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**GENERAL OVERVIEW OF ACTIVE WTO DISPUTE SETTLEMENT CASES  
INVOLVING THE EC AS COMPLAINANT OR DEFENDANT AND OF ACTIVE  
CASES UNDER THE TRADE BARRIERS REGULATION**

**16 MARCH 2007**

**LATEST DSU DEVELOPMENTS**

Below are summarised the most important new developments since the last edition of the overview of DSU cases. More details are given in the respective sections.

- *Australia Quarantine: On 9 March 2007, the EC and Australia notified the WTO that they had reached a mutually agreed solution to this case.*
- *Large Civil Aircraft: In DS 316 (first US offensive case) the first meeting of the Panel with the parties will take place on 20 and 21 March 2007. In DS 353 (second EC offensive case), the EC will file its first written submission on 22 March 2007.*
- *Mexico – olive oil: The panel was composed on 21 February 2007 and its timetable circulated on 13 March 2007.*
- *EC – bananas: a special DSB meeting was held on 8 March 2007 on the request of Ecuador to discuss its first request for the establishment of a Panel under Article 21.5 of the DSU. The second report in on the agenda of the regular DSB meeting of 20 March 2007.*
- *Brazil – Tyres: After twice delaying the interim report (the last date was 8 January 2006) the panel has issued its interim report on 12 March 2007.*
- *US – Zeroing: In the first case (DS294) as from 22 February 2007, the US stopped zeroing in original investigations when comparing export price and normal value on a weighted average to weighted average basis. The US Department of Commerce published preliminary results recalculating the dumping margins without zeroing in the 15 specific original investigations found WTO incompatible, but has not yet taken any steps to implement the DSB ruling in respect of the 16 specific administrative reviews. In the second case (DS350), the EC is analysing the impact of the ruling of the Appellate Body in the case brought by Japan (DS322) on its own possible panel request and the outcome of the second round of consultations.*
- *China – Auto parts: The EC has filed its first written submission on 13 March 2007.*
- *GMO: discussions are ongoing with the three complainants on the determination of the reasonable period of time to implement the ruling of the panel.*

*State of play: 13 March 2007*

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## **INTRODUCTION**

At present, the EC is actively involved in **34**<sup>1</sup> WTO disputes: in **16** of these cases the **EC** is the complaining party while in the remaining **18** cases the **EC** is on the defending side. These cases relate to the EC's relations with **14** of its trading partners (Argentina, Australia, Brazil, Canada, China, Ecuador, Honduras, India, Mexico, Nicaragua, Norway, Panama, Thailand and the US).

Dispute settlement activities against the US continue to represent the majority of EC's active disputes. In most of these disputes it is the EC which is the complaining party (**9** disputes), being the defendant in 4 cases (GMOs, hormones, customs procedures and aircraft). Regarding the substance of EC's offensive cases with the US, a major part concerns the misuse of trade defence instruments (Anti-dumping, CVD and Safeguards).

Below follows a short description of each of the abovementioned disputes. New developments are indicated in bold.

### **I - ARGENTINA**

#### **DEFENSIVE CASES**

(1) DS 293 – EC – Measures affecting the approval and marketing of biotech products (GMOs) (procedural stage: implementation)

See description under DS 291. Joint case with US and Canada.

(2) DS 349 –EC –TRQ on garlic (procedural stage: consultations)

On 6 September 2006, Argentina requested Article XXIII consultations on the TRQ that the EC created for garlic (NC 07 03 2000) as a result of Article XXIV:6 GATT negotiations with China. Argentina invokes a violation of Article XXIV:6 and XXVIII GATT. Consultations were held in Geneva on 5 October 2006.

### **II - AUSTRALIA**

#### **OFFENSIVE CASES**

DS 287 - Quarantine regime for imports (procedural stage: implemented)

On 4 April 2003, the European Communities requested WTO consultations on the measures applied by Australia to protect human, animal and plant health against risks posed by imports of agricultural and food products (sanitary and phytosanitary measures). These measures are thought to be contrary to the SPS Agreement, in particular Articles 4.1, 5.1 and 5.6. Consultations were held in Geneva on 8 May 2003 but failed to settle the dispute. The EC therefore requested that the DSB establish a panel. The panel was established on 7 November 2003.

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<sup>1</sup> Each case is counted separately

**The panel composition was suspended as Australia offered to settle the dispute in an amicable manner. Discussions between the EC and Australia have now been completed, and the panel procedure was terminated on 9 March 2007 by a joint notification from the EC and Australia that they had reached a mutually agreed solution to the dispute. Since the case has been successfully concluded, it is the last time that it figures in this overview.**

#### **DEFENSIVE CASES**

- (1) DS 265 - Sugar subsidies (procedural stage: implemented)

Joint case with Australia, Brazil and Thailand (DS265, DS266, DS283). See description under DS266 (Brazil). Australia disputes the fact that the EC has implemented the recommendations and rulings of the DSB. In June 2006, the EC has concluded a sequencing agreement with Australia according to standard WTO practice. Since then, the parties have been engaged in discussions on the effects of the sugar reform's implementation and on the evolution of the world sugar market. **Since the case has been concluded, it is the last time that it figures in this overview.**

### **III – BRAZIL**

#### **OFFENSIVE CASES**

- DS 332 – Measures affecting imports of retreaded tyres (procedural stage: panel)

On 20 June 2005, the EC requested WTO consultations with Brazil on its measures affecting the importation of retreaded tyres from the EC. Brazil maintains an import ban on retreaded tyres and also applies financial fines on the importation as well as storage, transportation and sale of imported retreaded tyres. Imports from other Mercosur countries are exempted from these measures. The EC considers that these measures are inconsistent with Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994. Consultations were held on 20 July 2005 and clearly showed that Brazil is not willing to settle this case amicably. On the contrary, the Brazilian government has submitted a draft law to the Brazilian legislature that would confirm in an act of parliament the above-mentioned import ban on retreaded tyres and an exemption for imports under a regional integration agreement. Although this draft has in the meantime been withdrawn, Brazil seems determined to rely on what it considers to be an “environmental (and health) justification” of its import ban. The DSB established the panel at its meeting on 20 January 2006. The panel proceeding is approaching its conclusion (second hearing took place on 4 September 2006, the descriptive part of the report has been circulated on 10 October 2006, **and, after two delays, the panel issued its confidential interim report on 12 March 2007.**

#### **DEFENSIVE CASES**

- (1) DS 266 - Sugar subsidies (procedural stage: implemented)

On 27 September 2002, Brazil requested WTO consultations on Council Regulation (EC) 1260/2001 on the European Communities' common organisation of markets and all other

legislation, regulations, administrative policies and other instruments relating to the EC regime for sugar and sugar containing products.

The panel report was circulated on 15 October 2004. The Appellate Body circulated its report on 28 April 2005 and confirmed the panel's ruling that exports of C-sugar and of sugar equivalent to ACP/Indian imports are illegally subsidised. In the case of ACP/India equivalent sugar exports, the panel and the Appellate Body did not recognise the footnote in the EC's schedule as permitting an additional 1.6 million tonnes of such sugar exports with refunds. As regards C sugar, the panel and the Appellate Body considered these exports to benefit from indirect subsidies stemming from high revenues from internal sales of A and B sugar. The Dispute Settlement Body adopted the panel and Appellate Body reports on 19 May 2005.

On 20 February 2006, the Council adopted Regulation No. 318/2006. This act also gives the necessary powers to the Commission to adopt the implementing measures required to achieve compliance with the DSB's recommendations and rulings. These implementing measures have been adopted (Regulations No. 493/2006 and 769/2006). Thereby, the EC has implemented the WTO ruling by the expiry of the reasonable period of time (22 May 2006). Yet, the complainants (Australia, Brazil, Thailand) dispute the EC's claim of compliance, but in June 2006 have concluded a sequencing agreement with the EC, according to standard WTO practice. Since then, the parties have been engaged in discussions on the effects of the sugar reform's implementation and on the evolution of the world sugar market.

**Since the case has been concluded, it is the last time that it figures in this overview.**

(2) DS 269 - Frozen chicken cuts (procedural stage: implemented)

On 11 October 2002, Brazil requested WTO consultations on the EC Commission Regulation No. 1223/2002 of 8 July 2002 concerning the classification of certain goods ("frozen boneless chicken cuts impregnated with a salt content of 1.2% to 3%"). The panel report was circulated on 30 May 2005.

The report of the Appellate Body was circulated on 12 September 2005. The AB, although it modified the panel's reasoning on a number of issues (subsequent practice), essentially upheld the panel's findings and found that the EC had acted inconsistently with Articles II:1(a) and II:1(b) of the GATT, since by applying EC Regulation no 1223/2002 and EC Decision no 2003/97 (classifying the products at issue under CN tariff heading 0207), the EC had in practice imposed customs duties on the products at issue that are in excess of those duties provided for in the EC's concession for heading 0210 of the EC Schedule. The AB report and the panel report, as modified by the AB report, were adopted by the DSB at its meeting of 27 September 2005.

In full implementation of the relevant DSB rulings and recommendations, Commission Regulation (EC) No 949/2006 of 27 June 2006 was adopted and published in the Official Journal (OJ L174/3, 28.6.2006).

The EC and Brazil have concluded a standard sequencing agreement on 26 July 2006. **Since the case has been concluded, it is the last time that it figures in this overview.**

## IV – CANADA

### **OFFENSIVE CASE**

DS 321 – Canada – Continued suspension of obligations in the *Hormones* dispute  
(procedural stage: panel)

Case practically identical to that against the US. See description under US.

DS 354 – Canada – Tax reductions and exemptions for wine and beer (procedural stage: consultations)

On 29 November 2006, the EC requested WTO consultations on the new Canadian measures providing excise tax relief to Canadian wine and beer, while leaving the excise tax on imported EU wine and beer in place. The new tax discriminatory discrimination has been applied on a provisional basis since 1 July 2006 and is still pending before the Parliament. WTO consultations were held on 18 January 2007.

The Canadian discriminatory tax proposal had already been announced on 2 May 2006 within the federal budget proposal. Despite various demarches and warnings about the WTO incompatibility of the envisaged measures from the EC side, on 18 October 2006 the Canadian Government formally tabled Bill C-28 in the Parliament aimed at, *inter alia*, eliminating/reducing excise duties on Canadian wine made from 100 per cent Canadian-grown agricultural products and domestic beer, respectively, while leaving the excise tax on imported wine and beer intact. **The Bill received Royal Assent on 21 February 2007, as the final step to bring the law into force.** It foresees retroactive application from 1 July 2006.

The EC considers that these measures are inconsistent with Canada's obligations under the SCM Agreement and GATT 1994. In particular, Canada is acting inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement (prohibited import substitution subsidy) and Article III:2 and Article III:4 of the GATT 1994 (national treatment). Consultations held on 18 January 2007 confirmed the EC legal analysis.

### **DEFENSIVE CASES**

(1) DS 292 – EC – Measures affecting the approval and marketing of biotech products (GMOs) (procedural stage: implementation)

Joint case with the US. See description under DS 291.

(2) DS 26 – Hormones (procedural stage: implementation)

Joint case with the US. See description under DS 48

## V – CHINA

### OFFENSIVE CASE

#### DS 339 – China - Measures affecting imports of automobile parts (procedural stage: composition of the Panel)

On 30 March 2006, the EC requested consultations with China on its measures affecting the importation of automobile parts from the EC. Since 1 April 2005 China has put into force measures which apply to automobile manufacturing enterprises that import automobile parts in order to assemble entire automobiles to be sold in China. If the imported components, once they are produced and assembled into complete vehicles, fulfil the “characteristics of a whole vehicle” they will be subject to the duty rates for a complete vehicle (final bound tariff rate of 25% for most motor vehicles instead of final bound rate of 10% for automobile parts).

According to the measures, imported automobile parts into China are considered to fulfil the characteristics of a whole vehicle under certain circumstances. This is the case when specific combinations of parts of the later assembled vehicle are imported or when the price of the imported parts attains 60 % or more of the vehicle. If these thresholds are met, the measures provide that imported parts will attract the charges for a complete vehicle. These charges are assessed after the assembly of the parts into complete vehicles.

The EC considers that these measures are inconsistent with Article III:2, Article III:4, Article III:5 and Article II of the GATT 1994, Article 3 of the Agreement on Subsidies and Countervailing Measures, Article 2 of the TRIMs Agreement and China’s Accession Protocol.

Consultations were held jointly with the United States (WT/DS340) and Canada (WT/DS342) on 11 and 12 May 2006 in Geneva. The parties failed to reach a mutually agreed solution.

On 12 July 2006, China announced the following modifications to its regime:

- the rule applying the 25% duty when the aggregate price of imported parts is 60% or more of the complete vehicle price is suspended until 1 July 2008;
- an additional rule classifying car components into categories A and B with the consequence that specific quantity thresholds are attached to categories A and attract the 25% duty when exceeded is also suspended until 1 July 2008.

However, these modifications do not address adequately the issue as the measure attracting the 25% duty when specific combination of car components are assembled remains unaffected and the other measures concerned by July modifications are only postponed and not repealed. Further discussions in Beijing in August failed to solve the dispute.

A single Panel has been established on 26 October 2006 at the request of the EC, the US and Canada. On 29 January 2007, the WTO Director General composed the panel. **The EC and the two other complainants filed their first written submission on 13 March 2007.**

## VI – ECUADOR

### DEFENSIVE CASE

DS 27– EC– Regime for the importation, sale and distribution of bananas  
(procedural stage: consultations)

On 16 November 2006, Ecuador requested WTO DS consultations on the EC import regime for bananas. Ecuador claims that: (a) the preferential treatment granted to ACP countries is inconsistent with Article I of the GATT; (b) the tariff rate quota for bananas of ACP origin is inconsistent with Article XIII: 1 and 2 of the GATT; (c) the "autonomous" applied tariff of 176€t currently applied to bananas of MFN origin is inconsistent with Article II of the GATT. Similarly to earlier requests made by Honduras, Panama and Nicaragua, the Ecuadorian request for consultations refers to Article 21.5 of the DSU (implementation of DSB recommendations) as a legal basis for an eventual Panel request. On 23 November 2006, Colombia requested to join the consultations as a third party. On 28 November, Ecuador resubmitted its consultation request so as to allow participation by third parties. On 11 December 2006, the US and Panama, respectively, also requested their participation as third parties. Nine ACP countries also requested participation as third parties.

Consultations were held on 14 December 2006 in Geneva in a positive climate. However, on 19 February 2007, Ecuador informed the EC of its decision to request the establishment of a panel. **A special DSB meeting was held on 8 March 2007 at the request of Ecuador. On this occasion, the EC objected to Ecuador's request for the establishment of a Panel and contested the use of Article 21.5 of the DSU as the legal basis for such request. Should Ecuador maintain its request on the agenda of the next regular DSB meeting (20 March 2007), the panel would be established.**

**Ecuador's request challenges Council Regulation (EC)No 1964/2005 on the following grounds:**

**(i) The preferential treatment granted to ACP bananas is inconsistent with Article I of the GATT, since it would no longer be allowed by the Article I GATT Waiver granted in the Doha Ministerial for the Cotonou Agreement (i.e. according to Ecuador the waiver expired for bananas following the rejection by the arbitration panel established according to the Annex to the Cotonou Waiver of the second consecutive EC proposal for an MFN tariff in 2005, the extension has not yet been granted).**

**(ii) The reservation of a TRQ for bananas of ACP origin is inconsistent with Article XIII:1 and XIII:2 GATT (i.e. no longer covered by a necessary waiver; the Doha waiver from Article XIII GATT expired on 31 December 2005, the extension has not yet been granted).**

**(iii) The EC applied tariff of 176€t is inconsistent with Article II of the GATT, since it is above the current EC bound rate (pending rebinding) of 75€t (in-quota).**

## **VII – HONDURAS**

### **DEFENSIVE CASE**

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consultations)

On 30 November 2005, Honduras, Nicaragua and Panama made identical requests for consultations with the EC under Article 21.5 of the DSU (“surveillance of implementation of recommendations and rulings”) with respect to EC Council Regulation 1964/2005 of 29 November 2005 introducing a new EC bananas import regime in force since 1 January 2006. These requests argue that the new EC bananas import regime is inconsistent with the recommendations and rulings of the DSB in the *EC-Bananas III* case (DS27- Panel and AB reports adopted in 1997), the Doha Waiver on the Cotonou Agreement adopted in 2001, the two arbitration awards issued in 2005 pursuant to that waiver, as well as Article XXVIII of the GATT. The EC agreed to hold consultations with Honduras, while reserving its position on the legal basis invoked (Article 21.5 DSU). These consultations were held in Geneva on 19 January 2006. The parties failed to reach a mutually agreed solution.

## **VIII – INDIA**

### **OFFENSIVE CASES**

(1) DS304 –Anti-Dumping Measures (procedural stage: consultations)

On 8 December 2003, the EC requested consultations with India on 27 antidumping measures imposed on a variety of EC exports, including pharmaceuticals, chemicals, paper, textile and steel. In total, EC exports of these products account on an annual basis for more than €50 million. The EC considered these measures to be inconsistent with the requirements under WTO rules in particular Article VI:1 of GATT 1994 and Articles 1, 3.1, 3.2, 3.5, 6.6, 6.8 (including Annex II), 6.9 and 12.2 of the Anti-Dumping Agreement. The problems in the Indian cases mainly referred to the highly insufficient injury and causality analysis, the failure to provide meaningful disclosure documents and a continuous disregard of arguments presented by EC exporters and the EC.

Following the consultations held in February 2004, India opened a review process which has led to the termination of most of the contested measures, including those of most economic interest for EC exporters (steel and pharmaceutical products).

(2) DS 352 - Measures Affecting the Importation and Sale of Wines and Spirits (procedural stage: consultations)

On 20 November 2006, the EC requested consultations with India regarding two Additional Duties imposed on imported wines and spirits, allegedly to compensate for excise duties levied at State level on domestic wines and spirits, and regarding restrictions on retail sale of wines and spirits applied by the Indian State of Tamil Nadu. The EC considers these measures to be contrary to in particular Articles II, III and XI of the GATT 1994. This consultation request has been preceded by an investigation under

the EC's Trade Barriers Regulation (see Section C.IV below). Consultations took place on 20 and 21 December 2006 in New Delhi. Although constructive, these did not immediately lead to an amicable solution. **The 2007 draft budget made public on 28 February 2007 does not remove the Additional duties that the EC considers illegal. The Commission will indicate its course of action at the 133 Committee meeting on 23 March 2007. The US has now also requested consultations on the same issues.**

## IX – MEXICO

### OFFENSIVE CASE

DS 341 – Definitive countervailing measures on olive oil from the EC (procedural stage: panel)

On 31 March 2006, the EC requested consultations with Mexico regarding the definitive countervailing measures imposed by the Mexican authorities on imports of olive oil from the EC.

This countervailing duty (CVD) case against EU exporters of olive oil was initiated by Mexico on 17 July 2003 and on 11 June Mexico imposed provisional measures. The EC requested consultations regarding the provisional CVDs on 18 August 2004 (DS 314). These consultations took place on 17 September 2004. Mexico decided to continue the investigation and imposed definitive countervailing measures on 1 August 2005. As a result, imports of EC olive oil whose customs value is lower than a reference price of \$4.05/kg are subject to countervailing duties.

The EC considers that the initiation and conduct of the investigations, as well as the imposition of the definitive countervailing measures are inconsistent with Mexico's obligations under GATT 1994, the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture of the WTO.

Consultations were held on 5 May 2006 in Geneva but unfortunately did not lead to an amicable solution. The EC requested for a first time the establishment of a panel at the DSB meeting of 19 December 2006 and has renewed its request at the DSB meeting of 23 January 2007, when the panel was established. **The Panel was composed by the Director-General on 21 February 2007 and it has circulated its timetable on 13 March 2007.**

## X – NICARAGUA

### DEFENSIVE CASE

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consultations)

Joint case with Honduras. See description under DS27. Nicaragua was not even a party to the Bananas-III case.

## XI – NORWAY

### DEFENSIVE CASE

DS337 – Anti-dumping measures against farmed salmon from Norway (procedural stage: panel)

The challenged definitive anti-dumping measure imposed by the EC by a Council Regulation of 17 January 2006 against Norwegian farmed Salmon replaced an earlier provisional anti-dumping measure according to which *ad valorem* duties ranging from 6,8 to 24,5 % were applied as of 27 April 2005, and, prior to that, a safeguard measure.

By letters of 17 and 27 March 2006, Norway requested DSU consultations with the EC on the matter. A first round of consultations took place in Geneva on 12 May 2006. The consultations were inconclusive and did not lead to an amicable settlement of the dispute. The EC subsequently indicated its readiness to engage in a second round of consultations, including with a view to go through any remaining questions from the Norwegian side. The suggestion for additional consultations was not taken up by Norway and on 29 May 2006 Norway requested for the first time the establishment of a panel on this matter, at a special meeting of the DSB to take place on 9 June 2006 at which occasion the EC rejected the request for establishment.

Norway subsequently requested a special DSB meeting to take place on 22 June 2006 for purposes of a second Norwegian request for establishment. This led to establishment of a panel on that date. The panel was composed by the WTO Director-General on 2 August 2006. The first written submission by Norway was submitted on 21 September 2006 and the first written submission of the EC was submitted on 30 October 2006. The first substantive meeting with the parties took place on 12-13 December 2006. **The second substantive meeting took place on 5-6 February 2007. The Panel has subsequently sent written questions to Parties and both Parties will also be given the opportunity to comment on the answers provided by the other Party.**

## XII – PANAMA

### DEFENSIVE CASE

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consultations)

Joint case with Honduras. See description under DS27. Panama was not even a party to the Bananas-III case.

### XIII- THAILAND

#### **DEFENSIVE CASES**

- (1) DS 283 – EC export subsidies on sugar (procedural stage: implemented)

Joint case with Brazil and Australia. See description under DS 266. Thailand disputes the fact that the EC has implemented the recommendations and rulings of the DSB. In June 2006, the EC has concluded a sequencing agreement with Thailand according to standard WTO practice. Since then, the parties have been engaged in discussions on the effects of the sugar reform's implementation.

**Since the case has been concluded, it is the last time that it figures in this overview.**

- (2) DS 286 - Frozen Chicken Cuts (procedural stage: implemented)

Joint case with Brazil. See description under DS 269. The EC and Thailand have concluded a standard sequencing agreement on 14 July 2006.

**Since the case has been concluded, it is the last time that it figures in this overview.**

### XIV - USA

#### **OFFENSIVE CASES**

- (1) DS 217 – Continued Dumping and Subsidy Offset Act (“Byrd amendment”)  
(procedural stage: implementation)

The Continued Dumping and Subsidy Offset Act (named “Byrd amendment” after its sponsor, the Senator, R. Byrd) adopted in October 2000 provides that the proceeds from anti-dumping and countervailing duty cases shall be paid to the US companies responsible for bringing the cases. This imposes a second hit on dumped or subsidised products: domestic producers are, first, protected by anti-dumping and anti-subsidy duties and, second they receive subsidies paid from these duties at the expense of their competitors. To date, the US authorities have distributed to domestic petitioners more than US \$ 1,6 billion.

Following an unprecedented common action of 11 Members (Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand), the DSB adopted in January 2003 the Panel and the Appellate Body reports concluding that the *Byrd Amendment* was an impermissible action against dumping or subsidisation. The US had until 27 December 2003 to comply with the WTO ruling, but failed to do so.

The EC and 7 other co-complainants (Brazil, Canada, Chile, India, Japan, Korea, Mexico) obtained the DSB’s authorisation to impose countermeasures on US products at any time they deem fit (DSB meeting of 24 November 2004, and of 17 December 2004 for Chile).

Since 1 May 2005, an additional duty of 15% has been imposed on imports of certain products originating in the United States (paper products, textiles, machinery and sweet-corn; Council regulation (EC) No 673/2005 of 25 April 2005 establishing additional customs duties on imports of certain products originating in the United States of America, OJ L 110, 30/04/2005, p. 1). On 1 May 2006, the level of retaliation was adjusted on the basis of the amount disbursed from duties collected on EC products in the most recent distribution (of October 2005), as required by the WTO authorisation for sanctions and Council Regulation (EC) 673/2005. Eight products (different types of blankets, paper products, photocopying apparatus and drills) were added to the list of products subject to the 15% additional import duty (Commission Regulation (EC) N° 632/2006). Japan is also currently applying retaliatory measures.

On 8 February 2006, the United States enacted the *Deficit Reduction Act of 2005*, which *inter alia*, repeals the *Byrd Amendment* but allows for a transition period. The repeal will not affect distribution of the anti-dumping and countervailing duties collected on imports made before 1 October 2007. Since in the US, these duties are usually collected several years after the import, this means, in turn, that distribution under the *Byrd Amendment* may continue for several years after 1 October 2007. The Congressional Budget Office foresees that the repeal of the *Byrd Amendment* will not produce effects before 1 October 2009.

In light of a decision of the US Court of International Trade (CIT) which concluded that the *Byrd Amendment* cannot apply to duties collected on Canada's products as a result of US laws implementing the North American Free Trade Agreement, the US Customs authorities announced that they would no longer distribute the duties collected on Canada's and Mexico's products (notice of 22 September 2006 published in the Federal Register of 28 September 2006, p. 57000). Despite this, the most recent distribution, completed at the end of November 2006, is the highest ever with more than US \$ 380 million (of which more than US \$ 112 million were financed by duties collected on EC products). An additional US \$ 38 million may be distributed later once ongoing litigations are completed. **The Commission services are taking the preparatory steps to adjust the level of retaliation as from 1 May 2007, after the Trade Retaliation Committee was duly consulted.**

In two other decisions (on 13 July and 12 September 2006), the CIT also ruled that the *Byrd Amendment* was in breach of the US Constitution. Refusing offset payments to US companies having opposed the original anti-dumping complaint does not respect the first amendment (freedom of speech) and the fourteenth amendment (right to equal protection under the law) to the US Constitution.

(2) DS 294 – Zeroing methodologies in the establishment of dumping margins (procedural stage: implementation)

In original investigations (i.e. investigations leading to the imposition of the AD duty), the US Department of Commerce ('DOC') calculates the dumping margin using the zeroing methodology condemned in the *EC - Bed linen* case. This methodology consists in disregarding negative dumping margins established for certain models of the product concerned (put at zero) when calculating the overall margin for the product. Although this dispute concerned the EU practice, it unambiguously condemned the "zeroing" methodology as such when used in well-defined circumstances. The US, however, refuses to abandon its methodology, arguing that the *Bed-Linen* decisions have effect *inter-partes* only.

In reviews (i.e. investigations that may be pursued after imposition of the duty to review its rate or the need to maintain it), DOC systematically uses a calculation methodology, which also includes "zeroing" in circumstances not foreseen by the WTO AD Agreement.

The dispute concerns the law, the implementing regulation, the DOC methodologies and 31 specific cases (15 new investigations and 16 annual administrative reviews). In most cases, without "zeroing", the dumping margin would have been *de minimis* or even negative and, therefore, no anti-dumping duty would have been imposed or collected.

The Panel report was circulated to all WTO Members on 31 October 2005. On 18 April 2006, the Appellate Body circulated its report. As a result of the Panel and Appellate Body's findings, the US is condemned:

- for using zeroing in 15 specific original investigations, and for maintaining in such investigations a zeroing methodology which is WTO incompatible *per se*.

- for using zeroing in 16 specific reviews. As regards the EC challenge of the US zeroing methodology in reviews, the Appellate Body considered that there were insufficient facts on the Panel's record to complete the Panel's analysis and decide whether that methodology was WTO inconsistent as such or not. However, the finding on the 16 specific cases makes clear that every calculation of a dumping margin with zeroing in a review will be WTO incompatible.

On 9 May 2006, the DSB adopted the Panel's and Appellate Body's reports, thus putting on the US the obligation to implement its ruling and recommendations. On 28 July 2006, the EC and the US reached an agreement on an implementation period of 11 months. The US has until 9 April 2007 to bring the condemned measures into compliance with its WTO obligations.

On 27 December 2006, the DOC announced that it would stop zeroing in original investigations when comparing export prices and normal value on a weighted average to weighted average basis (which DOC confirmed as the preferred calculation methodology in original investigations).

**This modification postponed twice finally became effective as of 22 February 2007 and applies to original ongoing investigations.**

**In respect of the specific measures found WTO incompatible the US has started implementation of the DSB ruling, but only for the 15 specific original investigations. Preliminary results recalculating the dumping margin without zeroing were published on 26 February 2007. DOC also proposed to revoke the order in respect of some exporters for which the dumping margin has now become *de minimis* or for which there was no dumping absent zeroing. However, in 3 cases (*Stainless Steel Bar from France, UK and Italy*), this led DOC to also propose a substantial increase of the "all others" rate (applicable to exporters which do not have a specific duty rate, notably new exporters). The reason for this would be that the "all others" rate would now correspond exclusively to the rate calculated for non cooperating exporters as the lower rate of those exporters benefiting from the proposed revocation could not be taken into account anymore. This is in effect determining that exporters subject to the "all others rate" are guilty of behaviour that would warrant the application of "adverse inferences" and has put them in the**

same basket as firms which allegedly have actively impeded the investigation, without demonstrating that such treatment is appropriate. The Commission has objected to such modifications in its comments submitted to DOC on 15 March 2007.

Concerning the 16 administrative reviews, there has not been yet any signs of actions to implement the DSB ruling, which must be implemented by 9 April 2007.

(3) DS 160 - Section 110(5) of the US Copyright Act ("Irish Music") (procedural stage: implementation)

On 27 July 2000, the DSB adopted the Panel report that found Section 110(5)(B) of the US Copyright Act to be incompatible with the TRIPs Agreement, in connection with the Bern Convention on the Protection of Literary and Artistic Works, as it provides an exceedingly broad derogation from the exclusive right of authors to authorise the public communication of their works. In particular, Section 110(5) allows the public retransmission of broadcast music in commercial premises (bars, shops, restaurants etc.) without royalties being paid.

In 2001, an arbitration panel determined that the level of nullification or impairment was equal to €1.219.900 per year.

As the US declared not to be in a position to comply promptly with the WTO ruling; the EC agreed to discuss a possible mutually acceptable arrangement. The parties eventually reached a common understanding: the US was to provide financial assistance to EU performing societies with a view to developing activities for the promotion of authors' rights, pending compliance with the DSB recommendations and rulings. The understanding covered a 3-year period ending on 21 December 2004.

In July 2002, the US Congress passed the Trade Promotion Authority Act, which included a provision setting up a fund for the payment of settlements of WTO disputes. In April 2003, the Wartime Supplemental Appropriations Act foresaw an appropriation to make a payment in connection with the Section 110(5) dispute. In the light of these legislative developments, the US and the EC notified to the WTO a mutually satisfactory temporary arrangement on 23 June. In September 2003, the US made the agreed payment. The arrangement expired on 21 December 2004 and the US has so far failed to offer either a temporary or definitive solution to the dispute.

For the time being there are no legislative initiatives to bring the Copyright Act into compliance with the TRIPs Agreement, **although discussions have stepped up in intensity after the recent changes in the composition of the US Congress.**

The EC's right to suspend concessions or other obligations has been safeguarded by means of a request under Article 22.2 DSU made on 7 January 2002. The requested suspension of TRIPs obligations consists in the levying of a special fee to US right holders that apply for action by the EU customs authorities to block pirated copyright goods. The EC request was immediately submitted to arbitration due to US opposition. The arbitration procedure is currently suspended.

(4) DS 176 - Section 211 of the US Omnibus Appropriations Act ("Havana Club") (procedural stage: implementation)

Section 211 U.S. of the Omnibus Appropriations Act was adopted by the U.S. Congress in October 1998. It is designed to diminish the rights of owners of U.S. trademarks and trade-names which previously belonged to a Cuban national or company which was expropriated in the course of the Cuban revolution.

On 26 September 2000, a WTO panel was established to rule on the compatibility of Section 211 with the obligations of the US under the TRIPs Agreement. The panel report was issued on 6 August 2001. The Appellate Body issued its report on 2 January 2002. It substantially reversed the reasoning of the panel. It ruled that trade names are protected by the TRIPs Agreement. On appeal, it was found that Section 211 violates both the national treatment and the MFN obligations of the TRIPs Agreement. It however reversed the finding of the panel on Article 42 TRIPs and maintained the finding of the panel that the TRIPs does not govern the issue of the determination of ownership of IP rights.

The DSB adopted the Panel's and the Appellate Body's reports at the regular DSB meeting on 1 February 2002. The reasonable period of time for implementation, extended several times, expired on 30 June 2005.

The EC has decided not to request authorisation to retaliate at this stage and reached an agreement with the US preserving each other's rights in the future. If the EC decides at some future date to request from the DSB authorisation to retaliate, the United States has undertaken not to block that request on the ground that such DSB action would not be within 30 days of the expiry of the implementation period. The United States retains the right to object to the level of suspension proposed, or to claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, and to have the matter referred to arbitration under Article 22.6 of the DSU. This agreement was endorsed by a decision of the DSB at its meeting of 20 July 2005.

(5) DS 317 and DS 353 – Aircraft (procedural stage: second panel)

On 6 October 2004, the European Communities requested consultations with the United States pursuant to Articles 4, 7 and 30 of the SCM Agreement, Article XXIII of the GATT 1994 and Article 4 of the DSU regarding subsidies granted to Boeing.

The EC considers that the US Government has been following now for a number of years a policy of systematic and persistent subsidisation of Boeing through a number of measures involving, *inter alia*, paying research and development costs through NASA, the Department of Defense, the Department of Commerce and other government agencies.. The latest and most flagrant violation consists in massive subsidies in the form, *inter alia*, of tax reductions and exemptions and infrastructure support for the development and production of Boeing's 787 in the State of Washington, as well as other benefits in the states of Kansas and Illinois. (For a summary of the EU's WTO Challenge of US Subsidies to Boeing, see the Commission fact sheets at: <http://trade.ec.europa.eu/doclib/html/133279.htm>).

The EC considers that the above mentioned subsidies are in violation of Articles 3, 5, and 6 of the SCM Agreement and Article III of the GATT 1994.

Consultations were held in Geneva on 5 November 2004. In parallel to the US request for the establishment of a panel on 31 May 2005, the EC submitted a similar request the same day.

During the DSB meeting on 13 June 2005, the US argued that a number of the measures referred to in the EC panel request of 31 May 2005 were not listed in the consultation request of October 2004. For reasons of absolute legal certainty, the EC on 27 June 2005 filed a second consultation request which explicitly lists all the measures in question. The US has accepted the request for consultations, which were held in Geneva on 3 August 2005.

The Panel was established on 20 July 2005 and composed on 17 October 2005. The first phase of the fact-gathering (“Annex V”) procedure was completed by 22 December 2005 with the submission of replies by the parties to follow-up questions posed on information submitted on 18 November. The Facilitator submitted his report on the above procedure to the Panel on 24 February 2006.

During the Annex V procedure the US refused to provide information, *inter alia*, on 13 programmes not explicitly listed in the initial consultation request of the EC. Unlike the EC, which filed a request for preliminary rulings in DS316 on 26 October 2005 (see DS316 and DS347 below) requesting the Panel to clarify the scope of the proceeding, the US refused to do so in DS317. In view of this, the EC on 23 November 2005 requested the Panel to invite the US to make a preliminary ruling request before the completion of the Annex V process, or take any other decision with equivalent effect. The Panel did not issue such a decision. The final working procedures only require the US to make a preliminary ruling request at the latest at the time of their first submission.

This situation of procedural limbo needed to be resolved quickly, since the US non-cooperation deprives the EC of access to documents falling within the scope of the dispute, in particular regarding NASA and Department of Defence subsidies. Consequently, the EC on 20 January 2006 filed a request for the establishment of a (second) panel based on its second request for consultations of 27 June 2005. Subsequently, the US submitted a second consultation request in DS316 on 31 January 2006, which has largely the same purpose as the EC request, i.e. to explicitly list measures which were contained in the US panel request, but not in the consultation request. The (second) panel (for DS317) was established on 17 February 2006.

The US repeatedly blocked the initiation of an Annex V process during DSB meetings. The EC made explicit reference to the WTO provisions which confirms a WTO Member’s right to the initiation of an Annex V procedure, and requested that the Facilitator from the original Annex V procedure be appointed to serve as Facilitator. On 23 May 2006 the EC transmitted Annex V questions for the US to the Facilitator. The questions were substantially identical to the questions submitted in the previous Annex V procedure, but some new questions had been added. This was followed by a meeting between the parties, the Facilitator and the WTO Secretariat to resolve the blockage of the Annex V procedure, to no avail. The Facilitator then informed parties on 6 June 2006 that his views were that the initiation of an Annex V procedure requires positive consensus – the EC objected, providing its own understanding of WTO law.

The EC requested the WTO Director General to compose the panel in DS317 bis (second offensive EC case) on 17 November 2006. The Panel was composed on 23 November 2006, with Mr. Crawford Falconer as Chairman, and Msrs. Francisca Orrego Vicuna and Varachai Plasai as Members. On 4 December 2006 the WTO Secretariat renamed DS317 bis, which became DS353.

Pursuant to the composition of the Panel, the EC filed a request for preliminary ruling to the Panel on 24 November 2006. In this request the EC asked the Panel to rule that the Annex V information-gathering procedure has been initiated at the EC's request in April/May 2006, and that the US is under an obligation to answer the questions that have been put to them on 23 May 2006, or alternatively, to use its fact-seeking powers under Article 13 DSU to request the US to provide relevant information that would be identified by the EC.

The panel has yet to issue a decision on the EC's request for preliminary rulings. The panel has adopted working procedures and procedures for the protection of confidential information, as well as a final timetable. **Pursuant to this timetable, the EC will file its first written submission on 22 March 2007. The first meeting of the Panel with the parties is expected to take place in July 2007.**

(6) DS 319 – AD measures on steel bars (Firth Rixson) (procedural stage: consultations)

In March 2002, the US Department of Commerce (DOC) imposed an anti-dumping duty of 125.77% on imports of stainless steel bars from the United Kingdom made by Firth Rixson Special Steels Limited (FRSS). This very high duty rate is the direct result of DOC's rejection of the data provided by FRSS during the investigation; DOC then refused to conduct a verification visit and established a duty on the basis of adverse facts available, i.e. the margin of dumping alleged by the complainant. To justify this harsh treatment, the DOC alleged that FRSS had failed to comply to the best of their ability with DOC's requests for information.

DOC's rejection of FRSS' data was motivated by FRSS' alleged failure to provide detailed cost data for a small number of sales made by a factory which it had acquired in a merger and had then closed and dismantled long before the investigation was started (the investigation period was 1 October 1999 to 30 September 2000, the proceeding being initiated on 2 January 2001). Not knowing there would be an anti-dumping case, the company did not keep detailed costing data, since this was not legally required. The DOC, without checking any of the facts or conducting an on-site visit, simply chose not to believe FRSS. For the vast majority of its US sales i.e. other than those made from the factory in question, FRSS cooperated fully to the satisfaction of the DOC.

FRSS has tried and failed to obtain relief in the US Court of International Trade. In this regard, the US law on the application of "adverse facts available" which gives to DOC a very wide margin of discretion is of some concern. In addition, it is clear that the DOC has breached the WTO Anti-Dumping Agreement (notably the provisions of Article 6 and Annex II thereof) by applying adverse facts available in this case. The anti-dumping duty imposed bears no relationship to any margin of dumping found for any exporter during the proceeding. Furthermore, this is not a one-off problem, since the misuse of "facts available" has been a feature of US dumping cases for many years.

Given the egregious nature of the case in question, and the recurring aspect of the problem, on 5 November 2004 the EC requested WTO dispute settlement consultations. WTO consultations took place on 11 January 2005 in Geneva but failed to resolve the issue. Upon US request, the EC held a second round of consultations on 18 May 2005 (videoconference). In light of new argumentation used by the DOC in recent discussions, the Commission has requested the US to hold another round of consultations. The US agreed to the EC's request. In January 2006, FRSS made one shipment to the US and has

requested and administrative review of the anti-dumping measures. This administrative review should be completed by 30 March 2007.

(7) DS 320 – US – Continued suspension of obligations in the *Hormones* dispute  
(procedural stage: panel)

On 8 November 2004, the EC requested consultations with both Canada and the US against the application of countermeasures. The EC's challenge is directed against the United States' continued suspension of obligations and its continued imposition of import duties in excess of bound rates on imports from the European Communities despite the EC's removal of the inconsistent measures. The challenge is secondly directed against the United States' unilateral determination that the new EC legislation is in violation of obligations under the WTO Agreement. Thirdly, the EC challenges the United States' failure to have recourse to dispute settlement proceedings as required by Article 21.5 of the DSU in order to resolve the disagreement over whether the new EC legislation is WTO-consistent. The EC considers that these measures are inconsistent with the United States' obligations under Articles I and II of GATT 1994 and Articles 23.1; 23.2(a) and (c); 22.8 and 21.5 of the DSU.

WTO consultations took place on 16 December 2004 in Geneva, but failed to resolve the issue. The DSB established the panel on 17 February 2005 and on 6 June 2005, the Director-General of the WTO decided its composition (Tae-yul Cho, William Ehlers and Claudia Orozco). The first public hearing in this dispute as well as the parallel one with Canada took place from 12 to 15 September 2005. For the first time in the history of the GATT/WTO dispute settlement system and based on the parties' (EC, US, CDN) joint request, the hearing was open to the public according to the Panel's decision of 1 August 2005 (via a closed-circuit TV broadcast). The panel postponed its second hearing (also foreseen to be open) from November 2005 to March 2006 because it decided that it needed to hear scientific experts. The parties and the panel have first engaged in a long and difficult process of selecting the experts, and then commented on the experts' responses to the panel's questions. The second oral hearing and the meeting with the experts took place, with public access, on 27-28 September and 2-3 October 2006. The interim report was delayed several times and is currently scheduled for 16 April 2007. Further delays are possible.

(8) DS 350 – US – Continued Existence and Application of Zeroing Methodology  
(procedural stage: consultations)

The WTO ruling under DS 294 has left open a number of issues, for which the implementation of the 9 May ruling will not necessarily provide an adequate remedy. Thus, the United States has used Zeroing in a number of anti-dumping measures, which were taken after the initiation of the DS 294 dispute and therefore could not be covered by it. Also, in respect of reviews (*i.e.* investigations conducted after the imposition of the anti-dumping measure to review the necessity to maintain it, or the level of the duty), the Appellate Body, being limited to issues of law, searched for undisputed facts in the Panel's record, but concluded that there were not enough to allow a decision on whether the US zeroing methodology was WTO compatible or not.

The new request for consultations covers all those issues by challenging:

- the use of zeroing in 35 annual reviews of Anti-Dumping measures (so-called administrative reviews);
- the use of zeroing in 4 original anti dumping investigations;
- the reliance, in a specific sunset review, on dumping margins calculated in the original investigation and in the administrative reviews with zeroing to determine that dumping was likely to continue or recur if the anti-dumping measure were removed;
- and the zeroing methodology in all reviews *per se*, *i.e.* independently of its application in specific cases.

The specific measures challenged in the consultation request apply to exports from 10 Member States to the United States of pasta, ball bearings and steel products (for the 33 administrative reviews), brass sheet and strip (for the sunset review), and chemical products (for the 4 original investigations).

The request for consultations was sent on 2 October 2006 and was complemented on 9 October 2006 by the addition of 2 administrative reviews to the list of measures identified in the first request. Consultations took place on 14 November 2006 by video-conference, and did not lead to resolution of the matter. In the light of the successful challenge to the use of the zeroing methodology in reviews brought by Japan, the Commission asked for a second round of consultations, in order to explore with the US the possibility of avoiding litigation in this dispute. **Those consultations took place on 28 February 2007 and failed to identify a specific means to resolve the dispute. The Commission is analysing the next steps.**

## DEFENSIVE CASES

- (1) DS 48 + DS 26 - Hormones (procedural stage: implementation has occurred, but US and Canada are maintaining their sanctions against EC exports)

On the basis of the studies reviewed by the Scientific Committee on Veterinary Matters relating to Public Health ("SCVPH"), on 5 May 2000 the Commission adopted a proposal to amend the "hormones directive." This proposal provides for a permanent ban of 17 $\beta$  oestradiol, which carcinogenic and genotoxic effects have been clearly demonstrated, and a provisional ban for the other 5 hormones. The new directive entered into force on 14 October 2003.

The adoption of new rules based on a revised risk assessment brings the EU into conformity with its WTO obligations. At the Dispute Settlement Body meeting of 7 November 2003 the EC notified the new Directive as compliance in this case. Both Canada and the US disagreed and stated that they will keep their sanctions.

At the DSB on 1 December 2003, the EC noted that this disagreement on compliance should be solved through multilateral DSB procedures. In this regard, the EC has informed Canada and the US its readiness to discuss procedural matters further with a view to agree on appropriate action. However, the United States and Canada refused to initiate proceedings under Article 21.5 of the DSU or to agree on other procedures in order to resolve the issue of compliance through a multilateral ruling.

On 8 November 2004, the EC has requested consultations with both Canada and the US against the application of countermeasures. The object of this case are the sanctions, not WTO-compliance of the new Hormones Directive. The case is therefore listed separately as a new, offensive case (see above).

(2) DS 291 – Measures affecting the approval and marketing of certain biotech products (GMOs) (procedural stage: implementation)

On 13 May 2003, the US, Argentina and Canada requested consultations on certain measures concerning GMOs. The US argues that there is a suspension of approvals in the approval of GMOs and GM food in the EU, which is contrary to several WTO agreements (GATT, SPS, TBT, and AoA). In this connection, the US also complains about the failure to consider for approval a number of specific products listed in the consultations request. Furthermore, the US considers that the restrictions imposed by several Member States on the sale or use of approved GMOs and GM food are inconsistent with WTO rules.

Consultations were held on 19 June 2003 and a panel was established on 29 August 2003 and composed by the WTO Director General on 4 March 2004. A confidential Final Report has been circulated to the parties on 10 May. The final report was circulated on 29 September 2006. The report concludes that: (a) the EC applied a general *de facto* moratorium on the approval of biotech products between June 1999 and August 2003 in violation of its obligations under Annex C(1)(a) first clause of the SPS Agreement and Article 8 of the SPS Agreement (i.e. obligation to undertake and complete approval procedures without "undue delays"); (b) The EC acted in violation of the above-mentioned SPS provisions in the approval procedures concerning 24 (out of 27) specific GM products; (c) nine national safeguard measures introduced by Austria, Greece, France, Germany, Italy and Luxemburg were not based on a risk assessment and were therefore inconsistent with Article 2.2 and 5.1 of the SPS Agreement. With respect to the alleged moratorium and the product-specific measures (other than national safeguard measures), the Panel rejected the complainant's claims of violation of Article 5 of the SPS Agreement.

The Panel report was adopted by the DSB on 21 November 2006. The EC has indicated at the DSB on 19 December 2006 that it intends to comply with the recommendations and rulings of the panel but needs a reasonable period of time (RPT) to do so. Discussions are currently ongoing with the complainants on both implementation and RPT.

(3) DS 315 – Customs procedures (procedural stage: appeal)

On 21 September 2004, the US requested consultations regarding certain aspects of the EC customs regime. The US argues that the EC fails to apply customs measures in a uniform manner, which is contrary to Article X:3(a) of the GATT 1994, and that the EC has failed to institute judicial, arbitral or administrative procedures for the prompt review of decisions on customs matters, which is contrary to Article X:3(b) of the GATT 1994.

WTO consultations took place on 16 November 2004 in Geneva but failed to resolve the issue. A panel was established at the DSB meeting of 21 March 2005. On 30 May 2005,

the WTO DG announced the composition of the panel. The second substantive meeting took place on 22-23 November 2005.

In the Panel proceedings, the US has made very systemic allegations, arguing that the EC system lacks mechanisms to prevent and reconcile divergences in the administration of EC customs legislation by the Member States' customs authorities. The US has defined the existing EC mechanisms as too general, non-binding and discretionary and therefore not enable to ensure uniform administration pursuant to Article X:3(a) GATT. The US has referred explicitly to a number of areas (classification and valuation of goods; customs procedures; penalties) and has put forward a few concrete examples of presumed lack of uniformity in these areas. Nevertheless, the US has argued that the alleged deficiencies of the EC system are applicable to all areas of EC customs legislation. With respect to Article X:3(b), the US has defended an ambitious interpretation of this provision, as requiring a WTO Member to provide for judicial review of administrative decisions with effect across the territory of the WTO Member. The US has argued that the review of customs decisions by Member States' authorities does not comply with such requirement.

The panel released its interim report to the parties on 10 February 2006. The interim report is confidential. The final panel report was circulated all WTO members by mid-June 2006. The report is largely favourable to the EC. First, the Panel rejects all "as such" claims made by the US on the "overall" EC customs regime. Second, the report only finds violation of the GATT provisions in 3 very specific instances of customs administration.

At the DSB meeting held on 14 August 2006, the US notified its intention to appeal the Panel report. In its appeal, the US insisted on its far-reaching general claims on the overall EC customs regime. On 28 August 2006, the EC introduced a counter-appeal seeking the repeal of the Panel's 3 findings of violation. The AB report was circulated on 13 November 2006. The conclusions of the report can be considered broadly a victory for the EC.

First, even if the AB has reversed the panel's findings with respect to the limitations of its terms of reference, it concludes that the US failed to bring sufficient evidence to support its claim that the EC system of customs administration "necessarily" leads to non-uniform administration in violation of the EC's obligation under Article X: 3(a) of the GATT 1994 (GATT). Second, the Appellate Body reverses two out of the three specific violation findings made by the panel. As a result, the EC is found only in violation of its WTO obligations with respect to one specific instance of customs administration, i.e. the tariff classification of liquid crystal display (LCD) monitors with digital video interface. Finally, the AB confirms the panel's finding that the fact that the decisions regarding the review of administrative decisions relating to customs matters taken by the authorities of the Member States do not have effect throughout the territory of the EC is not inconsistent with the obligation of "prompt review and correction" of administrative decisions in the customs area established in Article X:3(b) GATT.

The Appellate Body and Panel reports were adopted at a special DSB meeting held on 11 December 2006. On that occasion, the EC stated that it is already in compliance with the finding on LCD monitors with DVI. Uniform classification of this product is ensured, inter alia, by the adoption of Commission Regulation 2171/2005, which was followed by the repeal of the Dutch Decree and German Binding Tariff Information (BTI) concerned. Moreover, in order to clarify even further the situation for customs officials and economic operators, the EC has published in December 2006 an Explanatory note on the

classification of LCD monitors. The EC reiterated this statement at the regular DSB meeting held on 19 December 2006.

**Since the case has been concluded, it is the last time that it figures in this overview.**

(4) DS 316 and DS 347– Aircraft (procedural stage: panel)

On 6 October 2004, the US requested WTO consultations with Germany, France, the United Kingdom and Spain, and with the EC on alleged support to AIRBUS pursuant to Articles 4, 7 and 30 of the SCM Agreement, Article XXIII of the GATT 1994 and Article 4 of the DSU. On the same day, the US attempted to abrogate the 1992 Agreement. The United States considers that the EC and the Member States provide subsidies that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement and Article XVI:1 of the GATT 1994 and that they causing adverse effects to the United States in the sense of Articles 5(a), 5(c), 6.3(a), 6.3(b), 6.3(c), and 6.4 of the SCM Agreement.

The EC considers that these measures are fully in line with the 1992 Agreement and with the WTO Agreement. Consultations were held in Geneva on 4 November 2004. (For a summary of the US' WTO challenge of EU support to Airbus, and the EU's response to such challenges, see the Commission fact sheets at: <http://trade.ec.europa.eu/doclib/html/133279.htm>).

On 31 May 2005, the US requested the establishment of a panel on the ground that subsidies are granted by the EC and the Member States to Airbus in violation of Articles 3, 5 and 6 of the SCM Agreement and Article XVI of the GATT 1994. The EC considers that the scope of the panel request exceeds that of the consultation request. The Panel was established on 20 July 2005.

As in the parallel case against the US (DS317), the Panel was composed on 17 October 2005. The first phase of the fact-gathering (“Annex V”) procedure was completed by 22 December 2005 with the submission of replies by the parties to follow-up questions posed on information submitted on 18 November. The Facilitator submitted his report on the above procedure to the Panel on 24 February 2006.

Following the filing by the EC of a second panel request in DS317 on 20 January 2006 (based on its second request for consultations of 27 June 2005), the US submitted a second consultation request in DS316 on 31 January 2006 which has largely the same purpose as the second EC request, i.e. to explicitly list measures which were contained in the US panel request, but not in the consultation request. Consultations with the US took place on 23 March 2006. The US filed a second panel request on 10 April 2006 and it was placed on the agenda for the meeting of the DSB on 21 April 2006 along with a US request that the initial DS316 panel and a new DS316 panel be merged. Both the request for the new panel and the request for merger were rejected by the EC. Following the second US request for the establishment of a panel, a panel for DS316bis was established on 9 May 2006.

WTO Deputy-DG Jara on 17 July 2006 composed the panel. On 20 July the WTO Secretariat renamed DS316bis, which became DS347.

Organisational meetings and discussions followed, which led to the adoption by the panel on 7 August 2006 of working procedures and a timetable.

Absent a procedural agreement between the EC and the US on the implications of the existence of two panels on each side and because the US sought continued access to EC confidential information obtained through the DS316 Annex V procedure, the EC on 11 August 2006 requested the Facilitator of the DS316 Annex V procedure to rule that confidential information and documents obtained through the Annex V in DS316 be withdrawn and that the US do not use information obtained through the DS316 Annex V in DS347. The Facilitator on 30 August 2006 agreed with the EC and ruled that parties may not use confidential information obtained through the DS316 Annex V procedure in DS347.

Following this ruling, the US on 19 September 2006 requested that the original DS316 Panel reactivate its work and set a new timetable for submissions and hearings and that the DS347 Panel suspend its work pending a ruling by the DS316 Panel. The EC agreed but objected to the modalities of the suspension of the DS347 Panel requested by the US: the US was asking the DS347 Panel to set a flexible timetable whereby the Panel would resume its activities once the recommendations of the DS316 Panel are known. The Panel agreed with the EC's view that no provision in the Dispute Settlement Understanding allows such a suspension. As a result, the US on 6 October 2006 requested a suspension of the DS347 under Article 12.12 of the Dispute Settlement Understanding, i.e. for a maximum of 12 months.

The DS316 Panel is now active. It has adopted rules for the protection of confidential information. Pursuant to the new timetable set by the Panel, the US filed its first written submission on 15 November 2006. The US submitted a non-confidential version of the US first written submission on 10 January 2007.

The EC had filed a request for preliminary rulings on 7 November 2006 relating to a number of measures which in the view of the EC, are not properly before the Panel. The Panel on 22 December 2006 indicated that Parties should "proceed on the understanding that all of the alleged measures challenged by the United States continue to fall within the scope of this proceeding".

The EC filed its 745-page long first written submission on 9 February 2006. The first meeting of the Panel with the parties will take place on 20 and 21 March 2007, pursuant to which the EC will circulate the non-confidential version of its first written submission as well as an executive summary. The Parties have also agreed that parts of the hearing should be open to the public. **As a result, a public screening of the open parts of the hearings is scheduled to take place at the WTO on 22 March 2007.** Under the current timetable, the issuance of the final Panel report is due on 31 October 2007.

## **C) CASES UNDER THE TRADE BARRIERS REGULATION (TBR)**

### **I – ARGENTINA - TEXTILES**

#### **Steps in the TBR procedure:**

The complaint was lodged by the European Apparel and Textile Organisation (Euratex). The procedure was initiated on 27 November 1999 (O.J. C340/70). The investigation report was submitted to Member States on 25 July 2000.

#### **Measures investigated and findings:**

The complaint focused on certain measures maintained by Argentina affecting the import of textile and clothing products: repetition of pre-shipment controls and penalising customs valuation procedures, excessive requirements concerning certificates of origin impeding trans-shipment of goods and excessive requirements concerning customs documentation and labelling. The investigation concluded on the certificate of origin that the burdensome requirements appeared to infringe Article VIII.3 and X of GATT 1994, Article 7.1 of the WTO Agreement on Textiles and Clothing and to contravene the recommendations of Article VIII.1(c) of GATT 1994. The measures on labelling requirements appeared to violate Article 2.2 of the WTO Agreement on Technical Barriers to Trade and to contravene the recommendations of Article VIII.1(c) of GATT 1994. As regards the requirements of the Declaration Form On Product Composition, they appeared to be in breach of Article 2 of the WTO Agreement on Import Licensing Procedures. As for the procedure for controlling the customs value, the Commission services could not express a definitive position due to the recent introduction of a new law regulating this matter. On the pre-shipment inspection issue, no violation of any particular provision of the WTO Agreement on Pre-shipment Inspection could be found. However, it did not appear to adhere to the purpose and spirit of the Agreement

#### **Action taken and outcome:**

Following the investigation, it was decided to pursue the above matters with the Argentinean authorities with the aim of achieving an amicable settlement eliminating or gradually easing the above trade barriers. In this context, a visit of the Commission services to Argentina in January 2001 provided the opportunity of further raising the pending issues and planning specific steps towards finding an acceptable solution.

With regard to customs valuation practices, the situation seems de facto to have improved over the last three years. Transparency has improved while European manufacturers and exporters can participate in the determination of the indicative values for customs valuation. Pre-shipment inspection has been eliminated. On the issue of certificates of origin, a new legislation dated February 2002 appeared to soften the requirements regarding the legalisation of the certificate and facilitate exports from the EC of goods originating in third countries. In terms of labelling, encouraging developments took place with the introduction of new rules on labelling. Monitoring and contacts continue regarding remaining labelling requirements in particular with respect to the control of labelling (fiscal stamps).

## **Recent developments:**

There have been recent indications that certain requirements concerning the certificates of origin for products originating in third countries still pose a problem, particularly the requirement that the invoice of the first manufacturer need to accompany the certificate. The Commission is currently examining the comments received recently from the Argentinean authorities in reply to a detailed questionnaire addressing the certificate of origin requirements, import documentation and labelling. A letter has also been sent to the complainant, to which the complainant replied on 8 December 2006. The issue has been raised at a bilateral meeting. **Another meeting will take place with Argentina in April 2007.**

## **II – CANADA – PROSCIUTTO DI PARMA**

### **Steps in the TBR procedure**

On 3 May 1999, the *Consorzio del Prosciutto di Parma* (the Consorzio) lodged a complaint under the Trade Barrier Regulation (TBR) in order to eliminate certain alleged Canadian trade practices, which would adversely affect exports of Community producers of *Prosciutto di Parma* (cured raw ham) to Canada. The *Consorzio del Prosciutto di Parma* complained about the lack of protection of the geographical indication *Prosciutto di Parma* and the absence of legal remedies to redress the unfair competition generated by the use of the trademark "Parma" by Canadian producers (Maple Leaf).

The Commission services carried out an examination procedure, which found that the degree of protection of the geographical indication *Prosciutto di Parma* would be clear only after the conclusion of the two court proceedings initiated in Canada by the *Consorzio* and Maple Leaf (the "Parma" trademark holder): (a) the expunction action introduced by the Consorzio in 1997; (b) the appeal introduced in 1998 by Maple Leaf of the recognition of the Consorzio by the Canadian Trademarks Office as a "public authority" entitled to use the Ducal crown mark as an official mark for services

The expunction action by the Consorzio was dismissed by trial judge and on appeal (May 2002). The appeal by Maple Leaf of Consorzio's recognition as "public authority" was dismissed and the Canadian trademark holder discontinued in 2002 the further appeal.

As a result, both the Consorzio's "official mark" granted by the TMO and the Canadian trademark remain valid. However, it has so far not been clarified by Canadian courts whether those two rights would "co-exist" or whether a trademark holder would be able to oppose the use of an "official mark" that could mislead the consumer.

The WTO Panel report adopted on 15 March 2005 in the *EC- Geographical Indications* case addressed for the first time the issue of the co-existence between an existing trademark and a geographical indication. According to this report, co-existence of a geographical indication and an existing trademark is allowed as a "limited exception" to Article 16.1 under Article 17 of the TRIPS.

On 30 November 2005, the Canadian Federal Court of Ontario (in a case involving the US Postal Services) held that foreign public authorities cannot take advantage of Section 9 of the Canadian Trademark Act ("official mark") and that only Canadian authorities can do so. This decision is currently under appeal.

On 31 August 2006, the Commission sent a questionnaire to Canadian authorities in order to clarify the current legal situation of the Consorzio and the GI Prosciutto di Parma in the Canadian market. A reminder has been sent recently to the Canadian authorities.

**Recent developments:**

**The Commission will raise this issue again in the context of the current WTO Trade Policy Review of Canada.**

**III- CHILE- SWORDFISH**

**Steps in the TBR procedure:**

The complaint was introduced by ANAPA (Spanish National Association of Owners of Deep-Sea Longliners). The notice of initiation of the investigation was published on 10 July 1998 (O.J. C215/2). The investigation report was presented to Member States on 23 March 1999.

**Measures investigated and findings:**

The TBR complaint referred mainly to the prohibition on landing and transit of certain fish species (including swordfish) landing and transit established under 165 of the Chilean Fishery Law (*Ley General de Pesca y Acuicultura*) as consolidated by the Supreme Decree 430 of 28 September 1991.

The investigation concluded that this prohibition is contrary to Article V of the GATT and cannot be justified under the general exceptions under Article XX in its chapeau and in its paragraph (b) and (g).

**Action taken and outcome:**

A first meeting was held on 10 June 1999 with the Chilean authorities aiming at an amicable solution. A second meeting took place on 21-22 September 1999 between Community and Chilean experts (fishery and trade). However, no amicable resolution of the dispute could be reached. As a consequence, a Commission Decision to initiate a WTO Dispute Settlement procedure was published on 18 April 2000 (OJ L96/67).

On 12 December 2000 the WTO established a panel at the request of the EC. A dispute settlement procedure was also initiated within the framework of the United Nations Convention on the Law of the Sea at the request of Chile. Pending the negotiations for the composition of the WTO panel, EC and Chilean delegations met on 22-24 January 2001 and reached an arrangement, which takes into account both the needs of the multilateral trade system and of an effective conservation and management of natural resources. This arrangement (hereafter, "2001 Arrangement") allowed four EC vessels to make transshipment of their swordfish catch under the conditions of their participation in a bilateral fisheries research programme. Following this arrangement, Chile and the EC suspended in parallel the proceedings before the ITLOS (International Tribunal for the Law of the Sea) and in the WTO. However, each party retained the right to revive these procedures at any time should the arrangement not be fulfilled. The suspension of both WTO and ITLOS procedures was extended for a further two years in 2003 until 2006.

At the BSTC meeting held in Santiago on 5-6 October 2004, the EC and Chilean delegations noted that there had been some progress in two of the three elements of the 2001 Arrangement, namely the bilateral exchange of scientific and technical information and the development of multilateral co-operation among participants in the Pacific swordfish fisheries. The Chilean delegation and EU delegations agreed that the exchange of scientific information was functioning well. They regretted, by contrast, that the fisheries research programme was inactive and agreed to renew efforts to re-engage their respective industries in the activity.

The Bilateral Scientific and Technical Commission (BSTC) has met five times since 2001. Several Multilateral International Consultations aiming to establish multilateral co-operation in the South-East Pacific have been held to date, the last one taking place in Spain in June 2005 following the Annual Meeting of the IATCC (Inter American Tropical Tuna Commission).

In May 2004, the Chilean Government adopted the *Supreme Decree no. 123*, relating to access to Chilean ports by foreign fishing vessels for logistic operations. Following concerns expressed by the Commission on the implications for EC vessels and their rights under the 2001 Arrangement of this new piece of legislation, the Ambassador of Venezuela to the EU indicated, in a Note Verbale and Aide Memoire dated 13 September, that Decree 123 would not affect the rights of EC vessels operating under the 2001 Arrangement.

The EC concerns on the provisions of the Decree 123 were again raised at the EU-Chile Association Committee held in Chile on 16 and 17 December 2004. On this occasion, Chile indicated that access to Chilean ports for logistic operations by EC vessels whose main activity was the fishing of swordfish would not be restricted under the new Decree. This was subsequently confirmed in a Note Verbale by the Chilean Mission to the EU received in February 2005.

Despite the various statements made by Chile in 2004 in the sense that EC vessels would not be subject to the application of Decree 123, at the end of 2005 some Spanish vessels were required to provide VMS data for their activities in international waters prior to being authorised entry to Chilean ports. Following the intervention of the Commission, the National Fisheries Service of Chile adopted the *Instructivo no. 321*. According to this *Instructivo*, Chile allows Spanish vessels fishing swordfish access to Chilean ports for logistic operations upon presentation of a declaration attesting that the EC vessels have been operating outside the Chilean EEZ.

On the basis of the on-going cooperation both at bilateral and multilateral level, the EU and Chile agreed to extend the suspension of both WTO and ITLOS procedures for a further two years in December 2005 until 2008.

The fifth meeting of the BSTC was held on 28 and 29 September 2006 in Chile. Chile agreed to envisage a new pillar of bilateral cooperation on Jack mackerel. In this context, Chile confirmed that access to Chilean ports for logistic operations will be granted to "all EC vessels", including those fishing Jack mackerel, on the same basis as EC vessels fishing swordfish. Chile and the EU agreed that the exchange of scientific information is working well and decided to expand cooperation to new research lines. Finally, Chile and the EU agree that in principle there should be no further extension of 2001 Arrangement beyond 2008. A final solution to suspended WTO/ITLOS proceedings should be found on the basis of the existing bilateral and multilateral cooperation.

#### **IV – INDIA –SPIRITS AND WINES**

##### **Steps in the TBR procedure:**

The complaint was lodged on 20 July 2005 by the Confédération Européenne des Producteurs de Spiritueux (CEPS) and Comité Européen des Entreprises Vins (CEEV). A Notice of Initiation of an examination procedure was published on 17 September 2005. The investigation report was presented to Member States on 28 June 2006, and an additional investigation report was presented on 13 October 2006. No Member States opposed the content of those reports. A Commission decision to request WTO consultations was adopted by the Commission on 7 November 2006 and published on 18 November 2006. The EC accordingly requested WTO consultations with India on 20 November 2006.

##### **Measures investigated and findings:**

The complaint focused on three aspects of India's regime for the importation and taxation of wines and spirits. First, India imposes a federal Additional Duty on imported wines and spirits to compensate for excise duties levied at State level on domestic products. This Additional Duty appears to exceed the level of excise duties (and other indirect taxes) applied in most Indian States, contrary to Art: III:2 of the GATT 1994. Second, a number of Indian States impose duties, taxes and fees on imports of which are apparently either not levied on domestic products or levied at higher rates on imported products, contrary to Art. III:2 of the GATT 1994. Third, seven Indian States appear not to have adopted any policy for the taxation and licensing for (retail) sale of imported wines and spirits which restricts importation and sale contrary to Art. III:4 or Art. XI of the GATT 1994. During the investigation, the complainants withdrew the second of these claims. The investigation concluded that the Additional Duty is contrary to Article II of the GATT 1994, and that restrictions on retail sale of wines and spirits applied by the State of Tamil Nadu are contrary to Article III of the GATT 1994. According to the Commission services, the Additional Duty and the restrictions on retail sale in Tamil Nadu adversely affect exports of Community wines and spirits to India.

##### **Action taken and outcome:**

The EC requested WTO consultations with India on 20 November 2006. Consultations took place on 20 and 21 December 2006 in New Delhi. Although constructive, these did not immediately lead to an amicable solution.

##### **Recent developments:**

**The 2007 draft budget made public on 28 February 2007 does not remove the Additional duties that the EC considers illegal. The Commission will indicate its course of action at the 133 Committee meeting on 23 March 2007. The US has now also requested consultations on the same issues.**

## **V – KOREA - COSMETICS**

### **Steps in the TBR procedure:**

The complaint was lodged by the European Cosmetic, Toiletry and Perfumery Association (COLIPA). The notice of initiation of the examination procedure was published on 19 May 1998 (OJ C 154/12). The investigation report was presented to Member States on 23 February 1999.

### **Measures investigated and findings:**

The complaint focused on the Korean standards and other requirements that adversely affect the import and marketing of Community cosmetics products into Korea. The investigation concluded that the Korean practices appear to violate Articles 5.1.1 and 5.1.2 of the WTO Agreement on Technical Barriers to Trade in that the requirements of the Korean regime for cosmetics are discriminatory and more burdensome than necessary. According to the Commission services, the implementation of this system is adversely affecting exports and marketing of Community cosmetics products into Korea.

### **Action taken and outcome:**

During and following the investigation, the Korean authorities announced their decision to make changes in the regime for imported cosmetics. Several meetings took place with the Korean authorities, aimed at negotiating an agreement on the issues investigated during the TBR procedure. An agreement on the elimination of the testing of imported Community cosmetics was reached through an exchange of letters at the end of July 1999. In the meantime, Korea introduced a new legislation on cosmetics, regulating issues relating to the manufacture, importation and sale of cosmetics and functional cosmetics. In light of the above, a Commission Decision to suspend the TBR procedure and monitor the functioning and implementation of the new rules on cosmetics was published on 9 January 2001 (O.J. L4/29). In missions conducted in 2001 and 2002, the Commission services found that the new Korean cosmetics legislation seemed to be strict, burdensome and potentially trade restrictive in contradiction with Korea's international commitments. Under the circumstances, further monitoring of the situation was decided to continue with the objective of a) fully evaluating the impact of the recent Korean rules, and b) engaging the Korean authorities in a dialogue aiming at the necessary modifications and changes in conformity with international commitments. Following a dialogue with the Korean authorities, in January 2003 the Korean Food and Drug Administration enacted a revised version of the Regulation on Screening for Functional Cosmetics. At first sight some improvements could be identified, but they were not significant.

The Commission services were informed about 'informal' requirements for submission of quality and quantity-formula related information to the Korean Pharmaceuticals Trade Association on all imported cosmetic products (including functional cosmetics) before customs clearance. This practice seems to run counter to the 1999 EC-Korea agreement on exemption of pre-market quality testing as above.

Finally, new further revised screening rules were enacted from the Korean authorities in October 2004 (Screening rules for Functional Cosmetics. Despite certain positive amendments brought about by the amended screening rules (on efficacy data, stability data, specification data on ingredients, products of the same line, etc.), the regulation of functional cosmetics in Korea remains complicated, burdensome and potentially trade

restrictive. Many of the outstanding issues are related to the strict interpretation and application of Korean regulations by the KFDA, which has impeded the EU exporters to benefit in practice from the improvements introduced by the amendments to Korean legislation.

In April 2004, the Commission transmitted a set of questions to the KFDA on the implementation of Korean regulations on cosmetics. The replies of December 2004 were not entirely satisfactory and, following consultations with COLIPA and the European Union Chamber of Commerce in Korea (EUCCCK), the Commission transmitted a set of additional questions on 20 April 2005. The replies from the Korean authorities to these additional questions were received on 27 May 2005. These replies failed to address the outstanding concerns of the EU industry.

At the meeting of the EU-Korea Joint Committee held on 20 June 2005, the EU and Korea agreed to further explore a solution to this TBR case on the basis of a proposal from the Commission. In the context of a visit by Commission officials on 21-23 March, the Commission transmitted to the Korean authorities a proposal ("Shared Agreed Objectives") that would address the remaining obstacles to imports of EC cosmetic products into the Korean market and allow a solution to this longstanding trade irritant. Korean authorities agreed to make comments, if possible, by the end of April.

Few days prior to the meeting of the EU-Korea Joint Committee (held on 19 June 2006), Korea submitted a number of comments and questions on the EU proposal of "Shared Agreed Objectives". The EC provided oral replies in the context of Joint Committee meeting. Written replies were transmitted to the Korean authorities in the first week of July 2006.

On 11 August 2006, Korean authorities sent comments on their position with respect to the proposed "Shared Agreed Objectives". On 25 August 2006, the Commission and Korean authorities held a first technical meeting to discuss the proposal. On 27 November 2006, the Commission transmitted to the Korean authorities follow-up comments. A second technical meeting between the Commission and Korean authorities was held on 19 December 2006. Korea has committed to send a counterproposal to the Commission following a meeting with industry held in the industry on 9 January 2007.

#### **Recent developments:**

A third technical meeting was held between the Commission and the Korean authorities on 8 February 2007 in order to discuss the Korean counter-proposal to the EC's draft Shared Agreed Objectives that had been transmitted on 31 January 2007. Despite the rather disappointing nature of the Korean counterproposal (no major concessions being offered), this videoconference offered the opportunity to further clarify the respective positions and identify ways forward. No major progress was made at this specific occasion but KFDA seemed to be engaged in the negotiation towards the prompt termination of this TBR case. **The EU will transmit a counterproposal to ROK in the coming weeks.**

## **VI – KOREA - PHARMACEUTICALS**

### **Steps in the TBR procedure:**

The complaint was lodged by the European Federation of Pharmaceutical Industries Association (EFPIA). The notice of initiation of the examination procedure was published on 30 July 1999 (OJ C218/3). The investigation has been completed and the report was presented at the meeting of the TBR Committee on 15 March 2000. A Commission Decision to suspend the TBR procedure and monitor the implementation phase of the changes in the Korean legislation was published on 7 November 2000 (J.O. L281 p.18).

### **Measures investigated and findings:**

The complaint concerned discrimination in rules and practices concerning pricing and reimbursement of pharmaceutical products affecting trade of Community pharmaceutical products in the Korean market. The Korean system has undergone significant changes since the opening of the investigation. New rules have been introduced on the issues covered by EFPIA's complaint, eliminating the discriminatory elements in the reimbursement system and simplifying the requirements for the marketing of new products. No violation of WTO rules could be clearly identified at that stage. However, the new rules had not yet been implemented (at the time of the publication of the investigation report)

### **Action taken and outcome:**

In a fact-finding visit in June 2001, the Commission services found that an adequate and fully satisfactory implementation of the new Korean rules was still lacking. Under the circumstances, further monitoring of the situation was to continue with the aim of ensuring that all changes and rules introduced in Korea are properly implemented in conformity with the Korean and international commitments.

In March 2002, a follow-up monitoring mission was carried out. Since 2004, the situation in Korea concerning the marketing of pharmaceutical products has overall been stabilised. Nevertheless, and despite the above mentioned changes, market access for European and US research-based pharmaceutical firms continues to encounter a number of problems. Many measures are formulated without consultation and good faith dialogue with physicians, industry and other essential stakeholders. Some of the practices and measures encountered are described below:

Despite clear commitments undertaken by Korea on A-7 pricing, relatively only few innovative products have received A-7 pricing. As the term "innovative" is not defined in the Korean legislation and, therefore, needs to be agreed for each product, application of A-7 pricing is done on a rather arbitrary and non-transparent basis.

The ATP (Actual Transaction Price) system was introduced in 1999 in order to address the problems of illegal discounts through the reimbursement at actual purchase prices. As from December 2002, however, the Koreans abandoned the ATP methodology and replaced it with an LTP (Lowest Transaction Price found on the market – even when this LTP is a single event). This new methodology threatened to disrupt the pricing policy of imported medicines. Due to pressures from the Commission, the Korean authorities announced in 2003 that they would abandon the LTP system as of 1 September 2003.

In November 2002, the Korean authorities introduced a new guideline to review prices of newly introduced original products every 3 years on the then prevailing A-7 average prices. Re-pricing would be used only when the outcome would be a lower price, not in case of a higher price. Generic (mainly locally produced) products would also be subject to a re-pricing, be it following a different calculation method than the one used for original drugs (recently though the Korean authorities announced that generic products would be re-priced on the basis of the same calculation method as original products)

Other outstanding issues include the harmonisation of clinical trials for newly introduced medicines (strict application of the international ICH-E5 methodology is not guaranteed by the Korean authorities) and concerns still persist over the alleged insufficient data protection for patented drugs.

As indicated above, in August 2003 the Korean authorities have decided to abandon the LTP system for the calculation of the reimbursement. ATP is now again applied. Recently, the Korean authorities have also eliminated the different calculation method applied for generics in the context of the triennial re-pricing rules as above. The Commission continues monitoring the situation, while striving to arrive at sustainable solutions in conformity with international commitments and international practice. New discussions took place again in December 2005 and January 2006 with a view to finding an amicable settlement in line with Korea's previously assumed commitments and in conformity with international obligations. The issue has been raised again in Seoul on 23 March 2006, without success.

In the meantime, beginning of May, the Korean Government announced its intention to introduce a new system ('positive list' system) for the reimbursement and pricing of drugs in an effort to control health costs. The new measures which will most likely be put into effect in the coming September, have caused strong reactions among the industry as they are perceived as raising new barriers to the access of European pharmaceutical products to the Korean market.

The Commission has already raised the matter with the Korean authorities at high level stressing the need to avoid any discriminatory practices to the detriment of innovative imported pharmaceutical products and the need for Korea to fully respect its bilateral and international commitments on fair and equal treatment, transparency and due process. The matter was discussed during the EC-Korea Joint Committee meeting held in Seoul on 19 June 2006. During that meeting the Commission services submitted to the Korean authorities a number of questions regarding the new – 'positive list' – system. The Korean authorities committed to provide written replies.

On 11 July 2006 the Commission received the replies to its questionnaire. These replies basically confirmed the line of the 3 May announcement proposal but failed to provide further details on the envisaged regime on the argument that those details were being discussed with the industry. On 26 July 2006, only 2 weeks after receiving the replies to the questionnaire, the Korean Government issued a public notice on a proposed *amendment to the MOHW's Regulation of Standards of Medical Health Care Benefits under the National Health Insurance* (hereafter, "Draft Amendment"). This notice opened a 60-day public consultation period which ends on 24 September 2006.

On 22 September 2006, the Commission transmitted detailed comments on the Draft Amendment in the context of the public consultation launched by the Korean Government. The main elements are that the new regime ensures transparency, due process and non-discrimination in reimbursement and pricing decisions. The Commission also insisted that implementing regulations and guidelines are developed in close consultation with the Commission and the EU industry. On 26 September 2006, the

Delegation of the European Commission in Seoul met representatives of the Ministry of Health and Welfare (MOHW) to discuss EC concerns following the formal submission of the Commission's comments.

MOHW has clung to its intention to implement the new pharmaceutical reimbursement and pricing rules by the end of 2006.

The Commission received on 31 October 2006 comments by the MOHW on the contribution by the Commission to the public consultation on the new measures. The Commission evaluated those comments, which could not provide clear replies to the questions and concerns originally expressed to the MOWH. Accordingly, the Commission once again conveyed its concerns to the Korean authorities on 6 December 2006.

The Korean authorities have implemented the reform on 29 December 2007. **Despite improved drafting of the legislation and a modified timeline for obtaining a decision for reimbursement and a decision on a maximum reimbursement price for a new drug, in substance the reformed system does not address our concerns and seems to leave the door open to possible *de-facto* discrimination between generic products (mainly locally produced) and innovative products.**

## **VII– Taiwan – Compulsory licensing of CD-Rs**

### **Steps in the TBR procedure:**

On 15 January 2007, the Commission received a complaint from Philips against an alleged violation of the TRIP's Agreement by Taiwan, consisting in the grant by Taiwanese authorities of compulsory licenses in respect of the complainant's CD-R patent to Gigastorage Corporation, a Taiwanese producer of CD-Rs. **The Notice of Initiation was published on 1 March 2007 (OJ C 47/10).**

### **Measures investigated**

**The complaint concerns intellectual property rights in the form of patents which the complainant licenses to third parties for the manufacture of CD-Rs. The Chinese Taipei authorities have granted compulsory licences to a local producer of CD-Rs (Gigastorage). However, in so doing the Chinese Taipei authorities appear not to have respected the provisions of Article 31 of the TRIPs Agreement governing the granting of compulsory licences.**

**Philips claims that it has been adversely affected by the compulsory licensing, and there is reason to believe that other European producers of CD-Rs (in competition with producers in Chinese Taipei) will be adversely affected. Philips also alleges that the treatment of this issue by the Chinese Taipei authorities risks to set a precedent, in particular in China.**

**The Commission is currently investigating and the investigation report is expected for the second semester 2007.**

## **VIII– TURKEY - PHARMACEUTICALS**

### **Steps in the TBR procedure:**

The complaint was lodged by the European Federation of Pharmaceutical Industries and Associations (EFPIA) and the notice of initiation of an examination procedure published on 20 December 2003 (OJ C311/31). The investigation report was presented to Member States on 13 August 2004.

### **Measure investigated and findings:**

The complaint concerns the Turkish legislation and practices that adversely affect sales and marketing of Community pharmaceutical products into Turkey. The investigation concluded that the lack of data exclusivity as exemplified in Article 9 of the Turkish licensing regulation for pharmaceutical products (abridged applications) and followed practices is in breach of both Article 39.3 of the TRIPS Agreement and the explicit Turkish commitments under the EC-Turkey Customs Union Agreement and related EC legislation. It also found that the preferential pricing treatment afforded to pharmaceutical products incorporating raw materials of national origin included in the revised pricing rules of 2004, violated Article III of the GATT, Article 2 of the TRIMS Agreement and finally Article 5 of the EC-Turkey Customs Union Agreement as per Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union. In addition, the TBR report concluded that in the light of the evidence presented, it would continue monitoring the issue of inadequate protection of submitted data against disclosure (physical protection/security of submitted data) and, if necessary, request the Turkish authorities to take all necessary measures to ensure full respect of its obligations under Article 39.3 of the TRIPS Agreement.

### **Action taken and outcome:**

During the investigation and following a mission to Turkey and several meetings with industry and the Turkish authorities and concerned professional associations, the Turkish authorities modified the pricing rules on pharmaceuticals to make it more transparent and predictable. In this context, they eliminated the previously applicable discriminatory pricing practices and rules as well as discriminatory sales margins between locally produced and imported drugs. In addition, the Turkish authorities, through further revisions of their pricing rules, eliminated the preferential pricing treatment afforded to pharmaceutical products incorporating locally produced raw material. In early January 2005, the Turkish authorities adopted a new Regulation for licensing of pharmaceutical products to align their regime to the EC acquis in conformity with their commitments under the EC-Turkey Customs Union Agreement. Due to pressure from the Commission, Turkey amended its Licensing Regulation in June 2005 to ensure that unpatented drugs also enjoy data exclusivity in accordance with the WTO rules and Turkey's commitments under the Customs Union Agreement. The provisions on data exclusivity, although a significant improvement compared to the previous regime which did not envisage data exclusivity, still cause concerns as on a number of aspects they fall short of full compliance by Turkey with its commitments under the WTO rules and the EC-Turkey Customs Union Agreement. These include essentially the issue of the so-called pending generics applications tabled with the Turkish Ministry of Health until 31 December 2004 and the conditional data exclusivity afforded to original products approved in the Customs Union Area between 1 January 2001 and 31 December 2004.

In addition, both the Commission and the industry entertain concerns over the regulatory requirements and conditions for the lawful filing and approval of generics applications that should be observed by Turkey in accordance with its commitments under the Customs Union Agreement (requirement of prior marketing of the original/reference product in Turkey before a generic application is lawfully filed, necessary documentation to be submitted in order to prove essential similarity, quality of bio-equivalence data etc). Finally, the industry has concerns over the storing conditions of confidential data within the Turkish Ministry of Health. Contacts are continuing with the objective of reaching a solution to the remaining problems taking into account Turkey's commitments under the WTO and the EC-Turkey Customs Union Agreement stipulations. These issues were forcefully raised at the Customs Union Joint Committee meeting on 13 December 2005 held in Ankara and at the Association Committee meeting in Brussels on 27 March 2006. The issue of the respect of the regulatory conditions and requirements applicable to the processing and approval of generics applications, and the recent approval by the Turkish Ministry of Health of a generic product in violation of Turkey's commitments under the EC acquis, were raised on multiple occasions by the Commission services. The Commission continues to monitor developments and has urged Turkey to fully comply with the relevant EC acquis on the matter. The matter was again discussed on 30 June 2006 at an expert's meeting held in Brussels between Commission services and representatives of the Turkish Ministry of Health and the Turkish Delegation to the EU in Brussels.

On 3 August 2006, Turkey sent to the EC a memo setting out, on a product-by-product basis, the processing of licence applications from the point of view of data exclusivity. The Commission examined the list of products in consultation with the EU industry and expressed its concerns in a letter to the Turkish authorities, since there is evidence that a large number of products are deprived of data exclusivity due to unlawfully filed applications for generics. The Turkish authorities provided a reply on 19 January 2007 to which the Commission responded, by urging Turkey once again to find a definitive and predictable solution to the long-standing issue of unlawfully filed generics applications. In the meantime, Turkey was requested to extend the moratorium to generic applications until a definitive and predictable solution is found. In parallel, the issue of data exclusivity is systematically raised in the appropriate bilateral for a discussion (e.g. EC/Turkey Customs Union Joint Committee of 1 December 2006, meeting on trade policy of 18 January 2007, forthcoming EC/Turkey Association Committee of 22 March 2007).

## **IX – URUGUAY - SPIRITS**

### **Steps in the TBR procedure:**

TBR complaint lodged by the Scotch Whisky Association concerned some aspects of Uruguay's excise taxes (IMESI) on whisky. The complaint was lodged on 2 September 2004, and the notice of initiation of the examination procedure was published on 23 October 2004 (OJ C261/3). As a result of modifications to the Uruguayan legislation addressing the key measures challenged under this case, the Commission published a Decision on 22 July 2005 in the Official Journal (OJ L190/27) to suspend the TBR case.

### **Action taken and outcome:**

During the investigation, the Uruguayan Authorities expressed their willingness to seek a negotiated solution to the issues raised in the TBR complaint and proposed to:

- a) Withdraw the requirement that whisky be aged less than three years to be included in the most favourable tax category (n.b. all EU whiskies are aged for at least three years).
- b) Apply the same treatment to domestic and imported whiskies as regards the requirement to affix strip stamps.
- c) Promote a change in the structure of the IMESI tax in order to bring it in line with the most usual tax systems at the international level. This change would help to address the issue of the alleged lack of transparency and predictability.

The Commission and the TBR Committee agreed that the proposed course of action constituted a satisfactory solution to the issues raised by the Scotch Whisky Association. In a decree applying as of 1 July 2005, the Government of Uruguay implemented points (a) and (b) above. A deeper reform of the tax system should be adopted in Uruguay by the end of 2006. A draft law to reform the IMESI tax was recently proposed to the Parliament. The concerns of the industry were raised during a meeting with the Uruguayan Minister of Economy. The Uruguayan authorities were asked to provide clarification on articles 32 (applicable method of taxation) and 35 (adjustment of tax rates), and the possibility to withdraw the article 36 (taxable base and anti-dumping) was raised. The EC Delegation in Uruguay is closely monitoring the evolution of the case.

## **X – USA - OILSEEDS**

### **Steps in the TBR procedure:**

The complaint was lodged on 10 January 2003 by the European Oilseed Alliance (EOA) and the notice of initiation of the examination procedure published on 13 March 2003 (O.J. C58). The investigation has been concluded and the report was submitted to the Member States on 20 October 2003.

### **Measures investigated and findings:**

The complaint concerns subsidies granted in the United States to oilseed producers. Some of the US oilseed subsidies would be protected by the “peace clause” (article 13 of the Agreement on Agriculture). For others, the level of the US support in the 2001 marketing year appear to have had significant price effects, but the Commission does not have sufficient evidence at this stage to reach a final conclusion on whether they cause or threaten to cause serious injury.

### **Action taken and outcome:**

The Commission is monitoring the evolution of the oilseed market and the US subsidies and is collecting further evidence on the possible negative impact of the US oilseed subsidies on prices. It has presented an oral report on the situation during the TBR Committee held on 18 November 2005. A further report will be presented at the next TBR Committee meeting. Further information has been received from the complainant in February 2006. Further light on the US regime will be given in the compliance panel requested by Brazil against the US cotton regime (DS267), where the ruling is expected before the summer.