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The WTO Dispute Settlement Body has granted Antigua authorisation to retaliate against the US within the *US – Gambling* dispute

On 28 January 2013, the WTO Dispute Settlement Body (hereinafter, DSB) granted Antigua and Barbuda (hereinafter, Antigua) authorisation to suspend concessions or other obligations (*i.e.*, to retaliate) *vis-à-vis* the US, within the framework of the WTO dispute *US – Measures Affecting the Cross Border Supply of Gambling and Betting Services* (hereinafter, *US – Gambling*). By virtue of this decision, Antigua may now adopt '*retaliatory measures*' against the US under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPs Agreement), at a level not exceeding USD 21 million annually.

The authorisation from the DSB is the latest turn in the long-lasting WTO dispute, ongoing since Antigua filed a request for consultations with the US in March 2003, alleging that certain US federal and state laws impaired its rights under the WTO General Agreement on Trade in Services (hereinafter, GATS) and the US Schedule of Commitments. In April 2005, the DSB adopted the report from the Panel as modified by the Appellate Body, which essentially established that the US was in breach of WTO provisions, and recommended that the US measures be brought in line with WTO law. Subsequently, an arbitrator established, pursuant to Article 21.3(c) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter, DSU), that the reasonable period of time for the US to implement the rulings and recommendations of the DSB amounted to eleven months and two weeks (*i.e.*, expiring in April 2006). In May 2007, a compliance panel set up under Article 21.5 of the DSU determined that the steps taken by the US failed to comply with the recommendations of the DSB. In December 2007, an arbitral award determined that Antigua could request authorisation to suspend obligations *vis-à-vis* the US under the TRIPs Agreement at a level not exceeding USD 21 million annually. In particular, the arbitrators found that Antigua was in its right to request the DSB to '*retaliate*' under Sections 1, 2, 4, 5 and 7 of Part II of the TRIPs Agreement, which deal (respectively) with copyright and related rights, trademarks, industrial designs, patents and protection of undisclosed information.

Shortly after the adoption of the WTO compliance panel report in May 2007, the US announced its intention to modify its Schedule of Commitments so as to clarify the scope of '*recreational services*' in a manner that gambling services were excluded from the scope of its commitments, which would eventually bring the US into compliance with the ruling adopted by the WTO. Pursuant to Article XXI of the GATS, the US entered into negotiations with seven WTO Members, which claimed to have an interest in the matter, and mutually satisfactory agreements on compensatory adjustments were reached with all, but Antigua. In particular, these agreements resulted in the US liberalising its markets for warehousing services (excluding services supplied at ports and airports), private technical testing services, private research and development services, and postal services relating to outbound international letters. With respect to the failed negotiations with Antigua, and pursuant to Article XXI:3(a) of the GATS, an arbitration panel was established so as to determine the level of compensation for the US withdrawal of commitments, but it was

reportedly suspended in order to allow for the two Parties to proceed with their negotiations and eventually reach an agreement (see Trade Perspectives, Issue No. 9 of 6 May 2011). So far, however, no agreement on compensation has been reached.

In light of the developments described above, the authorisation granted by the WTO DSB to Antigua may help put an end to the deadlocked procedure under Article XXI of the GATS, as well as to resolve the long-standing *US – Gambling* dispute. Antigua is now in a position to adopt '*retaliatory measures*' against the US in accordance with the 2007 arbitral award, which could arguably satisfy the requirement that, prior to the enforcement of the renegotiated Schedule, the US had to reach an agreement on compensatory adjustments with all WTO Members affected by the modification. Under the modified Schedule, online gambling will no longer fall within the scope of '*recreational services*', and will therefore no longer be bound by the US market access and national treatment commitments in trade in services. Consequently, the US will be in compliance with the rulings and recommendations adopted by the DSB, and *a fortiori*, in line with WTO law.

As for the other WTO Members affected by the US modification of Schedules (*inter alia*, the EU), this development will bring to an end the ambiguity and uncertainty caused by the deadlock in negotiations, which prevented the new US Schedule and the compensatory agreements to come into force. Particularly concerned about the US developments to comply with the DSB rulings and recommendations, the EU launched in March 2008 an examination procedure under the so-called '*Trade Barriers Regulation*' (*i.e., Council Regulation (EC) No. 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization*). The investigation was instigated by the '*Remote Gambling Association*', a London-based trade association representing a substantial proportion of the European internet gambling industry. In its final report, the EU Commission concluded that the US had acted in breach of its WTO commitments in trade in services, inasmuch as it enacted legislation that discriminated against EU companies and, in particular, that the measures at hand violated the US market access and national treatment obligations (see Trade Perspectives, Issue No. 7 of 9 April 2009), precisely what the US sought to avoid with the modification of its Schedule.

Once the renegotiated US Schedule of Commitments is fully enforced, WTO Members affected by the modification will benefit not only from the compensatory adjustments they agreed to within the framework of the proceedings under Article XXI of the GATS, but also from a greater degree of clarity and predictability in their rights and obligations *vis-à-vis* the US. Businesses, especially those operating in the field of online gambling services and in those that stand to benefit from the compensatory concessions, are advised to closely monitor any upcoming development in this regard, as well as to coordinate with the relevant governmental bodies, in order to ensure that no measures detrimental for their interests are put in place or that they do not miss important new commercial opportunities.

The EU Commission publishes a guidance document on the Food Information Regulation

On 31 January 2013, the EU Commission's Health and Consumer Directorate General (hereinafter, DG SANCO) published a guidance document on its website entitled '*Questions and Answers on the application of the Regulation (EU) No. 1169/2011 on the provision of food information to consumers*'. DG SANCO had set up a working group with experts from EU Member States, which elaborated the guidance document, in order to provide answers to a series of questions concerning the application of Regulation (EU) No. 1169/2011 on the provision of food information to consumers (hereinafter, '*FIR*') The guidance document aims

at assisting all players in the food chain, as well as the competent national authorities to better understand and correctly apply the FIR.

The EU Parliament and the EU Council adopted the FIR on 25 October 2011. The Regulation consolidates and modifies existing food labelling provisions in the EU to allow consumers to make informed choices and to make safe use of food, while at the same time it ensures the free movement of legally produced and marketed food. The FIR entered into force on 12 December 2011 and will apply from 13 December 2014, with the exception of the provisions concerning the mandatory nutrition declaration, which are to apply from 13 December 2016. The 25-page guidance document addresses a number of different aspects of the FIR, without being exhaustive. On the first 12 pages, it deals with matters related to the way in which labelling on pre-packaged and non-prepackaged foods must be presented to consumers. The questions address matters such as the minimum font size, '*multipacks*', instructions for use, allergen labelling, distance-selling of food, list of ingredients, transitional measures, designation of ingredients, date of freezing, and indication of the net quantity. The second part of the document exclusively addresses specific questions in relation to the nutrition declaration.

Some '*novelties*' in EU food labelling law are dealt with in the guidance document, which states, for example, that in relation to ingredients present in the form of engineered nanomaterials, these must be clearly indicated in the list of ingredients, while the names of such ingredients must be followed by the word '*nano*' in brackets. However, according to the guidance document, engineered nanomaterials are not required to be included in the list of ingredients when they are in the form of one of the following constituents: 1) food additives and food enzymes; 2) carriers and substances, which are not food additives, but are used in the same way and with the same purpose as carriers, and which are used in the quantities strictly necessary; and 3) substances, which are not food additives, but are used in the same way and with the same purpose as processing aids and are still present in the finished product, even if this presence occurs in an altered form.

The possibility for '*vegetable oils*' like palm oil, rape oil or sunflower oil to be labelled under the category name '*vegetable oil*' has not been included in the FIR. Under the current general food labelling rules established in Directive 2000/13/EC on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs, it is still possible to use the category name '*vegetable oil*' until 13 December 2014, with the exception of certain vegetable oils, like soya or peanut oil, which need already be declared separately, as they are allergens. The guidance document addresses the question of whether it is possible under the FIR to state on the label: '*rape plant oil or palm plant oil partly hydrogenated*', which would allow for the situation where producers suddenly change the source of the vegetable oil. The guidance document holds that such indications would not comply with the FIR as it is not possible to display information on the label, which is neither accurate nor specific enough about the characteristics of the food and which may mislead consumers. The question is whether such '*alternative*' labelling, clearly expressed with an '*or*', would actually mislead the average consumer, who is reasonably well-informed and reasonably observant and circumspect, according to the criteria applicable in EU jurisprudence. Many food business operators will not agree with the interpretation expressed in the guidance document. The exception for different vegetable oils to be listed under the category name '*vegetable oil*' was introduced into EU food labelling law because food manufacturers often have to change the vegetable oil they are using in their products for reasons of availability on the market, quality and price. Each change in the vegetable oil used will have to be strictly recorded in the list of ingredients as of 13 December 2014. This will increase the labelling costs, which will be ultimately passed on to consumers.

Another aspect of the guidance document appears to bear particular interest from an international trade perspective. The question is whether nutrition declarations can be

provided in the format required by the US and Canada (so-called '*Nutrition Facts*') in addition to the nutrition declaration, which meets the requirements of the FIR, where products are destined for sale in more than one country. The EU Commission's guidance document argues that a nutrition declaration in the format required by the US and Canada (even if the EU format is given as well) would not be in line with EU requirements, inasmuch as both mandatory and voluntary information must comply with the rules laid down in the FIR and such labelling might mislead the consumer because of the different conversion factors used in the US to calculate energy value and the amount of nutrients.

Food business operators are permitted to place products labelled in accordance with the FIR on the EU market in advance of 13 December 2014, provided that there is no conflict with the labelling requirements of the current food labelling rules set out in Directive 2000/13/EC on the labelling and presentation of foodstuffs, which continues to apply until 12 December 2014. The guidance document provides an example: under Directive 2000/13/EC, the '*best before*' date must be in the same field of vision as the name under which the product is sold. Under the FIR, the '*best before*' date no longer needs to be in the same field of vision. In that case, if food business operators were to comply with the FIR prior to its entry into application (*i.e.*, prior to 13 December 2014), they would contravene Directive 2000/13/EC.

The interpretative guidance published by the EU Commission is certainly useful, although some controversial aspects of the FIR, such as the detailed provisions on the mandatory country-of-origin declaration (established in detail in nine paragraphs of Article 26 of the FIR) are not addressed at all (see, for more details, Trade Perspectives, Issue No. 14 of 15 July 2011). It should also be noted that the guidance document has no formal legal status and, in the event of a dispute, the ultimate responsibility for the interpretation of the law lies with the Court of Justice of the EU.

US export restraints on Liquefied Natural Gas may violate WTO rules

The US Department of Energy has recently come under pressure from domestic steel, chemical and other manufacturers to exercise its discretion in restricting the export of liquefied natural gas (hereinafter, LNG) from the US, which they use as raw material in their production process. The manufacturers complain that, while the benefits of recently improved hydraulic fracturing ('*fracking*') techniques have so far resulted in higher supply levels and lower prices of LNG on the US market, this has also led to LNG producers and traders seeking higher profits abroad. Although the US Department of Energy is empowered by the Natural Gas Act of 1938 (hereinafter, US Natural Gas Act) to restrict exports of natural gas where they are not considered to be '*in the public interest*', any decision to do so will draw strong criticism on the basis that such measures could be considered inconsistent with the WTO commitments undertaken by the US.

According to the US Natural Gas Act, authorisation must be obtained before natural gas can be exported from the US. The Department of Energy may only authorise exports where it finds that to do so would be consistent with US '*public interest*'. It has been argued that enacting export restrictions in relation to LNG could violate the WTO commitments undertaken by the US, which prohibit the institution or maintenance of quantitative restrictions by virtue of Article XI of the General Agreement on Tariffs and Trade (hereinafter, the GATT), an article previously used in arguments by the US against similar export restrictions by China (for more background on export restrictions and on this case see, Trade Perspectives Issues, No. 14 of 15 July 2011, No. 14 of 15 July 2011, No. 8 of 23 April 2010 and No. 21 of 13 November 2009). As recently as last year, for instance, the Appellate Body in *China – Raw Materials* confirmed that China's export restrictions on bauxite were inconsistent with Article XI:1 of the GATT, which prohibits restrictions and prohibitions on exports, and that the restrictions did not fall under the exception in Article XI:2(a) of the

GATT, which allows such measures to be '*temporarily applied*' where they are required in order to either prevent or relieve a '*critical shortage*'. The Appellate Body was of the view that, in order to come under this exception, the restriction must be for a limited duration of '*criticality*'. This case has originally followed an allegation by the US (along with Mexico and the EU) that the Chinese export duties and export quotas violated China's WTO obligations under the Accession Protocol of China to the WTO by depressing domestic prices in such a way as to give domestic manufacturers an unfair advantage. The US was also involved in a similar dispute with China regarding the export controls, which the Asian giant had imposed on rare earth materials (see Trade Perspectives, Issues No. 21 of 18 November 2011 and No. 1 of 14 January 2011), but may now find it difficult to prove that any restrictions imposed on LNG exports would not similarly violate Article XI or that they are exempted as being for a limited duration in order to tackle a '*critical shortage*' or indeed to justify these restrictions under the general exceptions to compliance with WTO commitments, as set out in Article XX of the GATT. In this respect, it will be interesting to see how the US intends to define and justify the concept of '*public interest*', in light of the applicable WTO rules and of the trade restrictive effects of the measures that are based on it.

A second aspect of the US measures, that will likely prove difficult to reconcile with the WTO commitments undertaken by the US, is the expedited export procedure introduced for the benefit of partners to US Free Trade Agreements (hereinafter, FTAs). The updated Section 3(c) of the US Natural Gas Act facilitates exports to partners where FTAs require national treatment for trade in natural gas in stating that they '*shall be deemed to be consistent with the public interest, and […] granted without modification*'. This clause could prevent the US from proving any rationale in denying currently pending export applications to WTO Members that do not have an FTA with the US under the general exceptions to the GATT, such as that they have been introduced to conserve '*exhaustible natural resources*' (Article XX(g) of the GATT) or that they are essential to the acquisition or distribution of products in general or local supply (Article XX(j) of the GATT), considering that there is a blanket policy to allow exports of LNG to FTA partners.

While WTO jurisprudence has historically under-analysed export controls, in comparison with import restrictions, disputes regarding export restrictions imposed on energy and natural resources are becoming more common, particularly as countries attempt to resort to them in order to provide an indirect advantage to their own downstream producers. The WTO compatibility of export restrictions is, therefore, becoming increasingly relevant for commercial parties and any related development ought to be monitored closely as export quotas can potentially drive prices up, forcing foreign traders to source alternative (and generally more expensive) suppliers.

Within the US, there is little agreement on what the future policy of the US Department of Energy should be. In light of the recent rise in supply levels on the US natural gas market, following the discovery of significant shale gas reserves in the US and the improvement of the technology required to extract them, the US Department of Energy has seen a surge in applications for the authorisation of exports to non-FTA countries. In response, the US Department of Energy has conducted a public consultation on its current policy, which closed on 24 January 2013 and will accept replies until 25 February 2013. Although it has been reported that most of the replies were related to concerns that exports should be limited on the grounds that the '*fracking*' method used to extract LNG is harmful to the environment, this domestic debate and the possible trade repercussions of this policy must be closely monitored.

The WTO Dispute Settlement Body establishes a panel to examine certain measures imposed by Argentina on the importation of goods

At its meeting on 28 January 2012, the WTO DSB established a single WTO panel to examine the complaints by the EU, the US and Japan (hereinafter, the complainants) following their second request for the establishment of a panel regarding the WTO-consistency of several measures imposed by Argentina affecting the importation of goods (for more background on Argentina's import control procedures, see Trade Perspectives, Issue No. 2 of 27 January 2012).

As of 1 February 2012, Argentina has subjected imports of all goods to a pre-registration and pre-approval regime in which importers have been required to file, prior to the importation of goods, *affidavits* with certain information (*inter alia*, the subject goods, the tariff classification, the amount and value of imports and product origin) to the Argentine tax agency (*i.e.*, the '*Administración Federal de Ingresos Públicos*', hereinafter, AFIP), and then wait for the approval or rejection of their applications. This dispute began on 30 May 2012, after the EU requested for WTO consultations with Argentina, which were held on 12 and 13 July 2012. Subsequently, on 21 August 2012, Japan and the US requested for separate consultations, which were held on 20 and 21 September 2012. As reported, on 24 August 2012, Mexico also initiated a formal WTO dispute against Argentina concerning the same matter, though on 13 December 2012, it withdrew its complaint after a bilateral agreement on the automotive sector was reached with Argentina. Since those consultations did not resolve the issue, the complainants decided to request for the establishment of a dispute settlement panel on 6 December 2012. For a second time, on 28 January 2013, the complainants required the establishment of a Panel, albeit Argentina's statements that the automatic import licences and all the non-automatic import licences had already been repealed as of 25 January 2013. The panel will now be composed and, according to WTO rules, it will have to issue its decision within a period not exceeding six months from the date that the composition and terms of reference of the panel have been agreed upon.

In their requests for the establishment of a WTO panel, the EU, Japan and the US have alleged that the import policies imposed by Argentina violate a number of provisions of various WTO Agreements, in particular the GATT and the Agreement on Import Licensing Procedures (hereinafter, ILPs Agreement). The measures alleged by the complainants to be illegal under the WTO are: 1) the Advanced Sworn *Affidavit* on Imports (hereinafter DJAI, by its acronym in Spanish); 2) the certificates required as a condition for the importation of goods (hereinafter, the CI requirement); and 3) the restrictive trade-related requirements that, alone or in combination with the other two measures, oblige economic operators to undertake certain actions (hereinafter, the other requirements). Specifically, importers are required to balance imports with exports, increase investment in production facilities in Argentina, increase local content of products manufactured in Argentina and refrain from transferring revenues abroad.

The Panel will have to determine whether the DJAI and the CI requirement constitute an import prohibition or restriction pursuant to Article XI of the GATT. In particular, Article XI of the GATT prevents WTO Members from applying import restrictions, made effective through import licensing. The DJAI and the CI requirement appear to result in a restriction of imports subject to an import permission requirement (*i.e.*, import licensing procedure). According to the ILPs Agreement, import licensing procedures are '*administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation to the relevant administrative body as a prior condition for importation*'. In this regard, the Panel would have to determine whether these import permission requirements constitute an automatic or a non-automatic import licensing procedure in accordance to the ILPs Agreement. The distinction between automatic and non-automatic import licensing procedures is clarified by the ILPs Agreement: an automatic import licensing procedure

essentially grants the approval of the application in all cases within a maximum of 10 working days, without having trade-restrictive effects, and in compliance with a number of procedural requirements, including transparency and non-discrimination. A non-automatic import licensing system does not comply with these requirements.

In this respect, the complainants allege that both measures constitute a non-automatic licensing procedure, which amounts to significant and burdensome restrictions on imports inasmuch as, *inter alia*, the regime permits authorities to deny applications and to take time to verify whether these goods are produced domestically. Should the DJAI and the CI requirements not comply with the procedural requirements of being neutral in the application and administered in a fair and equitable manner in line with WTO rules, Argentina would likely be found to violate Article 3.2 of the ILPs Agreement. Furthermore, Article III of the GATT obliges WTO Members to provide national treatment to foreign-made goods. Accordingly, local content requirements or any performance requirements (*e.g.*, the requirement for domestic producers to limit imports to an amount related to the volume or value of local products that they export) are not permitted as they provide foreign-made goods with less favourable treatment than those produced domestically. The complainants allege that Argentina has violated Article III:4 of the GATT, to the extent that, *inter alia*: 1) the country has forced companies looking to export to its territory to import Argentinean goods as a prior condition (*e.g.*, a German company had to commit to import wine and olive oil from Argentina in order to export over a hundred vehicles to the country); and 2) domestic producers have been required to increase local content of products manufactured in Argentina.

The major exporters to Argentina are companies from Brazil, the EU, China, the US and Mexico. In terms of trade, the EU exported to Argentina USD 10.4 billion in 2011, an increase of 17% over the previous year; the US exports were worth USD 9.9 billion in 2011, an increase of 32% over the previous year; and Japan's exports to Argentina have also seen significant growth in recent years (*i.e.*, 53% between 2009 and 2011). Companies, traders and producers in either Argentina or the complaining countries should closely monitor the development of this controversy and interface with their respective governments in order to assist them with factual and legal elements that could be instrumental for the WTO to correctly interpret the measures at stake.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) No. 91/2013 of 31 January 2013 laying down specific conditions applicable to the import of groundnuts from Ghana and India, okra and curry leaves from India and watermelon seeds from Nigeria and amending Regulations (EC) No. 669/2009 and (EC) No. 1152/2009*

- *Commission Implementing Regulation (EU) No. 82/2013 of 29 January 2013 laying down detailed rules for the application of an import tariff quota of dried boneless beef originating in Switzerland*

Trade Remedies

- *Commission Regulation (EU) No. 79/2013 of 28 January 2013 making imports of biodiesel originating in Argentina and Indonesia subject to registration*

- *Council Implementing Regulation (EU) No. 78/2013 of 17 January 2013 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey*

Food and Agricultural Law

- *Commission Implementing Decision of 4 February 2013 amending Decision 2009/719/EC authorising certain Member States to revise their annual BSE monitoring programmes (notified under document C(2013) 435)*

- *Commission Implementing Regulation (EU) No. 88/2013 of 31 January 2013 amending Decision 2007/777/EC and Regulation (EC) No. 798/2008 as regards the entries for Ukraine in the lists of third countries from which certain meat, meat products, eggs and egg products may be introduced into the Union*

- *Commission Implementing Decision of 29 January 2013 amending Decision 2004/416/EC on temporary emergency measures in respect of certain citrus fruits originating in Brazil (notified under document C(2013) 339)*

- *Commission Implementing Regulation (EU) No. 71/2013 of 25 January 2013 amending Regulation (EU) No. 206/2010 as regards the entry for Uruguay in the list of third countries, territories or parts thereof authorised for the introduction of fresh meat into the Union and correcting that Regulation as regards the model veterinary certificate for ovine and caprine animals intended for breeding or production after importation*

- *Commission Regulation (EU) No. 68/2013 of 16 January 2013 on the Catalogue of feed materials*

Other

- *Commission Directive 2013/2/EU of 7 February 2013 amending Annex I to Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste*

- *Notice concerning the entry into force of an Agreement on Trade in Bananas between the European Union and the United States of America*

- *Commission Implementing Regulation (EU) No. 92/2013 of 1 February 2013 amending Implementing Regulation (EU) No. 700/2012 as regards deductions from the Portuguese fishing quotas available for cod, Greenland halibut and redfish and the Spanish fishing quota available for red seabream in certain areas*

- *Information on the date of entry into force of the Fisheries Partnership Agreement between the Democratic Republic of São Tomé and Príncipe and the European Union*

- *Council Decision of 29 November 2012 on the conclusion of the Agreement in the form of an Exchange of Letters between the European Union, of the one part, and the State of Israel, of the other part, amending the Annexes to Protocols 1 and 2 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part*

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