

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

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INTRODUCTION

At present, the EU is actively involved in 42¹ WTO disputes: in 18 of these cases the EU is the complaining party while in the remaining 24 cases the EU is on the defending side. These cases relate to the EU's relations with 15 of its trading partners (Argentina, Brazil, Canada, China, Colombia, Ecuador, Honduras, India, Japan, Nicaragua, Norway, Panama, Philippines, Chinese Taipei, Thailand and the US).

Dispute settlement activities against the US continue to represent the majority of EU's active disputes. In most of these disputes it is the EU which is the complaining party (6), being the defendant in 6 cases (GMOs, hormones, bananas, poultry, aircraft and Information Technology Agreement). Regarding the substance of EU's offensive cases with the US, a major part concerns the misuse of trade defence instruments.

Our cases with China concern services, anti-dumping measures and raw materials on the offensive side and our anti-dumping measures on the defensive side.

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

I - ARGENTINA

DEFENSIVE CASE

(1) 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 – BRAZIL

OFFENSIVE CASE

DS332 – Measures affecting imports of retreaded tyres (procedural stage: implementation)

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. The DSB established the panel at its meeting on 20 January 2006. The panel publicly circulated its final report on 12 June 2007. Based on a

¹ Each case is counted separately

procedural agreement with Brazil, the appeal was delayed so that it has started on 3 September 2007.

The Appellate Body circulated its report on 3 December 2007. The Appellate Body has strengthened the previous panel ruling against Brazil's imports ban on retreaded tyres. The EC wins the dispute entirely on the chapeau of Article XX (arbitrary and unjustifiable discrimination, disguised restriction on international trade) because of both the MERCOSUR exception and the importation of casings. The Appellate Body confirms that these features of the import ban's application make the import ban illegal, no matter how few casings or MERCOSUR retreads are actually imported. The EC however loses on its claims that the import ban on retreaded tyres is not "necessary" to protect human health and life. Still, the reasoning of the Appellate Body on the "necessity" test is of significantly higher quality than that of the panel, and indirectly redeems certain of the EC's misgivings with the panel's reasoning. On 17 December 2007, the Dispute Settlement Body adopted the Appellate Body report. On 29 August 2008, a WTO arbitrator ruled that the reasonable period of time to implement ends on 17 December 2008. Brazil has failed to meet that deadline. The EC and Brazil have, on 5 January, concluded a "sequencing agreement", under which the EC maintains its right to directly initiate retaliation procedures, but is obliged to first conduct a compliance review once Brazil adopts implementing measures.

On 24 June 2009, the Brazilian Supreme Court (STF) confirmed the constitutionality of the Brazilian import prohibition against the import of retreaded tyres and declared that any decision to import retreaded tyres in Brazil (including the Mercosur exception) is unconstitutional.

Brazil's Secretary of Foreign Trade issued a new regulation, Portaria SECEX 24/2009, published on 28 August 2009. This regulation prohibits new licenses for the importation of used and retreaded tyres to be issued, irrespective of their origin (abolition of the Mercosur exception).

In its seventh Status Report to the DSB, dated 15 September 2009, Brazil claimed to be in full compliance.

The Commission is continuing to monitor Brazil's claim of full compliance.

DEFENSIVE CASES

DS 409 - Generic medicines in transit (procedural stage – consultations)

On 12 May 2010 Brazil requested consultations with the EU and the Netherlands in respect of certain EU and Dutch legislation, as well as their alleged application in certain cases of detention of generic medicines in transit through the EU. A similar, but not identical, request has also been filed on the same date by India (for further details see below under subheading VIII)

The EU measures challenged are: (i) Council Regulation (EC) No. 1383/2003 of 22 July 2003; (ii) Commission Regulation (EC) No. 1891/2004 of 21 October 2004; (iii) Council Regulation (EEC) No 2913/92 of 12 October; (iv) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004; (v) Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. The request also covers the following Dutch measures: (i) relevant provisions of the Patents Act of the Kingdom of

the Netherlands, 1995, as amended, including, but not limited to, the provisions of Chapter IV thereof, especially Articles 53 and 79, and relevant rules, regulations, guidelines and administrative practices; (ii) Relevant provisions of the General Customs Act of the Netherlands, as amended, including, but not limited to, Articles 5 and 11 and relevant rules, regulations, guidelines and administrative practices; (iii) Customs Manual VGEM (30.05.00 Intellectual Property Rights, Version 3.1) including, but not limited to, the provisions of Chapter 6 and of other relevant Chapters; (iv) the Public Prosecutor's Office Guide to Intellectual Property Fraud 20005A022 of 1 February 2006 and the Public Prosecutor's Office Directive (2005R013); (v) Relevant provisions of the Criminal Code of the Netherlands including, but not limited to, the provisions of Article 337, and relevant rules, regulations, guidelines and administrative practices; (vi) Relevant provisions of the Criminal Procedure Code of the Netherlands and relevant rules, regulations, guidelines and administrative practices; and, (vii) national courts' jurisprudence finding that goods in transit infringe patents (or supplementary protection certificates) in the Netherlands, including, but not limited to, due to the operation of a legal fiction pursuant to which the legal status of goods in transit is to be assessed *as if* they had been manufactured in the Netherlands.

Brazil alleges that a rule of general and prospective application seems to result from the individual or combined operation of the above mentioned instruments providing that, ex officio or following request from right-holders, competent authorities seize, authorize the seizure, order the seizure or otherwise restrict the passage of goods in transit on grounds that they infringe patents (or supplementary protection certificates) under a relevant national law, or are suspected of such infringement.

Brazil has alleged that these measures are inconsistent with Article V:1, V:2, V:3, V:4; V:5, V:7 and X:3 of the GATT 1994; Articles 1.1, 2, 28, 31, 41.1, 41.2, 42, 49, 50.3, 50.7, 50.8, 51, 52, 53.1, 53.2, 54, 55, 58(b), and 59 of the TRIPS Agreement, and Article 4bis of the Paris Convention of 1967; Article XVI:4 of the WTO Agreement.

The EU accepted Brazil's consultation request on 21 May 2010 and informed Brazil that as the alleged violations all relate to matters for which the EU bears responsibility in the WTO, the EU alone is the proper respondent in this dispute.

On 28 May 2010 Canada, Ecuador and India and on 31 May 2010 Japan, China and Turkey made requests to join consultations in DS409 as third parties.

A first round of consultations was held jointly with India on 7-8 July 2010 in Geneva. This was followed by a second round of consultations on 13-14 September 2010.

III – CANADA

OFFENSIVE CASES

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

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

2) DS 426 – Canada – measures relating to the Feed-in-Tariff Program (procedural stage – panel request)

On 11 August 2011 the EU requested consultations with Canada concerning Canada's measures relating to domestic content requirements in the feed-in tariff program (the "FIT Program").

The Ontario Green Energy and Economy Act (OGEA) empowers the Ontario Power Authority (OPA) to develop programs to encourage the use of renewable energy. Under this regime, the OPA has developed a FIT Program that allows buying renewable energy at an above market price, in order to compensate for the higher costs involved in producing solar and wind electricity. In order to benefit from this incentive programme, the OPA has set domestic content requirements (for solar 40-50% initially of the costs to develop a project, rising to 60% for post 2011 projects; and for wind 25% initially, rising to 50% post 2012).

The European Union considers the measure to be inconsistent with GATT Article III:4, Article 3.1(b) of the SCM Agreement and Article 2.1 of the TRIMs Agreement.

Consultations took place on 7 September 2011 via videoconference. Japan and the US joined the consultations as third parties. Consultations between Canada and the EU were held on 7 September 2011, but they failed to result in a positive solution of the matter. Therefore, on 9 January 2012 the EU requested the establishment of a WTO panel in order to determine whether Ontario's measures are consistent with WTO rules. The Dispute Settlement Body of the WTO will consider the EU request at its meeting on 20 January.

At the request of Japan a panel has been established on the same matter on 22 July 2011 in case DS 412, in which the EU is third party.

DEFENSIVE CASES

(1) DS 48 – Hormones (procedural stage: –implementation)

Joint case with the US. See also description under DS 26.

On 17 March the Commission and the Government of Canada signed a Memorandum of Understanding setting out a road-map that, if confirmed, will provide a temporary solution to the dispute. Under this roadmap, Canada would suspend all its sanctions on European products, while the EU would increase market access opportunities for beef imports. (WTO document WT/DS48/26)

The Memorandum foresees that Canada would suspend trade sanctions against EU products as soon as possible in the next weeks.

Increased market access opportunities on the EU market would take the form of an increase of an existing duty-free tariff-rate quota for imports of "high quality beef", in the form of 1,500 additional tons until August 2012 (Phase 1), which could be increased to 3,200 tons until August 2013 (Phase 2). Canada and the EU would then assess the situation and decide whether to reach a permanent settlement of the case (Phase 3). Both

the suspension of sanctions and the increase to the EU TRQ remain subject to the domestic decision-making procedures.

The MoU is non-binding and without prejudice to the EU rights in the WTO dispute and contains provisions on the timing of 21.5 proceedings similar to the US MoU.

Canada repealed its sanctions on 29 July 2011, with an order published in the Canada Gazette on 17 August 2011.

2) DS 369 Certain measures prohibiting the importation and marketing of seal products (procedural stage: –Panel)

On 25 September 2007 Canada requested consultations with the EC in respect of Belgian and Dutch laws which ban the import, distribution, marketing and sale of seal products and items containing seals products. The Belgian law was adopted on 16 March 2007 and prohibits the manufacture and commercialisation (including the importation) of products containing seal products. The Canadian request also covers the Belgian law on import licences as amended to cover imports of seal products. The Dutch ban covers the importation and offering for sale of harp and hooded seal products

Canada has alleged that these measures are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, and with Article I:1, III:4, V:2, V:3, V:4 and XI:1 of GATT 1994.

Consultations took place on 14 November 2007

On 11 February 2011 Canada requested the establishment of a panel. The panel was established at the DSB meeting of 25 March 2011.

3) DS 400 - Measures concerning the marketing of seal products (procedural stage: –Panel)

On 2 November 2009 Canada requested consultations with the EC in respect of Regulation (EC) No. 1007/2009 of the European Parliament and the Council on trade in seal products. The Regulation was adopted on 16 September 2009 and was published on 31 October 2009. It enters into force 20 days after publication. The Regulation prohibits the marketing of products derived from seals on the EU market, and is enforced on the border. It applies to seal products produced in the EU and imported products. It does not apply to transit through the EU. The marketing prohibition entered into force on 20 August 2010. On 10 August 2010 the Commission adopted regulation 737/2010, which lays down implementing measures, which also entered into force on 20 August 2010.

Canada has alleged that these measures are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, Articles I.1, III.4 and X.1 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Joint consultations with Norway were held on 15 December 2009.

On 18 October 2010 Canada requested supplementary consultations. On 28 October the EU informed Canada to have accepted its request. On 29 October Norway requested to be joined in the supplementary consultations.

On 11 February 2011 Canada requested the establishment of a panel.

The panel was established at the DSB meeting of 25 March 2011.

IV – China

OFFENSIVE CASES

(1) DS 372 – China – Measures affecting financial information services and foreign financial information suppliers (procedural stage: implementation)

On 3 March 2008, the EC requested consultations with China on a set of measures that restricted the operation of foreign financial information providers in China. These measures required foreign financial information suppliers to operate through an agent designated by the Chinese government, thus preventing foreign operators from providing their services directly to their clients. Moreover, the only agent designated by the government was the China Economic Information Service (CEIS), an entity under Xinhua News Agency itself. This was all the more worrying given Xinhua's launch of Xinhua 08 in June 2007, a financial information service in apparent direct competition with foreign suppliers. There were also concerns about the independence of the regulator and the protection of business confidential information provided to the regulator by foreign suppliers. Finally, foreign suppliers of financial information services were unable to establish a full commercial presence in China, despite China's GATS commitments.

Consultations were held jointly with the United States (WT/DS373) on 22 and 23 April 2008 in Geneva, as a result of which the EU and the US set up a process with China towards a solution of this dispute. Canada requested DSU consultations on this same issue in June 2008 (WT/DS378). Following consultations held on 25 September, Canada joined the EC and the US in their discussions with China. This process culminated with the signature of three separate but identical MoUs between China and the EC, the US and Canada on 13 November.

The MoUs required the appointment of a new regulator by 31 January 2009, and the adoption by the new regulator of a new legal instrument replacing the problematic measures. This new legal instrument had to come into effect by 1 June 2009.

On 29 January 2009, the State Council issued State Council Order 548, which modified Decision 412 by moving regulatory responsibility for items 373 (economic information) and 374 (news) from Xinhua News Agency to the State Council Information Office (SCIO). In so doing, China met the date agreed in the MoU for the appointment of a new regulator.

On 30 April 2009, and following contacts between China and the EC, Canada and the US as required by the MoUs, China issued the "Administrative Measures for Foreign Institutions to Supply Financial Information Services in China". These measures went into effect on 1 June 2009. With this, China met the dates agreed for the implementation of the MoUs.

Moreover, on 1 June 2009 SCIO published materials to be used in the applications for licences by foreign suppliers. These materials include forms to be filled in consisting of an "application letter" and a "registration form"; a form to provide an overview of the financial information products offered; and a further form to provide an explanation of

the transmitting means and technologies used. Foreign suppliers had 30 days following the entry into force of the Administrative Measures to apply for a licence.

Licences have been applied for by foreign suppliers and granted by SCIO.

(2) DS 395 – China – Measures Related to the Exportation of Various Raw Materials
(procedural stage: appeal)

On 23 June 2009 the EC requested consultations with China regarding various export restrictions on the exportation of certain raw materials from China. The EC has previously sought to raise the important issue with China at various levels, but to no avail.

The materials in question are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.

The export restrictions are mainly quotas (bauxite, coke, fluorspar, silicon carbide and zinc), export duties (bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc), a minimum export price system, as well as additional requirements and procedures that exporters must meet.

The export restrictions appear to be in violation of GATT Articles VIII, X, and XI, as well as commitments contained in the Protocol on China's Accession to the WTO as well as in the Report of the Working Party on China's Accession.

Consultations on the matter took place in Geneva on 30 July and 1-2 September 2009. On 21 August Mexico requested consultations with China on the matter. Following agreement among the Parties, Mexico was added as a co-complainant and the consultations on 1-2 September 2009 took the form of joint consultations with all three complainants. The consultations confirmed the EC's view that the measures are not WTO compatible.

On 4 November 2009, the EC, the United States and Mexico filed requests for the establishment of a WTO panel. The item appeared on the agenda of the meeting of the DSB on 19 November 2009 at which occasion China blocked the establishment of a panel. It appeared again on the agenda of the DSB meeting on 21 December 2009, at which occasion a panel was established.

On 29 March 2010, the WTO Director-General determined as panellists: Mr Elbio Rosselli (Chairman; Uruguay); Ms Dell Higgie (New Zealand); Mr Nugroho Wisnumurti (Indonesia).

On 7 May 2010, the panel issued a ruling on certain preliminary objections raised by China. The panel ruled in favour of the EU, the US and Mexico on a number of points:

- The panel's terms of references are not limited to those products falling under the tariff lines described in footnotes one to nine of the panel requests. The panel concludes that these tariff lines are only indicative of the broad scope of the challenge. The panel has therefore rejected China's allegations.
- The panel has decided that the panel requests include the two corrected tariff lines regarding zinc, contrary to China's allegations.

The panel has decided in favour of China only on minor procedural points that do not affect the main legal challenges.

In most other respects, the panel has decided that it will follow usual panel practice and will take a decision only after examination of the first written submissions. The ruling is public.

On 1 June 2010, the three complaining parties (EU, US, Mexico) submitted their first written submissions to the panel. China's first written submission was submitted by 4 August 2010.

The first hearing with the panel took place from 31 August to 2 September 2010 in Geneva. The second hearing with the panel took place from 22 to 23 November 2010 in Geneva.

On 1 April 2011, the Panel circulated its final confidential report to the parties of the dispute.

On 5 July 2011 the Panel made its final report public, circulating it to all WTO Members. The Panel supported most of the EU's claims against China. The Panel found: (1) China's export duties imposed on certain raw materials inconsistent with China's obligations under its WTO Accession Protocol; (2) The export quotas imposed by China in violation of the provision that prohibits quantitative trade restrictions. In the Panel's view, China did not demonstrate that these export quotas are justified (neither on the alleged need to prevent a critical shortage of an essential product, nor on environmental protection aims). The Panel did take due account of environmental considerations raised by China, but it clearly stated that these cannot be used as a pretext for restricting exports. The Panel also upheld the EU's claim that the conditions imposed by China for the allocation of export quotas violate its obligations under the WTO Accession Protocol. Finally, the Panel found that China imposed a minimum export price requirement on exporters of the products at issue which violate the GATT Article on general elimination of quantitative restrictions.

On 31 August 2011 China appealed the Panel Report submitting its Notice of Appeal and its Appellant's submission. Amongst others, China has appealed the panel's findings regarding the applicability of Article XX GATT 1994 to the commitments in paragraph 11.3. of its Accession Protocol, the interpretation of the term "critical shortage" in Art. XI:2 (a) GATT and the interpretation of the natural resource conservation justification in Art. XX (g) GATT 1994. An appeal normally takes around three months (90 days) to reach a conclusion.

The EU has filed a conditional cross-appeal on 6 September 2011 concerning the scope of the recommendations made by the Panel. The Co-complainants US and Mexico have filed separate conditional cross-appeals concerning the same matter. The Oral Hearing by the Appellate Body (AB) took place from 7 - 9 November 2011 in Geneva. The division of the AB was composed of Mr. Ramirez-Hernandez (Chairman), Ms. Hillman and Mr. Oshima. Apart from China and the co-complainants, the following third parties read their opening statement (Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Chinese Taipei, Turkey and Saudi Arabia). These were followed by 2 days of intensive questioning xby the Appellate Body covering the following issues: the requirements of Art. 6.2 DSU with regard to the co-complainant's Panel requests, the issue of how to deal with the annually recurring nature of most of the Chinese measures at dispute, the applicability of Art. XX GATT to China's duty commitments undertaken in para 11.3. of its Accession Protocol, the interpretation of Art. XI:2 (a) GATT (critical shortage and temporarily applied), Art. XX g GATT (in particular the relationship of the trade restrictive measures with the domestic measures), Art. X:3 (a) GATT (discretion sufficient for unreasonable/non-uniform manner), Art. XI:1 GATT (notion of

quantitative restriction) and Art. VIII GATT (application to quota bidding fee) as well as the interpretation of China's trading right commitments in para 5.1. and 5.2 of its Accession protocol.

The AB report is expected to be issued towards the end of January 2012.

- (3) DS407 China - Provisional Anti-Dumping Duties on Fasteners from the EU
(procedural stage: consultations)

On Friday, 7 May 2010, the European Union requested WTO dispute settlement consultations with China on China's provisional anti-dumping duties on certain iron or steel fasteners from the European Union. As from 28 December 2009, China has imposed provisional anti-dumping duties on certain iron or steel fasteners of 16.8% for the sole co-operating exporter, and of 24.6% for all other EU exporters. The EU considers that the imposition of these provisional duties is incompatible with WTO law, both on procedural and on substantive grounds. The EU challenges the following measures: The Ministry of Commerce of the People's Republic of China, Notice no. 115 (2009), including its annex, imposing provisional anti-dumping duties on certain iron or steel fasteners from the European Union, and Article 56 of the Regulations of the People's Republic of China on Anti-Dumping. The EU considers that these measures violate Articles 2.2, 2.2.2, 2.4, 3.1, 3.4, 3.5, 6.1.3, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.10, 12.2.1, 18.1 of the *Anti-Dumping Agreement*, Articles I:1, VI:1 and X:3(a) of the GATT 1994, and Article 23 DSU.

Consultations between the EU and China took place on 4 June 2010 in Geneva.

On 28 June 2010, China imposed definitive anti-dumping duties. The antidumping duty for the sole co-operating EU exporter was substantially lowered. The Commission is currently analysing the Chinese measure.

- (4) DS 425 China – Definitive anti-dumping duties on x-ray security inspection equipment from the EU (procedural stage – consultations)

On 25 July 2011 the EU requested consultations with China on China's definitive anti-dumping duties. Consultations were held on 19 September 2011 in Geneva.

On 23 October 2009 China's Ministry of Commerce (MOFCOM) initiated an anti-dumping investigation against x-ray scanners imported from the EU. On 23 January 2011 MOFCOM imposed definitive anti-dumping duties of 33.5% for the sole EU co-operating exporter and 71.8% for all the others (residual duty).

The European Union considers that the measure is inconsistent with Articles 2.4, 3.1, 3.2, 3.4, 3.5, 6.1, 6.2, 6.4, 6.5, 6.9, 12.2.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:6(a) of the GATT 1994.

On 9 December the EU requested the establishment of a Panel in this case. The panel will be established at the 20 January 2012 meeting of the DSB.

DEFENSIVE CASES

- 1) DS397 – EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (procedural stage: implementation).

First offensive case of China against the EU since China joined the WTO in 2001. On 31 July 2009, China requested WTO consultations on Article 9(5) of the EC Basic Anti-Dumping Regulation (Council Regulation (EC) No. 384/96) and on Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners in China. China claims that Article 9(5) of the EC Basic AD Regulation is inconsistent, as such, with Article XVI:4 of the Marrakesh Agreement, Articles VI:1 and X:3(a) of GATT 1994, Articles 6.10, 9.2, 9.3, 9.4, 12.2.2 and 18.4 of the WTO AD Agreement since, in China's view, these provisions require an individual margin and duty to be determined and specified for each known exporter or producer. China considers the criteria listed in Article 9(5) unreasonable and not objective. In China's view, the EU breaches Article I:1 of GATT 1994 by imposing these conditions only to imports from, "allegedly", non-market economy countries. Further, China considers that the EU's imposition of anti-dumping duties on imports of certain iron or steel fasteners is inconsistent with Articles VI and X:3(a) of GATT 1994, Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the AD Agreement as well as Part I, paragraph 15 of China's Protocol of Accession.

Consultations were held on 14 September 2009 in Geneva.

On 12 October 2009, China requested the DSB to establish a panel. On 23 October 2009, the DSB established a panel. The WTO Director-General determined the three panellists on 9 December 2009 (Mr Luiz Baptista, (Chair; Brasil); Mr Michael Mulgrew (Australia), Mr Arie Reich (Israel)). Third parties are Brazil, Canada, Colombia, Chile, India, Japan, Norway, Chinese Taipei, Thailand, Turkey and the United States. The first substantive meeting of the panel took place on 23-24 March 2010, the second substantive meeting took place on 2-3 June 2010.

On 3 December 2010, the panel circulated its report to WTO members.

The report has two parts:

The first part relates to Article 9(5), the provision in the EU Basic Anti-Dumping Regulation on so-called "individual treatment" of exporters from non-market economy countries. "Individual treatment", i.e. to give a company specific duty rate to a non-market economy exporter, is only granted to those non-market economy companies that can demonstrate their independence from the State. This is an important provision to prevent a State from channelling all dumped exports via the State company that meets the lowest duty rate. In the view of this panel, there was no basis in the WTO Anti-Dumping Agreement to condition the granting of an individual margin and duty rate on compliance with "individual treatment" criteria. The panel thus found that Article 9.5 of the Anti Dumping Regulation as such violated WTO law. The case was limited to the calculation of an individual dumping margin and an individual duty ("individual treatment"). It is important to note that this finding does not concern the Market Economy Status of China: Market Economy Status and Market Economy Treatment relate to the calculation of normal value. This important matter was not at issue here.

The second part of the panel report concerned Council Regulation 91/2009 which imposed customs duties on certain iron or steel fasteners from China.

On this specific measure itself, the panel found that in the great majority of the issues examined, the EU has acted in full compliance with WTO rules. The panel found some violations of WTO law which had no effect on the general soundness of the measure.

In its meeting of 25 January 2011, the WTO Dispute Settlement Body decided to extend the deadline for appeal to 25 March 2011. This decision was taken upon request by both

the EU and China in order to take into account the current workload of the WTO Appellate Body.

On 25 March 2011, the European Union notified its decision to appeal to the WTO Appellate Body certain issues of the Panel report. As regards the first part, the European Union appeals the finding of the Panel on "individual treatment". With regard to the second part, the European Union appeals the Panel's finding on disclosure of normal value determination and the confidentiality issues in view of the systemic issues involved.

On 30 March 2011, China notified its "Other Appeal".

Appellate Body hearings took place from 4 to 6 May 2011 in Geneva.

The Appellate Body, on 15 July 2011, issued its report in the case "European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China" (WT/DS397/AB/R).

The Appellate Body upheld the Panel's findings that Article 9(5) of the European Union's Basic Anti-Dumping Regulation (the "Basic AD Regulation") was inconsistent "as such", and "as applied" in the fasteners investigation, with Articles 6.10 and 9.2 of the Anti-Dumping Agreement because it conditions the determination of individual dumping margins, and the imposition of individual anti-dumping duties, on the fulfilment of an "Individual Treatment Test". Under Article 4.1 of the Anti-Dumping Agreement, the Appellate Body found that the Commission failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by defining the domestic industry as comprising producers accounting for 27 per cent of total estimated EU production of fasteners, and by including only those producers who were willing to be part of the sample for purposes of the Commission's injury determination.

At its meeting on 28 July 2011, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report. The European Union intends to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations. However, the European Union will need a reasonable period of time (RPT) in which to do this and requested to discuss the RPT with China.

2) DS405 – EU – Anti-dumping measures on certain footwear from China
(procedural stage: panel).

On 4 February 2010, China initiated its second WTO case against EU anti-dumping measures. China requested consultations on Article 9(5) of Council Regulation (EC) No. 1225/2009 (the EU "Basic AD Regulation") (similar to China's Fasteners challenge, at (1)); on Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from inter alia China; and on Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in inter alia China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.

China bases its consultation request regarding Council Regulation (EC) No. 1472/2006 on 24 different grounds. These relate, amongst others, to the like product, the sampling procedures, the underselling calculation, injury calculation, sampling, the confidentiality of the names of the complainants, and to a great number of procedural grounds. As regards the Review Regulation, China extends its consultation request to 17 grounds. These relate, amongst others, to the sampling, the analogue country selection process, the facts under consideration with regard to the market economy treatment and individual treatment applications, and to a wide variety of further procedural claims.

Consultations between the EU and China took place via videoconference on 31 March 2010.

In the DSB meeting of 20 April 2010, China requested for the first time the establishment of a panel. The EU objected and a panel was not established. China submitted the second panel request during the meeting of the DSB on 18 May 2010. A panel was automatically established.

The panel was composed by the WTO Director-General on 5 July 2010. The panellists are Mr Jose Antonio S. Buencamino (Chair, Philippines), Mr Serge Fréchette (Member, Canada) and D.J.Greenfield (Member, New Zealand). The Third Parties are Australia, Brazil, Colombia, Japan, Turkey, the United States and Viet Nam.

The first panel hearing took place 3-4 November 2010. The second panel hearing took place 25-26 January 2011.

The panel report was published on 28 October 2011.

The panel condemned again Article 9(5) of the EU Basic Anti-Dumping Regulation. However, the panel rejected almost all the numerous procedural and substantive Chinese claims against the original and the review investigations: it found the EU to be in breach of WTO law only in respect of a detail of the dumping calculation of one producer and the completeness of the non-confidential file. The EU must bring itself into compliance with respect to Article 9(5), but faces no compliance recommendations with respect to the definitive and the review regulations, as they expired on 31 March 2011.

V- COLOMBIA

DEFENSIVE CASE

DS 361- EC- Regime for the importation, sale and distribution of bananas (procedural stage: consultations)

On 21 March 2007, Colombia requested WTO consultations with the EC under Article XXIII of the GATT (no third parties allowed), invoking also Article 4.8 of the DSU for cases of urgency. The EC objected to the use of Article 4.8 DSU but agreed to hold consultations as soon as feasible. Those consultations were held in Geneva on 13 April 2007. A second round of consultations was held in Geneva on 27 June 2007.

The specific legal claims made by Colombia against the EC import regime for bananas are the same as those made by Ecuador (see below). From the procedural point of view, Colombia referred to the possibility of invoking Article 3.12 of the DSU, which provides for recourse by developing countries to procedures foreseen in a GATT Decision of 1966. This procedure has not been used since the WTO was created. It foresees good

offices by the WTO DG. Once it gets to a Panel, the deadline for issuing a report is 60 days (instead of 90 days in case of Article 21.5 and 6 months for an ordinary panel).

On 2 November 2007, Colombia requested the good offices of the WTO DG. Several rounds of consultations took place since December 2007. The Good Offices process resulted in a proposed agreement by DG Lamy. This draft agreement was not agreed by the Latin American suppliers. The failure of the DDA Ministerial in July 2008 made it not possible to reach any agreement on bananas in that context.

Following intensive negotiations between the EU and Latin American banana suppliers, an agreement setting the conditions for the final settlement of pending disputes on the EU import regime on bananas was initialled on 15 December 2009 (Geneva Agreement on Trade in Bananas, GATB). The GATB was signed in Geneva on 31 May 2010. A related settlement agreement with the US was signed on 8 June 2010 in Geneva. The EP gave its consent on the conclusion of the GATB on 3 February 2011. Notification to the WTO by the EU of the termination of internal procedures for the conclusion of the GATB took place on 17 March 2011.

Colombia counts among the Latin American suppliers having signed the agreement. Therefore, final settlement of this case should happen upon certification of the new EU tariff schedule on bananas reflecting tariff reduction commitments provided for in the agreement. In the meantime, Latin American banana suppliers have agreed not to take any action on pending disputes provided that the EU complies with its obligations under the agreement (truce clause).

VI – ECUADOR

DEFENSIVE CASE

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

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.

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. The Panel was established on 20 March 2007. The final report was circulated to the WTO members on 7 April 2008. The panel ruled against the EC.

The panel report was adopted by the DSB on 29 August 2008, following the failure to reach an agreement on bananas in the context of the good offices exercise led by Lamy and the DDA Ministerial in July 2008. The EC notified its intention to appeal on 28 August 2008.

On 26 November 2008, the Appellate Body upheld, but for other reasons, the findings of violation of Articles II and XIII identified the panel. The panel and Appellate Body reports were adopted at the special DSB meeting of 11 December 2008.

On 8 January 2009, the Commission informed the DSB of the intention of the EC to bring itself into compliance with the recommendations and rulings of the DSB in the case brought by Ecuador by modifying its scheduled tariff commitments on bananas. The EC noted its continued readiness to seek an agreement on the new bound tariff in the context of the negotiations of a broader agreement on bananas.

Following intensive negotiations between the EU and Latin American banana suppliers, an agreement setting the conditions for the final settlement of pending disputes on the EU import regime on bananas (Geneva Agreement on Trade in Bananas, GATB) was initialled on 15 December 2009. The GATB was signed in Geneva on 31 May 2010. A related settlement agreement with the US was signed on 8 June 2010 in Geneva. The EP gave its consent on the conclusion of the GATB on 3 February 2011. Notification to the WTO by the EU of the termination of internal procedures for the conclusion of the GATB took place on 17 March 2011.

Ecuador counts among the Latin American suppliers having signed the agreement. Therefore, final settlement of this case should happen upon certification of the new EU tariff schedule on bananas reflecting tariff reduction commitments provided for in the agreement. In the meantime, Latin American banana suppliers have agreed not to take any action on pending disputes provided that the EU complies with its obligations under the agreement (truce clause).

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.

Honduras participated in the last stage of the good offices exercise led by Lamy on the request of Colombia and Panama. This exercise did not lead to an agreement. An agreement was not possible either in the context of the DDA Ministerial in July 2008.

Following intensive negotiations between the EU and Latin American banana suppliers, an agreement setting the conditions for the final settlement of pending disputes on the EU import regime on bananas (Geneva Agreement on Trade in Bananas, GATB) was

initialled on 15 December 2009. The GATB was signed in Geneva on 31 May 2010. A related settlement agreement with the US was signed on 8 June 2010 in Geneva. The EP plenary gave its consent on the conclusion of the GATB on 3 February 2011. Notification to the WTO by the EU of the termination of internal procedures for the conclusion of the GATB took place on 17 March 2011.

Honduras counts among the Latin American suppliers having signed the agreement. Therefore, final settlement of this case should happen upon certification of the new EU tariff schedule on bananas reflecting tariff reduction commitments provided for in the agreement. In the meantime, Latin American banana suppliers have agreed not to take any action on pending disputes provided that the EU complies with its obligations under the agreement (truce clause).

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. 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). The issue has been raised again in the margin of the third round of consultations concerning case DS380.

(2) DS 380 India-Certain taxes and other measures on imported wines and spirits (procedural stage: consultations)

On 22 September 2008 the EC requested DSU consultations with India on certain tax measures and other import measures applied at State level on imported wines and spirits, *i.e.* the EC claimed that Maharashtra, Goa and Tamil Nadu tax measures appear to discriminate against imported wines and spirits in breach of Article III:2; the continuously restrictive retail and wholesale distribution of wines and spirits practised by the state of Tamil Nadu appear to be in breach of Article III:4 or, alternatively, Article XI. Maharashtra tax exemption for local wines is claimed to be a prohibited subsidy in breach of Article 3.1b) and 3.2 of the ASCM. Consultations were held in Delhi on 11 and 12 November 2008: they confirmed the EC legal analysis and at the same time, prompted the state of Goa to re-establish WTO compatibility.

On 15 December 2008, the EC sent an updated version of the consultations request, covering possible discrimination in Karnataka. Consultations were held on 29 January 2009. They confirmed that Karnataka tax measures are in breach of Article III:2 of the GATT 1994 by subjecting imported wines to higher taxation on domestic like products. Andhra Pradesh subsequently implemented new tax measures. An additional updated request for consultations was therefore sent on 4 May 2009. Consultations covering the entire scope of this dispute, including new claims on Andhra Pradesh, took place in Delhi on 16-17 July 2009. They confirmed the discriminatory nature of the taxes and other

measures at issue and unveiled additional breaches of WTO rules. The capital Delhi implemented new discriminatory tax measures in June 2009. The EC updated the scope of consultations accordingly, and including so far unexplored aspects of the monopolies in Andhra Pradesh and Tamil Nadu and requested the fourth round of consultations on 16 November 2009. The consultations took place on 18 and 19 February 2010 and recorded slow but steady progress, including new rules by Andhra Pradesh at the end of January 2010 setting out a) new, lower rates of taxation on imported wines and spirits and b) the issuance of tenders for imports wines and spirits from outside India. The state of Tamil Nadu eliminated the identified *de jure* discriminations and Delhi announced the reform on its taxation system of alcoholic beverages. The Commission, together with the EU wines and spirits industry, is closely monitoring the developments on the grounds as well as the implementation of the announced developments. Any possible improvement of market access in India is also assessed in the light of parallel efforts under the EU/India FTA negotiations to tackle the high Indian tariff rates for wines and spirits.

DEFENSIVE CASE

DS 385 – AD and CVD measures on PET (procedural stage: consultations)

On 4 December 2008 India requested consultations with the EU in respect of Article 11(2) of the Basic Anti-dumping Regulation (Council Regulation (EC) No. 384/96 of 22 December 1995), Article 18(1) of the Basic CVD Regulation (Council Regulation (EC) No. 2026/97 of 6 October 1997) and in respect of two Council Regulations imposing, respectively, a definitive anti-dumping/countervailing duty on imports of PET originating in India following an expiry review.

India has alleged that these acts are inconsistent with Articles 11.3 of the AD Agreement and 21.3 of the SCM Agreement, and with Article VI of the GATT 1994, Articles 11.1, 11.3, 11.4, 11.5, 6.1, 6.2, 6.5, 6.6, 6.8 and Annex II of the AD Agreement and Articles 21.3, 21.4, 12.1, 12.4, 12.5 and 12.7 of the SCM Agreement.

Consultations with India were held on 3 April 2009 in Brussels. India has not, for the moment, taken any further steps.

DS408 - Generic medicines in transit (procedural stage – consultations)

On 12 May 2010 India requested consultations with the EU and the Netherlands in respect of certain EU and Dutch legislation, as well as their alleged application in certain cases of detention of generic medicines originating in India while in transit through the EU. A similar, but not identical, request has also been filed on the same day by Brazil (for further details see above under subheading II).

The EU measures challenged by India are: (i) Council Regulation (EC) No. 1383/2003 of 22 July 2003; (ii) Commission Regulation (EC) No. 1891/2004 of 21 October 2004; (iii) Council Regulation (EEC) No 2913/92 of 12 October; (iv) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004; (v) Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. The request also covers the following Dutch measures: (i) relevant provisions of the Patents Act of the Kingdom of the Netherlands, 1995, as amended, including, but not limited to, the provisions of Chapter IV thereof, especially Articles 53 and 79, and relevant rules, regulations, guidelines and administrative practices; (ii) Relevant provisions of the General Customs Act of the Netherlands, as amended, including, but not limited to, Articles 5 and 11 and relevant rules, regulations, guidelines and administrative practices;

(iii) Customs Manual VGEM (30.05.00 Intellectual Property Rights, Version 3.1) including, but not limited to, the provisions of Chapter 6 and of other relevant Chapters; (iv) the Public Prosecutor's Office Guide to Intellectual Property Fraud 20005A022 of 1 February 2006 and the Public Prosecutor's Office Directive (2005R013); (v) Relevant provisions of the Criminal Code of the Netherlands including, but not limited to, the provisions of Article 337, and relevant rules, regulations, guidelines and administrative practices; (vi) Relevant provisions of the Criminal Procedure Code of the Netherlands and relevant rules, regulations, guidelines and administrative practices.

India has alleged that these measures are inconsistent with Article V:2, V:3, V:4, V:5; and V:7 and X:3 of the GATT 1994; Article 28 of the TRIPS Agreement read together with Article 2 of the TRIPS Agreement, Article 4bis of the Paris Convention of 1967, and paragraph 6(i) of the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health; Article 31 of the TRIPS Agreement read together with of the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health; Articles 41, 42 of the TRIPS Agreement.

The EU accepted India's consultation request on 21 May 2010 and informed India that as the alleged violations all relate to matters for which the EU bears responsibility in the WTO, the EU alone is the proper respondent in this dispute.

On 28 May 2010 Canada, Ecuador and Brazil and on 31 May 2010 Japan, China and Turkey made requests to join consultations in DS408 as third parties.

A first round of consultations was held jointly with Brazil on 7-8 July 2010 in Geneva. This was followed by a second round of consultations on 13-14 September 2010.

IX – JAPAN

DEFENSIVE CASE

DS 376 – Information Technology Agreement (procedural stage: panel)

On 28 May 2008, Japan and the US requested WTO consultations with the EU on the customs classification and resulting tariff treatment of 3 products, (i) set-top boxes with modems of certain types or which incorporate a device performing a recording or reproducing function such as a hard disk or a DVD drive, (ii) LCD monitors capable of reproducing video images from a source other than an automatic data-processing machine or with certain attributes such as a Digital Visual Interface, (iii) multifunctional printers. They were later joined by Chinese Taipei which also requested consultations on 12 June 2008. Japan and the other two complainants claim that these products should be classified under tariff lines which are duty free in application of the commitments taken under the Information Technology Agreement and implemented via a modification of the EU schedule of concessions in 1997. Complainants consider that, by failing to do so, the EU has breached Article II of the GATT 1994. In addition, they claim that the EU applied classification rules on set-top boxes before their publication in the Official Journal of the EU in May 2008 in breach of Article X:1 and X:2 of the GATT 1994.

Consultations with Japan were held on 26 June 2008 and 16-17 July 2008 in Geneva.

Japan requested the establishment of a panel for the first time at the DSB meeting of 29 August 2008, jointly with the US and Chinese Taipei. As this was the first time the request for the establishment of a Panel was placed on the agenda of the DSB, the EU exercised its right to oppose the establishment. A panel was established at the DSB meeting on 23 September 2008, but agreement between the parties on its composition could not be reached. On 22 January 2009 the Director-General of the WTO nominated the panel members.

The parties received the panel's final report on 23 July 2010. The report was circulated on 16 August 2010. The EU was found to be in violation of its WTO commitments both under Article II and Article X GATT, with respect to the measures challenged on the three specific products. At the same time, the panel stressed in its report that not all multifunction copy machines, television set-top boxes and flat panel display devices "will necessarily fall within the scope of this concession. That would have to be determined on a case-by-case basis, taking into account all the objective characteristics of a particular product".(para. 7.734; 7.986, etc.).

None of the parties to the dispute filed an appeal, as consequence the Dispute Settlement Body (DSB) of the WTO adopted the panel's report on 21 September 2010.

The EU confirmed its intent to implement the recommendations and rulings in this dispute in a communication to the DSB on 15 October 2010 (WT/DS375/14, WT/DS376/14, WT/DS377/12) and at the DSB meeting of 25 October 2010. The EU requested a reasonable period of time in which to do so.

On 20 December 2010, the parties to the dispute informed the DSB that they had agreed that the reasonable period of time for the EU to implement the recommendations and rulings of the DSB would be nine months and nine days from the date of the adoption of the recommendations and rulings of the DSB. Accordingly, the reasonable period of time expired on 30 June 2011.

On 30 June 2011, the EU notified to the complainants that it had adopted the measures necessary to comply with the recommendations and rulings of the DSB in this dispute. These measures are the following:

(a) Commission Implementing Regulation (EU) No. 620/2011 amending Annex I to Council Regulation (EEC) no 2658/78 on the tariff nomenclature and the Common Customs Tariff , published on the Official Journal of the European Union (hereinafter referred to as OJEU), L 166/16 of 25.06.2011);

(b) Deletion of Explanatory Notes for CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90 (2011/C 185/1, published on the OJEU C 185/1 of 25.06.2011); and

(c) Statement adopted by the Customs Code Committee on 7 June 2011, and published on 29 June 2011, according to which the Statement on the classification of "multifunctional devices" agreed at the 360th meeting of the Customs Code Committee is to be disregarded.

For a complete update of facts and arguments used by the EU in its submissions and in the Panel meetings, and more background information on the case, see: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=409&code=2>

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 CASES

DS 401 - Measures concerning the marketing of seal products (procedural stage – request for the establishment of a panel)

On 4 November 2009 Norway requested consultations with the EC in respect of Regulation (EC) No. 1007/2009 of the European Parliament and the Council on trade in seal products. The Regulation was adopted on 16 September 2009 and was published on 31 October 2009. It enters into force 20 days after publication. The Regulation prohibits the marketing of products derived from seals on the EU market, and is enforced on the border. It applies to seal products produced in the EU and imported products. It does not apply to transit through the EU. The marketing prohibition entered into force on 20 August 2010. On 10 August 2010 the Commission adopted regulation 737/2010, which lays down implementing measures, which also entered into force on 20 August 2010. Norway has alleged that these measures are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, Articles I.1, III.4 and X.1 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Joint consultations with Canada were held on 15 December 2009.

On 19 October Norway requested supplementary consultations. On 14 March 2011, Norway requested the establishment of a panel.

The panel was established at the DSB meeting of 21 April 2011.

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.

DS 364- Regime for the importation of bananas (procedural stage: consultations)

On 22 June 2007, Panama followed Colombia's move and requested WTO consultations. As the Colombian request for consultations, Panama invoked Article 3.12 of the DSU, which provides for recourse by developing countries to procedures foreseen in a GATT

Decision of 1966 (see above). Hereby, Panama seemed to abandon its earlier Article 21.5 DSU claim (not a party to the Bananas III proceedings).

Consultations were held on 13 July 2007 in Geneva. On 14 December 2007, Panama requested the good offices of the WTO DG.. Those good offices run in parallel to the good offices provided for Colombia and the EC until DG Lamy decided to bring in all Latin American MFN suppliers in a single exercise. The draft agreement ultimately proposed by DG Lamy was never agreed by Latin American suppliers. An agreement was not possible either in the context of the failed DDA Ministerial in July 2008.

Following intensive negotiations between the EU and Latin American banana suppliers, an agreement setting the conditions for the final settlement of pending disputes on the EU import regime on bananas (Geneva Agreement on Trade in Bananas) was initialled on 15 December 2009. The GATB was signed in Geneva on 31 May. A related settlement agreement with the US was signed on 8 June in Geneva. The EP plenary gave its consent on the conclusion of the GATB on 3 February 2011. Notification to the WTO by the EU of the termination of internal procedures for the conclusion of the GATB took place on 17 March 2011.

Panama counts among the Latin American suppliers having signed the agreement. Therefore, final settlement of this case should happen upon certification of the new EU tariff schedule on bananas reflecting tariff reduction commitments provided for in the agreement. In the meantime, Latin American banana suppliers have agreed not to take any action on pending disputes provided that the EU complies with its obligations under the agreement (truce clause).

XIII – PHILIPPINES

OFFENSIVE CASE

DS 396/403 – Discriminatory taxation of spirits (procedural stage: panel proceedings).
Joint case with the US

On 29 July 2009, the EC requested consultations with respect to the longstanding discriminatory taxation applied on imported alcoholic beverages by the Philippines, which is in breach of Article III:2 of GATT 1994. Consultations took place in Manila on 8 October 2009.

In view of the lack of prospects of a solution to this longstanding tax discrimination under the former Administration, the EU requested the establishment of a WTO panel on 10 December 2009. The panel was established at the DSB meeting of 19 January 2010. On 14 January, 2010 the United States requested DSU consultations with the Philippines on the same measures. These consultations were held in Geneva and the EU participated as third party. These consultations failed to bring a solution to this matter and a panel was established at the DSB meeting of 20 April. The EU and the US cases are being examined by a common panel. This panel was composed on 5 July 2010.. The panel report was circulated to WTO Members on 15 August 2011. The Panel report, circulated on 15 August 2011, found that the Philippines has acted inconsistently with its obligations under Article III:2, first sentence of the GATT 1994, in particular “through its excise taxes , the Philippines subjects imported distilled soiritts made from raw materials other than those designated in its legislation to internal taxes in excess of those applied to like domestic products made from the designated raw materials, and is thus inconsistent with Article III:2, first sentence of the GATT 1994”.

This report was appealed; the report of the Appellate Body report was circulated on 21 December 2011 and upheld the Panel's findings. The Appellate Body and Panel reports in *Philippines-Spirits* are up for adoption at the DSB meeting of 20 January 2012.

XIV– CHINESE TAIPEI

DEFENSIVE CASE

DS 377 – Information Technology Agreement (procedural stage: panel)

See description of the dispute under DS 375.

Chinese Taipei requested consultations on 12 June 2008. Consultations were held on 3 July, 18 July and 25 July 2008 in Geneva.

Chinese Taipei requested the establishment of a Panel for the first time at the DSB meeting of 29 August 2008, jointly with the US and Japan, but the EU opposed said establishment. A panel was established at the DSB meeting on 23 September, but agreement between the parties on its composition could not be reached. On 22 January 2009 the Director-General of the WTO nominated the panel members.

The parties received the panel's final report on 23 July 2010. The report was circulated on 16 August 2010. The EU was found to be in violation of its WTO commitments both under Article II and Article X GATT, with respect to the measures challenged on the three specific products. At the same time, the panel stressed in its report that not all multifunction copy machines, television set-top boxes and flat panel display devices "will necessarily fall within the scope of this concession. That would have to be determined on a case-by-case basis, taking into account all the objective characteristics of a particular product". (para. 7.734; 7.986, etc.).

None of the parties to the dispute filed an appeal, as consequence the Dispute Settlement Body (DSB) of the WTO adopted the panel's report on 21 September 2010.

The EU confirmed its intent to implement the recommendations and rulings in this dispute in a communication to the DSB on 15 October 2010 (WT/DS375/14, WT/DS376/14, WT/DS377/12) and at the DSB meeting of 25 October 2010. The EU requested a reasonable period of time in which to do so.

On 20 December 2010, the parties to the dispute informed the DSB that they had agreed that the reasonable period of time for the EU to implement the recommendations and rulings of the DSB would be nine months and nine days from the date of the adoption of the recommendations and rulings of the DSB. Accordingly, the reasonable period of time expires on 30 June 2011.

On 30 June 2011, the EU notified to the complainants that it had adopted the measures necessary to comply with the recommendations and rulings of the DSB in this dispute. These measures are the following:

(a) Commission Implementing Regulation (EU) No. 620/2011 amending Annex I to Council Regulation (EEC) no 2658/78 on the tariff nomenclature and the Common Customs Tariff, published on the Official Journal of the European Union (hereinafter referred to as OJEU), L 166/16 of 25.06.2011);

(b) Deletion of Explanatory Notes for CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90 (2011/C 185/1, published on the OJEU C 185/1 of 25.06.2011); and

(c) Statement adopted by the Customs Code Committee on 7 June 2011, and published on 29 June 2011, according to which the Statement on the classification of "multifunctional devices" agreed at the 360th meeting of the Customs Code Committee is to be disregarded.

For a complete update of facts and arguments used by the EU in its submissions and in the Panel meetings, and more background information on the case, see: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=409&code=2>

XV– THAILAND

OFFENSIVE CASE

DS 370 – Measures on the customs valuation of certain products from the EC (procedural stage: consultations)

Since September 2006, Thailand seems to systematically challenge and in general reject the declared transaction price of alcoholic beverages and other products from the European Communities imported into Thailand by related parties, and to apply instead an arbitrary value.

This arbitrary value ("assessed value") is calculated by deducting (1) a standard margin of profit and general expenses and (2) the customs duty and internal taxes paid from (3) the wholesale price of those goods in the Thai market, regardless of the transaction price provided by the importer. Broad standard margins of profit and general expenses have been fixed by the Thai customs authorities on the basis of sources that have never been explained or disclosed.

Where the shipments are tested and the declared value is different from the "assessed value", the Thai Customs authorities will require a guarantee, or if the amount is small, a cash payment, for an indefinite period of time. The bank guarantee or cash payment is set at the level of the difference between the duty (and taxes) on declared value and the duty (and tax) amount on the "assessed value".

The Thai measures seem to violate not only substantive and procedural obligations of the Customs Valuation Agreement, they also raise doubts about compatibility with other key provisions of the WTO Agreement such as Articles I, II, III, X and XI of the GATT 1994.

The request for consultations was sent to Thailand on 25 January 2008. The consultations were held on 11 March in Bangkok.

COM is currently monitoring the situation – no new problems on customs valuation have been reported.

XVI - 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 \$ 1,9 billion.

The *Byrd Amendment* was condemned in January 2003 at the unprecedented common request of 11 Members (Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand). Following the US failure to repeal it by 27 December 2003, 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 (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 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 does 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.

Consequently, retaliatory measures were maintained. As required by the WTO authorisation for sanctions and Council Regulation (EC) 673/2005, the level of retaliation is adjusted every 1 May depending on the amount distributed in the most recent distribution from duties collected on EU products. The current level of retaliation is USD 9,96 million (Commission Regulation (EC) No 311/2011, OJ L 86, 1.4.2011, p. 51). The level is much lower than last year 95, 83 million USD, which was due to the high amounts of duties collected on low enriched uranium from the EU and then re-distributed to the US petitioners. The Commission Regulation (EU) No 311/2011 of 31 March 2011 adjusting the level of retaliation was published, entered into force on 1 April 2011 and has applied from 1 May 2011. It imposes an additional 15% customs duty on three products, *i.e.* sweet corn, crane lorries, spectacles frames and mountings.

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

Background on the original DS294 dispute

On May 9, 2006, the Dispute Settlement Body ("DSB") adopted the Panel report (as amended by the Appellate Body Report) and the Appellate Body report in our original U.S. - "Zeroing" of Dumping Margins (DS294) dispute. In these reports, it was found that the US acted inconsistently with Anti-Dumping ("AD") Agreement Article 2.4.2 on the basis that the U.S. Department of Commerce ("DOC") used "model zeroing" in the 15 anti-dumping original investigations at issue. In addition, it was found that the US "zeroing" methodology, as it relates to original investigations, is inconsistent with AD Agreement Article 2.4.2. And finally, it was found that the US acted inconsistently with AD Agreement Article 9.3 and GATT 1994 Article VI:2 by using a form of "zeroing" in the administrative reviews at issue. The DSB recommended that the US bring its measures into conformity with these obligations, and the US and EU agreed to a reasonable period of time (RPT) of 11 months for implementation, ending on 9 April 2007.

In response to these rulings, the US took a number of actions. While the US (with one exception) correctly recalculated the dumping margins in the original investigations and revoked a number of measures, it continued to impose cash deposit rates going forward and collect "zeroed" duties after the end of the RPT, in cases where the goods entered the US before the end of the RPT and were assessed at a later date under the US "retrospective" system. Furthermore, the US took no action to remedy zeroing in the 16 administrative reviews, claiming that they had been "superseded" by subsequent reviews (all of which involved zeroing).

Compliance proceedings: Panel

On 9 July 2007, the EU requested 21.5 consultations with the US on its insufficient actions to bring the 15 original measures in conformity with its WTO obligations and its failure to act in respect of the 16 administrative reviews. The consultations held on 30 July failed to settle the dispute. The EU therefore proceeded with a request for a Panel. The panel was established on 25 September 2007 and composed on 30 November 2007. The first hearing, which was open to the public, took place on 9 and 10 April 2008.

The measures at issue in this compliance dispute were:

- Certain of the Section 129 determinations adopted by the United States to implement the rulings and recommendations of the DSB.
- Subsequent administrative reviews, changed circumstances reviews and sunset reviews adopted in the "cases" at issue, that is, the 15 original investigation determinations and 16 administrative review determinations challenged in the original dispute (as well as assessment instructions issued by the DOC to the U.S. Customs and Border Patrol ("CBP")).
- Liquidation of duties by the CBP following instructions issued by the DOC.
- Related omissions and deficiencies in the U.S. compliance with the DSB's recommendations and rulings.

The final report of the compliance panel was circulated to all WTO Members on 17 December 2008. The panel ruling provided a mixed outcome. It was a positive achievement for the EU to the extent that the panel ruled against the United States'

attempt to continue using zeroing in subsequent administrative reviews carried out after the expiry of the reasonable period of time for implementation. The panel also disagreed with the threshold argument advanced by the United States that implementation is only required with regard to goods which enter the United States after the end of the reasonable period of time for implementation (the so-called "date of entry" argument). Nonetheless, the outcome of the dispute was not entirely satisfactory. For example, the panel rejected the argument advanced by the EU that any action of the United States to collect duties after the expiry of the reasonable period of time for implementation must be consistent with adopted Panel and Appellate reports. The panel ruled instead that the date that is relevant for the implementation by the United States is that of the final determination of duty liability and not as we maintained that of the actual liquidation of the duties.

Compliance proceedings: Appellate Body

The EU appealed the unfavourable findings of the compliance panel on 13 February 2009, the US cross-appealed on 25 February 2009. The oral hearing before the Appellate Body took place in Geneva on 23 and 24 March 2009 and was open to the public. The report of the Appellate Body was published on 14 May.

The Appellate Body's findings are over all very positive for the EU. In particular, the AB has created a powerful tool to counter US efforts to avoid implementation by dismissing the US claim that it is only required to remove zeroing with regard to imports which enter after the end of the implementation period (the so-called "date of entry" argument) and by finding that duty collection ("liquidation") after the end of the implementation period also has to be free of zeroing. It has also confirmed that the US cannot claim that subsequent reviews "supersede" measures challenged by the EU and relieve it of any obligations and has found that a number of sunset reviews require compliance by the US. The Appellate Body has also found that the panel was wrong to refuse to consider a blatant calculation error in the case of one Italian exporter. However, it declared itself unable to complete the analysis because of an alleged lack of undisputed facts on the record.

The reports of the panel, as modified by the Appellate Body, and the Appellate Body, were adopted by the Dispute Settlement Body on 11 June. There is no second reasonable period of time to implement after a compliance case; the US is required to comply immediately.

Arbitration on the level of sanctions

In response to the United States' persistent refusal to comply with WTO rulings on the anti-dumping practice of "zeroing", on 29 January 2010 the EU requested authorization from the DSB to suspend the application to the US of concessions or other obligations under the covered agreements. The request is only the first step in the retaliation proceedings. The US has objected to the level of retaliation requested on 12 February, thereby referring the matter to WTO arbitration.

The meeting of the arbitration panel with the parties took place on 20-21 May 2010 and was open to the public for observation. The report of the arbitrator was expected to be issued on 8 September 2010.

On 7 September 2010 the EU and the US made a joint request to the Art 22.6 DSU arbitration panel in this dispute to suspend the arbitration proceedings, which was

accepted by the arbitrator on the 8th of September 2010. The EU reserved the right to request the resumption of the arbitration proceedings at any time, should the measures taken by the US to implement be unsatisfactory.

The US Department of Commerce (USDOC) published a proposal in the Federal Register on 28 December 2010, pursuant to which it proposes the discontinuation of the use of zeroing in all the specific situations that were subject to findings of the WTO, notably in reviews. At the same time it also proposes to change the normal methodology used to date to establish dumping margins in reviews. The US took this step in response to legal challenges brought by the EU (in two cases), Japan, Mexico and other Members under the World Trade Organization, which concluded that the US use of zeroing violates WTO rules.

In view of the EU the proposed weighted average-to-weighted average methodology can satisfy WTO requirements if (i) the new methodology is used so as to establish one single dumping margin for the whole review period, for the purposes of both the duty assessment and the cash deposit rate; (ii) the US offsets "negative" monthly amounts of dumping (i.e. where the weighted-average export price exceeds normal value) against "positive" monthly amounts of dumping, in all cases; (iii) the amount of duty collected from importers under the new methodology never exceeds the exporter's dumping margin.

The EU also remains vigilant about the fact that pursuant to the proposal the US Department of Commerce retains the possibility to use a different approach in reviews besides the weighted average-to-weighted average approach in some instances. The EU had formally asked the US to clarify what criteria the US Department of Commerce would use to vary from the "normal" method outlined in the proposal, and whether zeroing would be used in connection with any alternative methods.

The key outstanding issue with the proposal of 28 December 2010, however, remains whether the US Department of Commerce will recalculate dumping margins established in specific past reviews that were successfully challenged in our disputes before the WTO and refund excess duties paid after the expiry of the deadlines for compliance. The current US proposal is silent on this matter. The EU has asked the US to clarify its intentions in that regard and is awaiting a response.

The public consultation on the proposal ended on 18 February 2011.

For a complete update of facts and arguments used by the EU in its submissions and in the Panel meetings, and more background information on the case, see: http://trade.ec.europa.eu/wtodispute/show.cfm?id=168&code=1#_eu-submissions

On 7 September 2011 the EU and the US submitted a request to the arbitration panel to extend the suspension of the arbitration proceeding in the Zeroing I case DS 294 until 9 January 2012. On 15 September 2011 the arbitration panel agreed to extend the suspension of the proceeding. The extension of the suspension was granted after the US committed to discuss implementation of the panel ruling with the EU. The suspension has been extended twice since and the current suspension will expire on 6 February 2012.

(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.

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.

So far, the US has failed to comply with the DSB report adopted in 2000.

(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. On 24 May 2009 Senator Baucus, Chairman of the Senate Finance Committee, introduced a bill to repeal various U.S. restrictions on travel and agricultural sales to Cuba. Such bill also contains provisions which *inter alia* repeal Section 211 U.S. of the Omnibus Appropriations Act. The Commission will carefully monitor this and other initiatives currently pending in the US Congress.

(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/docs/2007/june/tradoc_134957.pdf -- note that a more recent version will be made available on 27 or 28 September 2007 on the following page: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=354&code=1>).

The EU 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.

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 EC filed its first written submission on 22 March 2007. The US for its part filed its first written submission on 6 July 2007. Third Parties filed their first written submissions on 1 October 2007.

The first meeting of the Panel with the parties took place on 26 and 27 September 2007. The Parties had 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 was scheduled to take place at the WTO on 28 September 2007.

The Parties filed their rebuttal submissions on 19 November 2007 (instead of 6 November 2007 as initially scheduled), as well as their responses to the Panel's questions on 5 December 2007. The first meeting of the Panel with the Third Parties took place on 15 January 2008, followed by the second meeting of the Panel with the Parties on 16-17 January 2008. Parties filed answers to the Panel's additional questions pursuant to the second panel meeting, as well as comments on the other party's answers, on 15 April 2008 and 5 May 2008 respectively. The delay was caused by the Panel sending questions to the Parties six weeks after the panel meeting (such questions are usually posed to parties within 1 to 2 weeks after a panel meeting).

On 15 September 2010, the Panel issued the confidential interim report to the Parties. On 31 January, the Panel transmitted the confidential final report to the Parties. The final and public report was issued by the WTO on 31 March 2011.

On 1 April 2011 the EU appealed to the Appellate Body a number of errors of law and legal interpretation contained in the Panel report.

The Appellate Body in this case is chaired by Ms. L. Bautista accompanied by Mr. D. Unterhalter and Ms. Y Zhang. First session of the oral hearing took place in the middle of August (16-19 August) in Geneva where the Appellate Body focused on the financial contribution, benefit and specificity issues. The second session took place on 11-14 October and covered Annex V and Adverse Effects issues.

For a complete update of facts and arguments used by the EC and the US in their submissions and in the Panel and Appellate Body hearings, and more background information on the case, see:
<http://trade.ec.europa.eu/wtodispute/show.cfm?id=354&code=1>

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

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.

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. The panel circulated its report on 31 March 2008. It finds the US in breach of its obligations under Article 23 (2)(a) and Article 23.1 of the DSU and recommends that the DSB request the US to bring its measure into conformity with its obligations under the DSU. On 29 May 2008, the EC has filed an appeal against parts of the panel report. Subsequently, the US and Canada filed a cross-appeal against those parts of the panel report which the EC had won. The hearing of the Appellate Body has taken place on 28-29 July 2008. It was the first time ever that an Appellate Body hearing has been open to the public. The Appellate Body on 16 October circulated its report, which the DSB adopted on 14 November 2008. The report reverses the panel's finding of a US and Canadian breach of Article 23, but also the panel's findings that the EC directive was SPS-incompatible. The Appellate Body recommends that the US, Canada and the EC initiate compliance review proceedings under Article 21.5 of the DSU. The EC on 22 December 2008 complied with the DSB recommendation and ruling by requesting consultations with the US and Canada under Article 21.5 of the DSU. On 15 January 2009, USTR announced that it would apply the "carousel" legislation and partly rotate the sanctions to other products and other Member States, to increase their impact. The new measures were postponed several times and, following the *Hormones* Memorandum, USTR has now repealed the *Carousel* list of sanctions and has substituted it with the reduced list applied since 23 March 2009, with effect from 19 September 2009. Sanctions were later terminated on 27 May 2011 (see below for the *Hormones* case).

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

Following the DSB ruling in the first zeroing dispute (DS 294), we requested consultations with the US on 2 October 2006 to cover issues left open by the previous ruling and to keep the pressure on the United States in an effort to ensure that the US would finally abandon zeroing as required by its WTO obligations.

Consultations were held with the United States on 14 November 2006, and then again on 28 February 2007, following the DSB ruling in a case brought by Japan (DS 322).

The EC appealed the panel report in DS 350 on 6 November 2008 and the US cross-appealed on 18 November 2008. The oral hearing of the Appellate Body, which was open to the public, took place on 11-12 December 2008.

The Appellate Body report was circulated on 4 February 2009. The Appellate Body confirmed the main EC claims on appeal, rejected all grounds of appeal put forward by the US and upheld the Panel's findings that the US was in breach of its WTO obligations by applying zeroing in periodic reviews. The EC was successful on the key object of the appeal: to receive clarification from the Appellate Body that the duty can be the measure. In this respect the Appellate Body reversed the Panel's findings and endorsed the argument advanced by the EC that the original anti-dumping order for a product from a certain country and all the subsequent annual steps (review investigations) are part of the same "duty", which should therefore be treated as a single measure and be subject to the same round of litigation. It ruled that in seeking an effective resolution of its dispute with

the US, the EC, rather than having to challenge each new investigation and review separately, is entitled to make a case against the "continued use" of the zeroing methodology against the "duty" as a whole in the specified cases, under the scrutiny of WTO dispute settlement.

The Appellate Body and Panel report – as modified by the Appellate Body – were adopted by the DSB on 19 February 2009.

On 2 June the EC and US agreed to set the reasonable period of time for implementation in this dispute at 10 months from the date of adoption of the recommendations and rulings of the DSB. Accordingly, the reasonable period of time expired on 19 December 2009.

In the beginning of December the US started Section 129 proceedings to amend original investigation rates in four cases: Case XVIII: Chlorinated Isocyanurates from Spain (A-469-814), Case XV: Purified carboxymethylcellulose from Sweden (A-401-808), Case XVI: Purified carboxymethylcellulose from the Netherlands (A-421-811) and Case XVII: Purified carboxymethylcellulose from Finland (A-405-803). Preliminary findings were issued on 17 December 2009. These findings only addressed the original investigations. On reviews (the real battleground), there is no development and no indication that we could expect any in the foreseeable future. The Commission has made concern about the US failure to implement clear in comments on the preliminary findings, submitted on 15 January 2010.

On 12 March 2010, the USDOC issued its final determination under Section 129, which is identical to the preliminary one. In response to the EU comments, the USDOC explained that USTR had directed it not to consider any cases except the four original investigations.

The US Department of Commerce (USDOC) published a proposal in the Federal Register on 28 December 2010, pursuant to which it proposes the discontinuation of the use of zeroing in all the specific situations that were subject to findings of the WTO, notably in reviews. At the same time it also proposes to change the normal methodology used to date to establish dumping margins in reviews. The US took this step in response to legal challenges brought by the EU (in two cases), Japan, Mexico and other Members under the World Trade Organization, which concluded that the US use of zeroing violates WTO rules.

In view of the EU the proposed weighted average-to-weighted average methodology can satisfy WTO requirements if (i) the new methodology is used so as to establish one single dumping margin for the whole review period, for the purposes of both the duty assessment and the cash deposit rate; (ii) the US offsets "negative" monthly amounts of dumping (i.e. where the weighted-average export price exceeds normal value) against "positive" monthly amounts of dumping, in all cases; (in) the amount of duty collected from importers under the new methodology never exceeds the exporter's dumping margin.

The EU also remains vigilant about the fact that pursuant to the proposal the US Department of Commerce retains the possibility to use a different approach in reviews besides the weighted average-to-weighted average approach in some instances. The EU had formally asked the US to clarify what criteria the US Department of Commerce would use to vary from the "normal" method outlined in the proposal, and whether zeroing would be used in connection with any alternative methods.

The key outstanding issue with the proposal of 28 December 2010, however, remains whether the US Department of Commerce will recalculate dumping margins established in specific past reviews that were successfully challenged in our disputes before the WTO and refund excess duties paid after the expiry of the deadlines for compliance. The current US proposal is silent on this matter. The EU has asked the US to clarify its intentions in that regard and is awaiting a response.

The public consultation on the proposal ended on 18 February 2011.

DEFENSIVE CASES

(1) DS 26 - Hormones (procedural stage: implementation)

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 β 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 is the sanctions, not WTO-compliance of the new Hormones Directive. The case is therefore listed separately as a new, offensive case (see above).

Following the recommendations of the Appellate Body in the Hormones Sanctions cases (see DS320-321 above), the EC requested and held consultations with the US and Canada and started compliance proceedings under Article 21.5 DSU in the original Hormones cases (DS26 and 48), with a view to demonstrate that the current ban on hormones-treated beef is no longer in breach of the SPS Agreement and that therefore the US and Canada must lift the sanctions.

On 15 January 2009, USTR announced that it would apply the "carousel" legislation and partly rotate the sanctions to other products and other Member States, to increase their impact. The application of carousel was postponed several times (the latest postponement runs until 15 August) during negotiations with the EC on a provisional solution to the dispute. Sanctions that were scheduled to be eliminated on 23 March have been eliminated from that date. On 13 May a Memorandum was signed with the United

States under which the EC will grant MFN market access opportunities for high quality beef, and the U.S. will reduce the sanctions applied to EC products.

The memorandum provides for three phases:

Phase 1 will last three years. The United States will maintain a reduced level of sanctions on EU products of USD 38 million instead of USD 116 million. The United States also agrees not to impose so-called Carousel sanctions. This legislation would have meant that existing sanctions would have rotated to new products every six months, affecting EU exports worth over USD 200 million to the United States, including products such as mineral waters, Roquefort cheese, fruit juices and canned peaches. In return for the US assurances not to raise sanctions, the EC will open a tariff rate quota, on an autonomous and MFN basis, for imports of 20,000 tons of high quality beef at zero duty. This beef will be in line with all EU import requirements, including that it must be hormone-free.

The Memorandum provides for the possibility to advance to Phase 2 in the fourth year. The United States would then suspend the remaining sanctions on EU products, while the EC would increase the size of the tariff rate quota for high quality beef to 45,000 tons. During phase 2 the United States and the EC would also discuss whether to extend the agreement into a phase 3, the duration of which remains to be discussed (including the possibility to make the arrangement permanent), together with other issues such as the status of the WTO dispute on Beef Hormones.

The Memorandum also provides a roadmap for the WTO dispute on Beef Hormones pending a definitive solution that may be agreed under Phase 3. The Memorandum is without prejudice to the EC and United States legal position in the Hormones dispute. The EC and United States agree however not to request a compliance panel for the first 18 months following the beginning of phase 1. If a compliance panel is launched after this date, such a panel will not render its report to the parties during phase 1 or phase 2. The status of such panel report, if any, will be clarified in phase 3.

The TRQ was opened by Council Regulation (EC) No 617/2009 and its management rules adopted in Commission Regulation (EC) No 620/2009. The United States has repealed the *Carousel* list of sanctions and has substituted it with the reduced list applied since 23 March 2009, with effect from 19 September 2009. In February 2011 the Commission and the US government made contact as required under Article IV:2 of the MoU to start discussions concerning the possibility to move to phase 2 in August 2012.

On 27 May 2011, the United States published a notice in the Federal Register terminating the imposition of all *Hormones* sanctions, and ordering the refund of sanctions already paid in some cases (<http://www.gpo.gov/fdsys/pkg/FR-2011-05-27/pdf/2011-13282.pdf>). This action is related to the implementation of domestic court proceedings but also constitutes early unilateral implementation by the US of Phase 2 of the Memorandum, under which the United States would have been entitled to maintain sanctions until the enlargement of the TRQ.

(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 argued that there was a suspension of approvals in the approval of GMOs and GM food in the EU, which was contrary to several WTO agreements (GATT, SPS, TBT, and AoA). In this connection, the US also complained

about the failure to consider for approval a number of specific products listed in the consultations request. Furthermore, the US considered that the restrictions imposed by several Member States on the sale or use of approved GMOs and GM food were 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 was circulated to the parties on 10 May. The final report concludes that: (a) the EU 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 EU 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 EU indicated at the DSB on 19 December 2006 that it intended to comply with the recommendations and rulings of the panel but needed a reasonable period of time (RPT) to do so. The EU engaged in technical discussions with the complainants on biotech-related issues, including those relevant for the implementation of the WTO Panel report.

On 21 June 2007, the EC and the complainants notified the DSB of their agreement on a RPT of 12 months (i.e. until 21 November 2007). The RPT was further extended by agreement amongst the parties until 11 January 2008.

On 17 January 2008, the US made a retaliation request following the expiration of the RPT. This request only contains a general formula (i.e. annual level of nullification or impairment equivalent to the lost value of US shipments of biotech products). According to the request, suspension of concessions could occur under the GATT, the SPS Agreement or the Agreement on Agriculture. No specific amount or targeted EU products is indicated. By letter to the DSB Chairman of 6 February 2008, the EU objected to the US retaliation request. At the special DSB meeting held on 8 February, the matter was referred to arbitration under Article 22.6 DSU. However, according to the sequencing agreement reached by the EU and the US, those proceedings were suspended on 18 February 2008 and will only be resumed after completion of Article 21.5 DSU compliance procedures.

The latest round of technical discussions with the US took place on 27 September 2011.

Related disputes with Canada and Argentina have been closed following the notification of a mutually agreed solution to the WTO DSB.

(3) DS 316 and DS 347 – Aircraft (procedural stage: appeal)

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.

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.

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 Panel on 11 July 2007 issued a ruling to respond to the EC request for a preliminary ruling. It ruled that a number of the measures which the EC claimed were outside the scope of the Panel did indeed fall within its scope. For one other measure challenged by the US, the Panel ruled that its falling within its scope was a question of fact that would be decided at a later stage.

The EC filed its 745-page long first written submission on 9 February 2006. The first meeting of the Panel with the parties took place on 20 and 21 March 2007. Following this meeting, the EC made available the non-confidential version of its first written submission and of its oral statements at the meeting, as well as an executive summary on its website (these documents can be found at: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2>). The Parties had 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 took place at the WTO on 22 March 2007.

Following this meeting, the Panel also sent detailed questions to the parties, to which the parties answered on 30 April 2007.

The EC and the US filed their respective second written submissions on 25 May 2007. The second meeting of the Panel with the Parties took place on 25 and 26 July 2007, and the first meeting of the Panel with Third Parties took place on 24 July 2007. The non-confidential part of the second meeting with the Parties was videotaped and was shown in a public screening at the WTO premises on 27 July 2007. The Parties on 10 September 2007 filed answers to the questions posed by the Panel following the second meeting of the Panel with the Parties. The Panel subsequently posed additional questions to the parties, to which the Parties responded on 22 January 2008. The parties then submitted comments on the answers of the other party on 8 February 2008.

Under the revised timetable, the issuance of the final Panel report was due on 19 December 2007. This timetable was subsequently suspended.

As subsequently communicated by the Panel to the Parties, the confidential interim report was issued on 4 September 2009. The final and public report was issued by the WTO on 30 June 2010.

On 21 July 2010 the EU appealed to the Appellate Body a number of errors of law and legal interpretation contained in the Panel report, and therefore prevented the DSB from adopting it. On 16 August 2010 the EU filed its Appellant's Submission. On 19 August 2010 the US decided to cross-appeal to the Appellate Body certain issues of law and legal interpretation contained in the Panel Report. The Members of the Appellate Body division hearing the appeal are Mr David Unterhalter (Presiding Member), Ms Lilia Bautista (Member) and Mr Peter Van den Bossche (Member).

The first hearing took place on 11-17 November 2010. The second hearing took place on 9-14 December 2010. On 18 May 2011 the Appellate Body published its report. The Appellate Body overturned key findings of the Panel, vindicating many of the EU's long held positions. At a special meeting of the DSB held on 1 June 2011, the Appellate Body and Panel reports were adopted.

On 1 December EU submitted to the DSB its compliance report stating full compliance with the DSB recommendations and rulings. The compliance report can be found: http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc_148389.12.2011%20EU%20Compliance%20Report.pdf.

On 9 December 2011, the US submitted

1) a request for compliance consultations under Article 21.5 of the DSU, stating that it considered that, through the actions listed in the 1 December compliance report, the EU has failed to withdraw the subsidies or remove their adverse effects, and thus has failed to comply with the DSB recommendations and rulings in the Airbus case.

2) a request for authorizing sanctions under Article 22.2 of the DSU of an amount ranging between \$7 and \$10 billion per year. According to the US, as it is impracticable and ineffective to retaliate up to \$10 billion solely on the EU exports of goods, it also requested authorization to impose sanctions on the EU exports of services, except financial services. There is however no product list attached to the sanctions request.

On 22 December 2012, at as special DSB, the EU objected to the level of suspension of concessions or other obligations requested by the US, claimed that the principles and procedures set forth in Article 22.3 have not been followed and that the proposal is not allowed under the covered agreements, and requested for that the matter to be referred to arbitration pursuant to Article 22.6 of the DSU.

On 12 January 2012, a sequencing Agreement was signed between the EU and the US. As a result, the arbitration of the US retaliation request is now suspended, and may only be reactivated following an adverse ruling by the DSB in compliance proceedings.

On 13 January 2012, compliance consultations were held under Article 21.5 DSU.

For a complete update of facts and arguments used by the EU and the US in their submissions and in the Panel meetings, and more background information on the case, see: http://trade.ec.europa.eu/doclib/docs/2007/july/tradoc_135341.pdf

(4) DS 27- Bananas (procedural stage: implementation)

On 29 June 2007, the US requested the establishment of a WTO panel under Article 21.5 DSU on the EC import regime for bananas (the US was part of the original *Bananas III* proceedings). The US did not request prior consultations (in contrast with Ecuador). The US requested a special DSB meeting on 12 July 2007 where the panel was established. The Panel was finally composed by the WTO DG on 13 August. Its members were the same as those integrating the panel in the proceedings brought by Ecuador (see above).

The interim panel report was issued on 6 February 2006 and the final panel report was transmitted to the Parties on 29 February 2008. This report has been circulated to the WTO Members on 19 May 2008. The claims made by the US in its panel request were the same as those made by Ecuador, with the exception of the claim of violation of Article II GATT, absent in the US request. As a result, the US challenged exclusively the preferential duty-free TRQ granted to ACP banana imports.

On 24 June, the DSB adopted an agreement between the US and the EC (similar to the agreement between the EC and Ecuador) that allows the extension of the period for adoption of the panel report from 19 June until 29 August.

The US requested the adoption of the panel report by the DSB at its meeting of 29 August. On 28 August, the EC introduced a notice of appeal of this report. On 26 November 2008, the Appellate Body upheld, but for other reasons, the violation of Article XIII identified by the panel. The panel and AB reports were adopted at the regular DSB meeting on 22 December 2008, following a US request for correction of certain aspects of the report and a consequent US request to have the reports withdrawn from the agenda of the DSB meeting on 11 December. The AB had rejected most of this request and has only accepted correcting minor clerical errors.

An agreement setting the conditions for the final settlement of this dispute was initialled by the EU and the US on 15 December 2009. This Agreement was signed by the US and the EU in Geneva on 8 June. The EP gave its consent on the conclusion of the GATB on 3 February 2011. Notification to the WTO by the EU of the termination of internal

procedures for the conclusion of the GATB and the parallel agreement with the US took place on 17 March 2011.

(5) DS 375 – Information Technology Agreement (procedural stage: panel)

On 28 May 2008, the US requested WTO consultations on the customs classification and resulting tariff treatment of 3 products, (i) set-top boxes with modems of certain types or which incorporate a device performing a recording or reproducing function such as a hard disk or a DVD drive, (ii) LCD monitors capable of reproducing video images from a source other than an automatic data-processing machine or with certain attributes such as a Digital Visual Interface, (iii) multifunctional printers. The US claims that these products should be classified under tariff lines which are duty free in application of the commitments taken under the Information Technology Agreement and implemented via a modification of the EU schedule of concessions in 1997. The US considers that, by failing to do so, the EU has breached Article II of the GATT 1994. In addition, the US claims that the EU applied classification rules on set-top boxes before their publication in the Official Journal of the EU in May 2008 in breach of Article X:1 and X:2 of the GATT 1994.

Consultations were held on 25 and 26 June 2008 and 15 and 16 July 2008 in Geneva. The US requested the establishment of a panel for the first time at the DSB on 29 August 2008, jointly with Japan and Chinese Taipei, but the EU opposed said establishment. A panel was established at the DSB meeting on 23 September, but agreement between the parties on its composition could not be reached. On 22 January 2009 the Director-General of the WTO nominated the panel members.

The parties received the panel's final report on 23 July 2010. The report was circulated on 16 August 2010. The EU was found to be in violation of its WTO commitments both under Article II and Article X GATT, with respect to the measures challenged on the three specific products. At the same time, the panel stressed in its report that not all multifunction copy machines, television set-top boxes and flat panel display devices "will necessarily fall within the scope of this concession. That would have to be determined on a case-by-case basis, taking into account all the objective characteristics of a particular product". (para. 7.734; 7.986, etc.).

None of the parties to the dispute filed an appeal; as consequence, the Dispute Settlement Body (DSB) of the WTO adopted the panel's report on 21 September 2010.

The EU confirmed its intent to implement the recommendations and rulings in this dispute in a communication to the DSB on 15 October 2010 (WT/DS375/14, WT/DS376/14, WT/DS377/12) and at the DSB meeting of 25 October 2010. The EU requested a reasonable period of time in which to do so.

On 20 December 2010, the parties to the dispute informed the DSB that they had agreed that the reasonable period of time for the EU to implement the recommendations and rulings of the DSB would be nine months and nine days from the date of the adoption of the recommendations and rulings of the DSB. Accordingly, the reasonable period of time expires on 30 June 2011.

On 30 June 2011, the EU notified to the complainants that it had adopted the measures necessary to comply with the recommendations and rulings of the DSB in this dispute. These measures are the following:

(a) Commission Implementing Regulation (EU) No. 620/2011 amending Annex I to Council Regulation (EEC) no 2658/78 on the tariff nomenclature and the Common Customs Tariff, published on the Official Journal of the European Union (hereinafter referred to as OJEU), L 166/16 of 25.06.2011);

(b) Deletion of Explanatory Notes for CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90 (2011/C 185/1, published on the OJEU C 185/1 of 25.06.2011); and

(c) Statement adopted by the Customs Code Committee on 7 June 2011, and published on 29 June 2011, according to which the Statement on the classification of "multifunctional devices" agreed at the 360th meeting of the Customs Code Committee is to be disregarded.

For a complete update of facts and arguments used by the EU in its submissions and in the Panel meetings, and more background information on the case, see: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=409&code=2>

(6) DS 389 – Poultry Antimicrobial Treatment (AMT) (procedural stage: panel request)

On 16 January 2009, the United States requested consultations with the EC on certain measures concerning the production and marketing of poultry, and in particular not allowing the use of substances other than water for the treatment of poultry carcasses. In their request for consultations, the US challenges the following measures:

- "(1) Regulation (EC) No 853/2004, including Articles 3 and 6;
- (2) Council Regulation (EC) No 1234/2007, including Annex XIV(B)(II)(2);
- (3) SCoFCAH's rejection of the Commission's proposal regarding the removal of surface contamination from poultry carcasses on June 2, 2008;
- (4) the EU Agricultural and Fisheries Council's rejection of the Commission's proposal regarding the removal of surface contamination from poultry carcasses on December 18, 2008; and
- (5) any amendments, related measures, or implementing measures. "

The US argues that these measures appear to be inconsistent with the SPS Agreement (Articles 2.2, 5, 8, and Annex C (1)); the GATT (Articles X and XI:1), the Agreement on Agriculture (Article 4.2) and the TBT Agreement (Article 2).

The Commission has held consultations with the US on 11 February 2009.

On 8 October 2009, the US requested the establishment of a panel to rule on the matter. At the DSB meeting of 23 October, the US requested for the first time the establishment of a Panel. Such request was opposed by the EC. The US requested a second time the establishment of a panel at the DSB meeting of 19 November, when the panel was established.

B) CASES UNDER THE TRADE BARRIERS REGULATION (TBR)

Please consult document 482/07 of 15 November 2007 for a description of the cases.

I – CANADA – PROSCIUTTO DI PARMA

Recent developments:

The issue was raised at the TISC in November 2007, and a questionnaire was subsequently sent to the Canadian authorities. The answers to this questionnaire were provided by Canada on 23 May 2008. They explained the procedural situation of the Consorzio's application and provided some further explanations of the functioning of the Canadian trademark system. This issue, as well as the action launched by Maple Leaf in order to have the official mark (Parma "Ducal Crown Mark") granted in 1998 to the Consorzio declared invalid, were then discussed at the TISC meeting held on 28 May 2008. Canada basically said that it could not anticipate any of the decisions that the Courts may take in the judicial proceedings that would most likely follow. The issue was again on the agenda of the TISC meeting of 25 November 2008 and 15-16 July, after which Canada replied to further written questions by the Commission. The issue was again on the agenda of the TISC meeting held on 7 December 2009, where the EC insisted on its concerns.

The collective mark "Prosciutto di Parma" requested by the Consorzio was approved for registration by the Canadian Trademarks Office (TMO) in December 2006 and published on 24 January 2007. Maple Leaf filed an opposition to this registration on 25 June 2007. Several procedural steps before the Trademarks Opposition Board have since then been taken by both the Consorzio and Maple Leaf. Once a decision by the Opposition Board is issued, it can be appealed to the Federal Court and then again to the Federal Court of Appeal. As a result, and provided that appeals are launched, the proceedings would last for at least five more years.

On 15 October 2009 the Federal Court of Canada issued its judgment dismissing Maple Leaf's application to annul the Parma "Ducal Crown Mark". The Court also ordered that Maple Leaf pay the Consorzio's costs of the proceeding. As a result, the Consorzio retained its rights with regard to the "Ducal Crown Mark", with the name "Parma" inscribed in it, in Canada. This outcome strengthens the position of the Consorzio in other proceedings regarding the use of "Parma" in Canada. However, on 12 November 2009 Maple Leaf appealed this judgment before the Federal Court of Appeal. That appeal was dismissed in September 2010, and Maple Leaf was again ordered to pay the Consorzio's costs.

Maple Leaf owns a pending application to register the trademark Parma & Design, which was rejected in 2003 on the basis of the Consorzio's "Ducal Crown Mark" rights. Maple Leaf's appeal to the Federal Court in 2008 was dismissed, and the further appeal by Maple Leaf to the Federal Court of Appeal was again dismissed with costs in September 2010. On 16 December 2010, the Canadian Trademarks Office formally rejected Maple Leaf's application to register the trademark Parma & Design.

II- CHILE- SWORDFISH

The negotiating directives for a permanent agreement with Chile were adopted by the Council on 7 April 2008. On 16 October 2008, the Commission and their Chilean counterparts agreed on a Draft Text, which would constitute the basis for the establishment of a new "Understanding Concerning the Conservation of Swordfish Stock in the South Eastern Pacific Ocean" ("the Understanding"). The Understanding shall enter into force after the necessary procedures are completed on both sides. This draft

Understanding provides for access of EU vessels to designated Chilean ports in exchange for commitments on cooperation in the management of stocks and fishing efforts.

In light of progress made, and on request of the Commission and the Chilean authorities, the International Tribunal for the Law of the Sea (ITLOS) further extended the suspension of proceedings brought by Chile and the EC until 31 December 2009. In view of the EU and Chile's commitment to present the Understanding for signature and conclusion through their respective internal procedures, and on the request of the Parties, the ITLOS adopted on 16 December 2009 an Order of discontinuance of this case. On 28 May 2010, the EU and Chile also notified jointly the withdrawal of case DS193 to the WTO Dispute Settlement Body (see prior note to the TPC 197/10, dated 14 April 2010).

On 3 December 2009, the Commission presented to the External Fishery Working Group the Understanding initialled in 2008, together with a revised annex regarding the conditions for access to ports by EU vessels fishing swordfish and an official communication from Chile on the replacement of the third port suggested by Chile for access by EU vessels (Caldera) by Antofagasta. The Council adopted the Decision authorising the signature and provisional application of the Understanding on 3 June 2010 (doc. 9337/08). The EP PECH Committee adopted on 30 November 2010 a report recommending the rejection of this Understanding.

III – INDIA – SPIRITS AND WINES

Information about this case is now provided under DS 352 and DS 380.

IV – KOREA - PHARMACEUTICALS

Recent developments:

The Korean authorities have implemented the reform of their health insurance system on 29 December 2006. The new system is based on "positive listing" of pharmaceuticals eligible for reimbursement, whereby the assessment of the pharmaceutical cost-efficiency plays a major role. 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 the EC concerns to the EC satisfaction and seems to leave the door open to possible *de-facto* discrimination between generic products (mainly locally produced) and innovative products. In particular, the new system does not provide the legal certainty the EC has been striving for, since it does not yet refer to transparent, objective and verifiable criteria nor does it provide due process guarantees in decision-making on reimbursement and pricing of pharmaceutical products. The Commission had the opportunity to raise its concerns by letter and on occasion of several bilateral fora where pressure has continued to be exerted to address the industry's concerns and find a definitive solution to them. The conclusion of the Korea /US FTA negotiations had prompted a public consultation on an independent review system in the National Health insurance system to which the Commission participated and submitted its views on 11 December 2007. On this occasion, the Commission also re-stressed the need to make such a system available to both reimbursement decisions and decisions resulting from price negotiations as well as the need for the new legislation to address the current lack of transparency and due process guarantees.

At various bilateral fora the Commission also raised concern with regard to lack of transparency in both methodology and criteria applied to the evaluation of innovative products within a recent pilot project on the re-evaluation of the prices of lipid-lowering drugs. A sectoral annex on pharmaceuticals was included in the initialled EU/Korea FTA. The technical background and investigations carried out under the TBR substantially contributed to identifying the EU interests and the obligations included in the annex at issue.

V– Chinese Taipei – Compulsory licensing of CD-Rs

The investigation report was circulated to Member States on 11 January 2008 and was made public on 30 January 2008.

The report concludes that the Patent Act of Chinese Taipei is inconsistent with the TRIPs Agreement, and that the specific application to the case between Philips and Gigastorage was also inconsistent with the TRIPs Agreement. It calls on Chinese Taipei to take concrete steps to amend the law, and eliminate the precedential effects of the Gigastorage/Philips decision within 2 months.

A first round of contacts took place in early March but did not permit resolution of the matter. On 13 March 2008 an administrative court in Chinese Taipei annulled the grant of the compulsory licence. The court's reasoning still leaves a great deal of flexibility to the administration.

A second set of contacts took place on 29 April 2008. This was conducted in a far more positive atmosphere. Chinese Taipei confirmed that it would not appeal the Court's decision. The administration was required to issue a redetermination on the original case. This is to be done within 6 months (i.e. October 2008). The administration was also planning a major revision of its Patent Law which will include the provisions on compulsory licensing. Chinese Taipei agreed to continue discussions with the Commission over the next months.

On 17 June 2008 the authorities of Chinese Taipei informed the Commission that Gigastorage had requested that there be no redetermination, so there would be no more decisions on the specific Philips-Gigastorage case. The Commission has presented its views as part of the review of the Patent Law, and the authorities of Chinese Taipei have now submitted a draft law to the Legislative Yuan. The Legislative Yuan is expected to adopt the law during its session, starting in March 2010. The Commission will continue to carefully monitor developments. In the light of the removal of any immediate commercial disadvantages for EU companies, the Commission will continue to monitor the situation and consult with the authorities of Chinese Taipei.

VI– TURKEY – PHARMACEUTICALS

Since the TBR case was initiated in 2003 the Commission in co-operation with the industry has worked to contain possible damages deriving from the lack of legal certainty in Turkey on the issue of data exclusivity. This issue has been systematically raised by means of regular letters addressed to the Turkish authorities within the framework of the TBR case as well as in the appropriate bilateral fora (e.g. EC/Turkey Customs Union Joint Committees, meetings on trade policy, EC/Turkey Association Committees, EU-Turkey Information Meeting on Trade, EU-Turkey information meetings) and on

occasion of bilateral meetings at senior level It should be acknowledged that thanks to the TBR case Turkey has continued to maintain a *moratorium* on pending generics applications (with one single exception), but has not yet provided a definitive solution to the existing legal uncertainty. Turkey's most recent letters (5 March 2009, 4 September 2009) remain ambiguous with regard to the treatment of pending generic applications and maintain a situation of legal uncertainty. The Commission has reiterated its concerns with various letters, including on 17 December 2008, to which Turkey replied on 5 March 2009. With regard to combination products and possible unlawful approval of generic applications as reported by the industry, the Commission expressed once again its concerns in a letter dated 17 February 2009 and met the Turkish authorities in Ankara on 26 March 2009 to explain once again the *acquis communautaire* and Turkey's obligations in this regard. The meeting did not shed light on the way Turkey intends to treat combination products, though it provided an apparently divergent interpretation of the *acquis communautaire* with regard to so –called "fixed combinations". On 22 April 2009 Turkey published amended rules on the registration of medicinal products for human use. On 4 September 2009 Turkey provided an unclear record of the meeting of 26 March 2009. The Commission has worked closely with the industry and concurred with it that at that stage Turkey did not appear to provide the long-sought legal certainty on the issue of regulatory data protection. With a letter dated 15 September 2009 the Commission requested confirmation that the *moratorium* on pending generics applications within the scope of the TBR case be respected, including with regard to combination products and in spite of Turkey's divergent interpretation of "fixed combinations" under the relevant *acquis communautaire*. Turkey replied with an explanatory note dated 12 May, to which the Commission answered by clarifying and once again reiterating its concerns. The issue of regulatory data exclusivity is equally addressed within the broader framework of the bilateral EU/Turkey fora, e.g. at the last EU/Turkey Joint Custom Union Committee of 26 October 2009, together with other questions on regulatory issues that stem from the amended Regulation, but do not directly fall within the scope of the TBR case at issue. The Commission has continued to closely monitor Turkey in the field of data exclusivity in co-ordination with the industry As of September 2011, there are no indications of approval of unlawful generics applications. Within the 2003 TBR case on pharmaceuticals, Turkey has *de facto* maintained a moratorium on pending generics applications, *i.e.* on generics applications submitted until 1 January 2005 with regard to original products (including some combinations) registered in the Customs Union area during the period from 1 January 2001 to 1 January 2005. As of September 2011, the data exclusivity period has elapsed for all pending generics at issue within the TBR case.

VII – USA - OILSEEDS

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. Further information has been received from the complainant in February 2006. Further light on the US regime has been shed by the compliance panel requested by Brazil against the US cotton regime (DS267), where the final report has been circulated on 18 December 2007 and has been appealed. The Appellate Body circulated its report on 2 June 2008.

VIII – USA – GAMBLING

The Commission decided on 11 March 2008 to open a formal examination procedure following a complaint against US measures lodged by the Remote Gambling Association (RGA). In summary, the RGA argued that US legislation banning internet gambling; the measures taken to enforce that legislation; and the fact that the legislation is enforced in a discriminatory way, are all inconsistent with Articles XVI and XVII of the GATS. The RGA maintained that these violations would remain even after the current process of withdrawal of US GATS gambling commitments. In their view, the withdrawal of commitments would not have retroactive effects, that is, would only remove US obligations for the future, but not in respect of past events. Given that the only relevant trade at issue in this case was the remote gambling that a number of EU based operators offered to persons in the US prior to their withdrawal from the US market, while the US commitments were in place, the US would be under the obligation not to take or continue any measure that would constitute a violation of its international obligations in relation to such past events.

Following the conclusion of its investigation, the Commission submitted the report on this matter to the TBR Committee. The report was communicated to the complainant and to the US on 9 June 2009, and made public on the Commission's website on 10 June 2009.

The report concludes that there is an obstacle to trade in the US, that the obstacle to trade causes adverse effects, and that action is necessary in the interests of the Community. This means that the EU could bring a WTO case against the US. However, the Commission has indicated to the US that it favours an amicable solution.

More specifically, the report finds that the relevant US measures deny market access to the US online gambling market and discriminate in favour of US companies which can freely operate online gambling on horse racing in the US, while EC companies and individuals are prosecuted for the online services that they provided in the past. This is incompatible with GATS Articles XVI and XVII, and cannot be justified under GATS Article XIV.

The report addresses also the question of the possible withdrawal of US GATS commitments on gambling and betting. It concludes in this respect that a withdrawal of these commitments would not make a WTO case unfeasible. The reason is that the relevant DOJ criminal investigations focus on gambling services offered at a time when the US still had GATS commitments. The EU would, once the withdrawal occurs, still be able to challenge US laws to the extent that they are applied in respect of gambling services trade that took place while the US commitments were in place, but disregarding those commitments.

The Commission has asked the US to provide a definitive solution for this matter and continues to discuss the issue with USTR and the DOJ.