deemed compliance 149
  restricted funds 148-149
  retirement funds 150
  sources 144-145
  timeline 162
  US investment funds 161
  withholdable payments 152

LOCOG 126-133
  BOA, and 130-132
  contracting with 128-130
  contractual process of obtaining 124-133
  creation of 126, 127-128
  dispute resolution 129
  procurement contracts 128-129
  responsibilities 128
  sponsors, number of 141-142
  structure 127
  Time Grievance Resolution Protocol 130
London Olympics 2012 119, 123-142
Adjudication Panel 135-136
advertising legislation 137-140
remedies 139
Secretary of State, powers of 139-140
disputes relating to 130-133
dispute resolution in commercial context 119, 123-142
Greenwich dispute 132-133
Host City Contract 125-126
conditions 126
contract governed by Swiss law 125-126
 guarantees 126
Independent Disputes Avoidance Panel 135-136
local business dispute 133
LOCOG sponsors, number of 141-142
NEC3: standard form construction contract 134-135
Olympic Charter 124
Olympic Delivery Authority 133-134
Olympic Park Legacy Company 136-137
Olympic Stadium 136-137
Olympic Symbol Act 138
TOP programme of IOC 140-141
UK Olympic legislation 133-140

Minority Shareholders: Law, Practice, & Procedure
review 236-237

Social media
constraints on monitoring 197-199
England 198
France 198
Germany 198
Hong Kong 198
Italy 199
Netherlands 199
Spain 199
United States 199
derogatory remarks about employer 202-206
England 203-204
France 202-203
United States 205-206
workplace, usage in 120, 195-207
constraints on monitoring 197-199
developing law and practice 195-207
disciplinary action, and 200-201
emerging trends 206-207
legal issues 196
limiting outside workplace 201
policies, need for 195-196
Proskauer Rose LLP survey 206-207
recruitment and selection, and 200-201
right of employers to monitor 197
rights of employers to prohibit 200

Trade war in the skies 121, 209-234 see also Emissions Trading System

Vodafone International Holdings BV 121, 223-234
agreement before Supreme Court 226-228
amendments, effects of 230-231
arbitration 232-33
arguments of ITD 227-228
Bombay High Court Order 226
critical analysis of tax proceedings 225-226
Direct Taxes Code Bill 232
facts 223-224
issue 225
post-ruling events 230
role of CGP in transaction 228
submissions of Vodafone 227
Supreme Court ruling 228-229
transaction and structure of HTL 224

WTO rules
Argentina’s import controls, and 120, 163-194 see also Argentina
Guidelines for Contributors

1. Business Law International, published by the Legal Practice Division of the IBA, is the leading law journal devoted to issues of relevance to the international commercial, legal and academic community. All members of the IBA Legal Practice Division receive the journal as part of their membership. It is also available to individual subscribers and libraries.

2. Business Law International articles break new ground on legal issues, provide an in-depth discussion of current developments and timely issues, particularly those with a cross-border or multijurisdictional focus, and offer a survey of the law in areas of particular interest to our international readership. The Editorial Board welcomes the submission of articles which illuminate legal problems or issues currently confronted by governments, international organisations, private enterprises etc, by setting them within their general legal, economic or political context. Articles are welcome from both private practitioners and academics.

3. Articles should typically be around 3,500–5,000 words, although articles up to 10,000 words will be considered for publication. Articles should break new ground on legal issues, provide an in-depth discussion of current developments and timely issues and in particular those with a cross-border focus, or survey the law in a particular area of interest to our international readership.

4. Except in special circumstances, the Editorial Board will not consider articles published or to be published elsewhere. Authors are asked to confirm that their typescript is not and will not be so published, or to explain the relevant circumstances.

5. Copyright in the article will normally be assigned to the IBA.

6. Title and author of the article should be clearly indicated together with the brief personal description (max 50 words) that the author would wish to see appear.

7. Contributors are asked to provide a brief headline of around 100 words describing the contents of their article.

8. All articles are refereed to ensure both accuracy and relevance. Authors may be asked to revise their articles before final acceptance.

9. Referencing in IBA publications follows The Oxford Standard for Citation of Legal Authorities. Please visit http://www.oxfordstyle.com/ for further details.

10. All footnotes should be numbered from 1–99 and should be as concise as possible. Footnotes should be checked for accuracy, completeness and consistency.

11. The citation for the journal is in the following style: (2011) 12 BLI.

12. All materials for the journal must be in English. In special circumstances articles written in a foreign language will be considered for translation and publication. Such articles when submitted to the Editorial Board must be accompanied by a synopsis in English.

13. All materials should be submitted as a Word document via e-mail.

14. Contributors are recommended to retain a copy of their article.

15. The author should supply his or her contact details for further correspondence.

All typescripts to:
Paul Crick (Content Commissioning Editor) at paulcrick@mac.com
International Bar Association
4th floor, 10 St Bride Street, London EC4A 4AD
Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544 E-mail: editor@int-bar.org

Terms and Conditions for Submission of Articles

1. Articles for inclusion in this journal should be sent to the Content Commissioning Editor at paulcrick@mac.com

2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else’s copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author’s knowledge, contain anything which is libellous, illegal, or infringes anyone’s copyright or other rights.

3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) itself throughout the world in printed, electronic or any other medium, and in turn to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.

4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.