

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

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INTRODUCTION

At present, the EU is involved in 46¹ WTO disputes, and 3 disputes under FTAs: in 28 of these cases the EU is the complaining party while in the remaining 21 cases the EU is on the defending side. These cases relate to the EU's relations with 15 of its trading partners (in WTO: Argentina, Brazil, Canada, China, Colombia, India, Indonesia, Philippines, Russia, Thailand, Turkey and the US; under FTAs: Korea, SACU and Ukraine).

Dispute settlement activities concerning the US continue to represent the highest number of EU's active disputes. The EU is the complaining party in 7 of the disputes and the defendant in 6 other cases.

Our cases with China concern technology transfer measures and raw materials on the offensive side, and antidumping and feed-in-tariff measures on the defensive side.

The EU has now also launched three cases under the dispute settlement provisions of bilateral agreements.

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

As of May 2020, this overview document will no longer include those defensive or offensive cases where the latest procedural or other development has taken place before 2018. For the purposes of the WTO dispute settlement, however, these cases continue to remain formally 'pending'. The list of all 'pending' cases is included in the Annex.

A) WTO DISPUTES

I – ARGENTINA

OFFENSIVE CASE

DS 438 – Argentina – Measures affecting the importation of goods

Procedural stage: implementation

On 25 May 2012, EU requested consultations with Argentina on its restrictive import measures affecting a wide range of products exported from Europe. The restrictive, non-transparent measures include Argentina's import licensing regime and notably the procedures to obtain an import licence, including certificates of importations required for more than 600 product types, such as electrical machinery, auto parts and chemical products, shoes, paper products; a pre-registration and pre-approval regime, called the "Declaración Jurada Anticipada de Importación" (DJAI), which extends to imports of all goods since February 2012. In addition, Argentina requires importers to balance imports with exports, or to increase the local content of the products they manufacture in Argentina, or not to transfer revenues abroad. This practice is systematic, non-written and non-transparent. Acceptance by importers to undertake this practice appears to be a condition for obtaining the license allowing imports of their goods. These measures delay or block goods at the border and inflict major losses to industry in the EU and worldwide.

¹ Each case is counted separately.

These measures are at odds with the WTO rules, in particular the prohibition to institute quantitative restrictions as well as the obligation of non-discrimination and national treatment principle under the GATT 1994 and the rules of the Agreement on Import Licensing Procedures.

Consultations were held on 11 and 12 July 2012 in Geneva but did not bring a solution to the dispute. In the meantime, the US, Japan and Mexico requested consultations on the same set of measures (DS444, DS445, DS446), and the EU was accepted as third party in those consultations. Consultations did not bring a solution to the dispute.

In view of unsuccessful consultations and no sign of an improvement of the situation, the EU, US, Japan and Mexico have closely cooperated since then with a view to requesting the establishment of a Panel by the end of 2012.

Following the request of the EU and the three other complainants, the panels were established at the meeting of the Dispute Settlement Body (DSB) on 28 January 2013.

In May 2013, the WTO Director-General composed the panel. The final panel report was circulated to the WTO Members on 22 August 2014. Argentina has lodged an appeal and the EU has cross-appealed. The Appellate Body (AB) circulated its report on 15 January 2015. The report was a full victory for the EU. The AB upheld most of the findings of the panel.

In particular, the AB upheld the Panel's finding that the Argentine authorities' imposition on economic operators of one or more of the five trade-restrictive requirements (TRRs) as a condition to import or obtain certain benefits, operates as a single measure (the TRRs measure) attributable to Argentina and as a consequence, upheld the Panel's findings that the TRRs measure constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994. Also with respect to the TRRs local content requirement, the AB confirmed the Panel's finding of inconsistency with Article III:4 of the GATT 1994 because it modifies the conditions of competition in the Argentine market, so that imported products are granted less favourable treatment than like domestic products. With respect to the DJAI procedure, the AB upheld the Panel's finding that the DJAI procedure constitutes a restriction on the importation of goods and is inconsistent with Article XI:1 of the GATT 1994.

As regards the EU's cross-appeal, the AB reversed the Panel's findings and found instead that the EU had identified the 23 specific instances of application of the TRRs as "specific measures at issue" in conformity with Article 6.2 of the DSU and that these measures are within the Panel's terms of reference.

The DSB adopted the AB report and the Panel report, as modified by the AB report at its meeting on 26 January 2015. At the following meeting, on 23 February 2015, Argentina requested a reasonable period of time to implement the rulings. On 2 July 2015, Argentina and the European Union agreed on the reasonable period of time (RPT) for Argentina to implement the DSB recommendations and rulings. That RPT expired on 31 December 2015. Argentina reported on the measures it took for implementation on 14 January 2016, stating that they have fully complied. The EU continues to monitor the situation. **Given that the situation is stable, this case will not be included in the next edition.**

DEFENSIVE CASES**1) DS 349 – 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. **In absence of new developments since 2006, this case will not be included in the next edition.**

2) DS 443 – Certain measures concerning the importation of biodiesel

Procedural stage: consultations

On 17 August 2012, Argentina requested consultations with the European Union concerning certain measures relating to the consideration of imported biodiesels for accounting purposes with regard to the compliance with the mandatory targets for biofuels. The measure challenged by Argentina is the Spanish Ministerial Order IET/822/2012 of 20 April 2012 regulating the allocation of biodiesel volumes needed to achieve the mandatory target.

Argentina claims that the Spanish measure is inconsistent with:

- Articles III:1, III:4, III:5 and XI:1 of the GATT 1994;
 - Articles 2.1 and 2.2 of the TRIMs Agreement; and
 - Article XVI:4 of the WTO Agreement.
- Consultations were held on 4-5 October. Australia and Indonesia participated as third parties.

On 6 December, Argentina requested the establishment of a panel. The EU opposed the establishment of a panel at the DSB meeting of 17 December. It has to be noted that the procedures foreseen in the challenged measure had already been cancelled in October, and Ministerial Order IET/822/2012 was amended in December. Thus, Argentina's panel request is without object. At the following January DSB meeting Argentina did not request the establishment of a panel. **In absence of new developments since 2012, this case will not be included in the next edition.**

3) DS 459 – Certain EU and Member States' measures concerning biodiesels

Procedural stage: consultations

On 15 May 2013, Argentina requested consultations with the European Union concerning EU Directives 2009/82/EC (Renewable Energy Directive), and 2009/30/EC (Fuel Quality Directive). In addition, Argentina challenges measures of a number of Member States that seek to implement the above directives, as well as certain Member States' measures that, allegedly, provide support to the EU biodiesels industry.

Argentina makes claims under:

- Articles I:1, III:1, III:4 and III:5 of the GATT 1994;
- Articles 2.1, 2.2, 5.1 and 5.2 of the TBT Agreement;
- Article 2.1 and 2.2 of the TRIMS Agreement;
- Article 3.1(b) and 3.2 of the SCM Agreement;

Consultations must be held within 60 days of Argentina's request.

A consultations meeting took place in Brussels on 26-27 June 2013.

Argentina may engage in further consultations with the EU, or it may at any time request the establishment of a panel to hear this dispute. **In absence of new developments since 2013, this case will not be included in the next edition.**

II – BRAZIL

OFFENSIVE CASES

1) **DS 332 – 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 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 has been monitoring Brazil's claim of full compliance. **Given that the situation is stable, this case will not be included in the next edition.**

2) DS 472 – Certain Measures Concerning Taxation and Charges

Procedural stage: RPT

On 19 December 2013 the EC requested consultations with Brazil on certain Brazilian measures concerning taxation and charges affecting several economic sectors (e.g. automotive, computing and automation goods). The dispute also involves measures granting tax benefits to domestic goods produced in certain areas in Brazil, whatever the sector, and cross-cutting export support programmes.

These measures, taken as a whole and individually, increase the effective level of border protection in Brazil, whilst providing preferences and support to domestic producers and exporters, by inter alia (1) imposing a higher tax burden on imported goods than on domestic goods, (2) conditioning tax advantages to the use of domestic goods, and (3) providing export contingent subsidies.

The EU considers that these measures are inconsistent with Articles I:1, II:1(b), III:2, III:4, III:5 of the GATT 1994, Article 3.1(b) of the SCM Agreement and Article 2.1 of the TRIMS Agreement in conjunction with Article 2.2 and the Illustrative List in the Annex to the TRIMS Agreement.

Consultations were held in Geneva on 13 and 14 February 2014. Given that consultations failed to bring a satisfactory resolution to the dispute, the EU asked for a panel to be appointed. The DSB established a panel on 17 December 2014 to adjudicate the dispute. Argentina, Australia, China, India, Japan, Korea, Russia, Chinese Taipei, Turkey and the United States reserved their third-party right to participate in the panel's proceedings. Proceedings are ongoing.

Of note, Japan has launched a case against Brazil with the same scope and claims (DS 497). The establishment of the panel in DS 497 took place on 28 September 2015. The procedures for this dispute and for DS 472 have been merged. The first substantive meeting took place on 23 to 25 February 2016. The second substantive meeting took place on 31 May to 1 June 2016. The Panel report was circulated to the DSB on 30 August 2017. The Panel sided with the EU in all its claims.

Brazil appealed on 28 September 2017. Amongst other, Brazil challenged the Panel's characterisation of Inovar-Autos and the ICT programmes as product-related measures covered by the scope of non-discrimination obligations in Article III of the GATT; and as fiscal advantages contingent on the use of domestic over imported goods prohibited

under the SCM Agreement. Brazil also contended that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts of the case by assessing "export contingency" in the PEC and RECAP programmes within the meaning of Article 3.1(a) of the SCM Agreement; and by recommending under Article 4.7 of the SCM Agreement that prohibited subsidies be withdrawn in 90 days from the adoption of the reports.

In turn, the EU and Japan filed a cross-appeal taking issue with the Panel's erroneous exercise of judicial economy when omitting to make findings and recommendations on the imposition of requirements to use domestic products in the production of incentivised products under the ICT and Inovar-Autos programmes in the in-house scenario. By omitting to make such findings, the complainants took the view that the Panel did not "secure a positive resolution to the dispute".

The appeal hearing in cases DS472 (EU) and DS497 (Japan) was held on 19-20 June 2018.

On 13 December 2018, the Appellate Body adopted its Report which confirmed that Brazil's automotive and ICT programmes were:

- Inconsistent with Article III:2 of the GATT (national treatment), by subjecting imports to internal taxes in excess of those applied to like domestic products.
- Discriminated against imports in a manner that is inconsistent with Article III: 4 of the GATT and Article 2 of TRIMs Agreement (national treatment), by conditioning fiscal advantages to local content requirements.

The Appellate Body partially upheld the Panel's findings that by granting some tax exemptions, reductions and suspensions under the automotive and ICT programmes, Brazil confers subsidies contingent on the use of domestic over imported products, prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement. It upheld this with regard to so-called nested basic production processes ("PPB"), which it considered require as a condition the use of domestic components produced in accordance with their own PPB in order to benefit from the tax incentives. However, for the remaining PPBs, the Appellate Body found that they do not provide for more than a series of production steps which must be carried out in Brazil for a company to get fiscal advantages but do not require the use of domestic components and thus do not amount to prohibited subsidies.

The Appellate Body also endorsed the Panel's finding that the automotive programme is in breach of the MFN obligation under Article I of the GATT, by discriminating between automotive products originating from MERCOSUR and Mexico and automotive products originating from other WTO members.

The Appellate Body reversed the Panel's findings that:

- Brazil is in breach of Articles 3.1(a) and 3.2 of the SCM Agreement by providing subsidies contingent upon export performance through the PEC and RECAP programmes. This was based on the wrong identification by the Panel of the benchmark for comparison: the Panel should have determined the tax treatment of comparably situated tax payers, instead of seeking to determine the existence of a general rule whereby the tax suspensions would only apply to companies that structurally accumulate credits. Having reversed the Panel's findings on the identification of the benchmark, the Appellate Body then concluded that it was

not able to complete the analysis as to whether the tax suspensions granted under the PEC and RECAP programmes constituted illegal subsidies.

- The PADIS and the Digital Inclusion programmes require the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement.
- The prohibited subsidies should be removed within 90 days. The SCM Agreement provides that prohibited subsidies should be removed “without delay” and the Panel should specify a time-period in which they should be withdrawn. However, the Appellate Body found that the underlying reasoning of the Panel for giving a 90 day deadline was not related to the specific circumstances of this case. The Appellate Body did not complete the legal analysis and specify the time-period, as requested by Brazil, but left undisturbed the Panel's recommendations that Brazil withdraw the prohibited subsidies at issue “without delay”.

The DSB adopted the Appellate Body Reports on 11 January 2019. For the illegal subsidies, Article 4.7 of the SCM stipulates that Brazil must comply “without delay”, which the parties have agreed means that they must be withdrawn by 21 June 2019. For the other measures, it has a reasonable period of time, which was agreed by the parties as expiring on 31 December 2019.

At the DSB meeting of 27 January 2020 Brazil recalled the information contained in its status report of 16 January 2020. Brazil recalled that three programmes (INOVAR-AUTO, PATVD, and Digital Inclusion) have expired before the adoption of the reports of the Panel and of the AB and have not been renewed. With regard to the findings on "Processos Produtivos Básicos" (PPBs), Brazil noted that it has either revoked or substituted all implementing orders found to be inconsistent. With relation to the findings on the Informatics and PADIS programmes, Brazil stated that the Government of Brazil has enacted Law 13.969 of 26 December 2019, bringing those measures into conformity within the agreed RPT. Brazil considered that it is in full compliance with the DSB recommendations and rulings in this dispute. At the DSB meeting of 28 February, Brazil has not provided further status reports. The EU (and Japan) is currently analysing Brazil's compliance efforts.

DEFENSIVE CASE

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. **In absence of new developments since 2010, this case will not be included in the next edition.**

III – CANADA

OFFENSIVE CASE

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.

DEFENSIVE CASE**DS 48 – Hormones**

Procedural stage: mutually agreed solution reached

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

On 17 March 2011, the Commission and the Government of Canada signed a Memorandum of Understanding setting out a road-map that provides for a temporary solution to the dispute. Under this roadmap, Canada suspends all its sanctions on European products, while the EU increased market access opportunities for beef imports (WTO document WT/DS48/26).

Increased market access opportunities on the EU market 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 1 August 2012 (Phase 1), which were subsequently increased to 3,200 tons until 1 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).

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. The European Parliament and Council approved a proposal to increase the size of the TRQ as from 1st of August 2012.

On 28 September 2017 Canada and the EU notified a mutually agreed solution to the DSB referring to the conclusion of a Comprehensive Economic and Trade Agreement (CETA). Under the terms of the mutually agreed solution, Canada suspends all rights upon provisional application of CETA and renounces all rights upon its entry into force. **Given that the situation is stable under the mutually agreed solution, this case will not be included in the next edition.**

IV – CHINA**OFFENSIVE CASES****1) DS 407 – 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 continues to monitor the impact of the Chinese measure. **Given that the situation is stable, this case will not be included in the next edition.**

2) DS 509 – China – Duties and other Measures concerning the Exportation of Certain Raw Materials

Procedural stage: panel composition

On 19 July 2016, the European Union requested consultations with China regarding China's duties and other alleged restrictions on the export of various forms of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin.

The European Union claims that the measures are inconsistent with:

- Paragraphs 2(A)(2), 5.1, 5.2 and 11.3 of Part I of China's Accession Protocol, as well as paragraph 1.2 of the Accession Protocol (to the extent that it incorporates paragraphs 83, 84, 162 and 165 of the Report of the Working Party on the Accession of China); and
- Articles X:3(a) and XI:1 of the GATT 1994.

Mexico and Canada requested to join the consultations.

On 19 August 2016 the European Union added ferronickel to the list of raw materials subject to WTO-inconsistent export duties.

On 8 and 9 September 2016 the EU and the US (that filed a similar case DS508) held joint consultations with China in Geneva. Canada and Mexico participated in those consultations as third parties.

A panel was established at the DSB meeting on 23 November 2016.

After the establishment of a panel China informed the European Union that the measures which were subject to the complaint were not renewed for 2017. The Commission continues to monitor the situation in China. **Given that the situation is stable, this case will not be included in the next edition.**

3) DS 549 – China – Certain Measures on the Transfer of Technology

Procedural stage: consultations

On 1 June 2018, the European Union requested consultations with China regarding certain Chinese legislation concerning the transfer of foreign technology to China. The challenged measures include in particular regulations on the Administration of the Import and Export of Technologies (“TIER”) and on Joint Ventures (“JV Regulation”).

The European Union claims that these measures are inconsistent with Articles 3, Article 28.1(a) and (b), Article 28.2, Article 33 and Article 39.1 and 39.2 of the TRIPS Agreement.

Moreover the European Union alleges that China appears to apply and administer its laws, regulations and other measures governing the transfer of technology into China with a view of inducing the transfer of foreign technology to China, contrary to China's obligations under Article X.3(a) of the GATT 1994 and Paragraph 2(A)2 of the Protocol on the Accession of the People's Republic of China to the WTO.

Japan, the United States and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, requested to join the consultations.

On 20 December 2018, the European Union filed a revised request for consultations replacing the request of 1 June 2018 and expanding the scope of its claims. In addition to the measures covered in the request of 1st of June, the European Union challenged the following measures: the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (“JV Law”); the New Energy Vehicle Production Enterprises and Product Admissions Regulations (“NEV Regulation”); the Administration of the Examination, Approval and Registration of Foreign-invested Crop Seed Enterprises Provisions (“Seed FIE Approval Provisions”); the Measures for the Administration of Crop Seed Production and Operation Licenses (“Seed Measures”).

In addition to restating the claims contained in the request of 1 June 2018, in the revised request of 20 December 2018 the European Union also claims that:

- the JV Regulation operating separately or together with the JV Law, and the NEV Regulation, are inconsistent with paragraphs 1.2, as it incorporates commitments under paragraphs 49 and 203 of the Working Party Report on China's Accession to the WTO, and 7.3 of Part I of China's Protocol of Accession;
- the Seed FIE Approval Provisions and the Seed Measures, are inconsistent with paragraphs 1.2, as it incorporates commitments under paragraph 203 of the Working Party Report on China's Accession to the WTO, and 7.3 of Part I of China's Protocol of Accession;
- the TIER, operating separately or together with other relevant instruments, is inconsistent with paragraph 1.2, as it incorporates commitments under paragraphs 49 and 203 of the Working Party Report on China's Accession to the WTO, of Part I of China's Protocol of Accession.

On 15 January 2019, Chinese Taipei requested to join the revised consultations. On 18 January 2019, Japan and the United States requested to join the revised consultations.

Consultations between the EU and China took place on 19 and 20 February 2019 in Geneva.

DEFENSIVE CASES

- 1) **DS 452 – EU – Certain measures affecting the renewable energy generation sector**

Procedural stage: consultations

On 5 November 2012, China requested consultations with the European Union, regarding the local content requirements included in the Greek and Italian Feed-in-Tariffs (FIT) Programmes. The measures challenged include in particular Italy's Fifth and Fourth Energy Bills (Ministerial Decree of 5 July 2012 and 5 May 2011 respectively) and Greece' Law 4062/2012 (FEK A'70/30.03.2012) of 27 March 2012 on the "Development of the Athens former international airport Hellinikon - Project HELIOS - Promotion of the use of energy from renewable sources (Integration of Directive 2009/28/EC) Sustainability criteria of biofuel and bioliquids (integration of Directive 2009/30/EC)".

China claims that these measures are inconsistent with: Articles I, III:1, III:4 and III:5 of the GATT 1994; Articles 3.1(b) and 3.2 of the SCM Agreement; and Articles 2.1 and 2.2 of the TRIMs Agreement.

The EU accepted the request for consultations and the participation of Japan as third party. **The case has not proceeded further since 2012 and it will therefore not be included in the next edition.**

2) DS 516 – European Union – Measures Related to Price Comparison

Procedural stage: panel proceedings suspended

On 12 December 2016, China requested consultations with the European Union concerning certain provisions of the EU regulation pertaining to the determination of normal value for "non-market economy" countries in anti-dumping proceedings involving products from China.

China claimed that the measures appear to be inconsistent with:

- Articles 2.1 and 2.2 of the Anti-Dumping Agreement; and
- Articles I:1 and VI:1 of the GATT 1994.

The consultations were held on 23 January 2017 in Geneva. China requested the establishment of a panel for the first time on 9 March 2017, which the EU opposed. Following China's second panel request, the panel was established at the special DSB meeting of 3 April 2017. The panel was composed by the DG of the WTO on 10 July 2017. The first oral hearing took place on 6-7 December 2017. Second written submissions were filed in February 2018. The second hearing took place on 15-17 May 2018.

On 7 May 2019, China requested the Panel to suspend, until further notice, the Panel's work, pursuant to Article 12.12 of the DSU. On 21 May 2019, the European Union commented on China's request, asking the Panel to take a number of considerations into account in deciding whether to grant China's request. On 23 May 2019, China responded to the European Union's comments, reiterating its request for suspension. On 14 June 2019, the Panel decided to grant China's request and suspend its work.

V – COLOMBIA**OFFENSIVE CASES****1) DS 502 – Colombia – Measures Concerning Imported Spirits**

Procedural stage: panel established

On 13 January 2016, the European Union requested consultations with Colombia over a number of discriminatory measures placing EU produced spirits at a disadvantage in the Colombian market.

The EU industry is seriously affected by these measures and reform is long overdue. The case is also linked to the fact that Colombia did not eliminate the discrimination within the deadline of 1 August 2015 set out in the bilateral Trade Agreement with the European Union.

The request of the EU concerns Colombia's higher taxes and charges imposed on imported spirits and other market access restrictions imposed at the level of the "*departamentos*" (administrative subdivisions of Colombia).

First, Colombia applies a higher tax and higher regional charges on imported spirits than the ones it applies on domestically produced spirits. The consumption tax or regional charge ("*participación*") is imposed based on degree of alcohol: spirits with alcohol content higher than 35% alcohol by volume (ABV) pay a higher tax in comparison to those with less than 35% abv. While domestically produced spirits usually contain less than 35% ABV, EU imports contain more than 35% ABV and hence pay a higher tax.

Second, the regional departments ("*departamentos*") exercising the fiscal monopoly over the introduction and commercialization of spirits restrict the access of imported spirits in the territory of their jurisdiction through the operation of the so-called contracts of introduction which include a number of restrictive clauses.

The EU considers that these measures are WTO inconsistent, in particular with Article III and Article X of the GATT 1994, but also Article XXIV: 12 of the GATT 1994. Consultations took place in Bogotá on 8-9 March 2016. The EU requested the establishment of a WTO panel on 05 September 2016 and Colombia blocked the establishment at this first request. The WTO panel was established upon a second request on 26 September 2016. Brazil, Canada, Chile, China, El Salvador, Guatemala, India, Kazakhstan, Korea, Mexico, Panama, the Russian Federation, Chinese Taipei and the United States reserved their third-party rights.

On 23 December 2016, the Colombian Congress approved a law reforming the spirits' regime that entered into force on 1 January 2017. The law modifies both the fiscal regime in Colombia and the marketing restrictions applied by the *departamentos* in the exercise of the so-called fiscal monopoly over spirits. Given the decentralized system of Colombia, the law is implemented by the *departamentos* through local measures. The European Commission continues to monitor the implementation of the Law in the departments. **Given that the situation is stable, this case will not be included in the next edition.**

2) DS 591 – Colombia – AD Duties on Frozen Fries

Procedural stage: panel establishment requested

On 15 November 2019, the European Union requested consultations with Colombia over Colombia's imposition of anti-dumping measures on frozen fries from Belgium, the Netherlands and Germany.

In November 2018, Colombia imposed definitive anti-dumping (AD) measures on imports of frozen fries from Belgium, Germany and the Netherlands. The duties ranged from around 3% to around 8% and were imposed for a period of two years.

The EU considers that the investigation of dumping, injury and causality that led to the imposition of duties were WTO-inconsistent, in particular with Articles 1, 2.1, 2.4, 2.4.1, 2.6, 3, 3.1, 3.2, 3.4, 3.5, 3.6, 3.7, 3.8, 5.3, 5.8, 6.1.2, 6.2, 6.4, 6.5, 6.5.1, 6.8, 6.9, 9.1, 9.2, 9.3, 11.1, 12.2, 12.2.2, 18.1, and paragraphs 3 and 6 of Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement); Article 10 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement); and Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

Consultations took place with Colombia on 15 and 16 January 2020 but failed to resolve the issue. On 17 February 2020, the EU asked that the request for the establishment of a panel be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 28 February 2020. At the DSB meeting Colombia has blocked this first request for the establishment of a panel.

VI – INDIA

OFFENSIVE CASES

1) DS 304 – 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. **In so far as it remains relevant, the contested measures are addressed under DS380, and this case will not be included in the next edition.**

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. **In absence of new developments since 2010, this case will not be included in the next edition.**

3) DS 582 – ICT Products

Procedural stage: panel establishment requested

On 2 April 2019, the EU requested consultations with India on excessive tariffs on ICT products. India had introduced a duty-free regime in its WTO bound Schedule on ICT products as a translation of its ITA-1 commitments. However, since 2014, India has been progressively re-introduced import duties on certain ICT products and regularly increased them.

The EU has challenged India's excessive tariffs on ICT products on the basis of GATT Article II:1. India accords to the EU commerce of certain ICT products treatment less favourable than that provided for in its WTO bound Schedule.

Consultations with India took place on 21 May 2019, but failed to resolve the issue. The Commission followed up with the analysis of the elements provided by India at the occasion of the consultation meeting. This analysis confirmed the Commission's position on India's tariffs on ICT products. On 17 February 2020, the EU asked that the request for the establishment of a panel be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 28 February 2020. At the DSB meeting India has blocked this first request for establishment of a panel.

DEFENSIVE CASES

1) 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 taken any further steps. **In absence of new developments since 2009, this case will not be included in the next edition.**

2) DS 408 – 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. **In absence of new developments since 2010, this case will not be included in the next edition.**

VII – INDONESIA

OFFENSIVE CASE

DS 592 – Measures Relating to Raw Materials

Procedural stage: consultations

On 22 November 2019, the EU requested consultations with Indonesia with respect to various measures restricting exports of certain input materials for the production of stainless steel, notably nickel, scraps, coal and coke, iron ore and chromium; in particular export restrictions and prohibitions as well as domestic processing requirements, domestic marketing obligations and export licensing procedures. The EU's request also covers an import duty exemption scheme which amounts to a prohibited subsidy conditional upon the use of domestic over imported goods and that applies across several industries.

The EU and Indonesia held consultations on 30 January 2020 in Geneva.

DEFENSIVE CASE

DS 593 – Certain measures concerning palm oil and oil palm crop-based biofuels

Procedural stage: panel establishment requested

On 9 December 2019, Indonesia filed a WTO request for consultations with the EU taking issue with the EU's renewable energy framework, notably the recast Renewable Energy Directive (EU) No 2018/2001 (RED II) and the related Delegated Regulation (EU) No 2019/807, as well as certain French measures which establish incentive schemes for biofuels (DS593). Indonesia attacks the EU measures under the WTO Agreements on Technical Barriers to Trade (TBT), Tariffs and Trade (GATT) and subsidies (SCM). Indonesia claims the measures are *inter alia* constitute unnecessary obstacles to trade, fail to rely on scientific evidence and relevant international standards, amount to quantitative restrictions, as well as fail

to ensure a uniform, impartial and reasonable administration of laws by the EU. Indonesia also claims that certain Member State support schemes amount to actionable subsidies causing adverse effect to Indonesia's interests.

The EU and Indonesia held consultations on 19 February 2020 in Geneva, attended also by Colombia, Costa Rica, Guatemala, Malaysia and Thailand as third parties.

On 18 March 2020, Indonesia requested the establishment of a WTO panel.

VIII – 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 spirits 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* were adopted at the DSB meeting of 20 January 2012.

The Philippines and complainants agreed that the reasonable period of time to implement would end on 8 March 2013.

The EU has closely followed the Philippines' on-going work to reform their taxation system on distilled spirits.

On 19 December 2012 the Philippines adopted a new tax reform law. At the DSB of 28 January 2013 the Philippines claimed full compliance. The EU follows closely the situation on the ground. **Given that the situation is stable, this case will not be included in the next edition.**

IX – RUSSIA**OFFENSIVE CASES****1) DS 475 – Russian Federation – Import ban on life pigs, pork and certain pig products originating in the EU**

Procedural stage: arbitration under Article 22.6 of the DSU; panel proceedings under Article 21.5 of the DSU

On 8 April 2014, the European Union requested consultations with the Russian Federation regarding Russia's import ban on life pigs, pork and certain pig products originating in the EU. Following the finding of two dead wild boars in Lithuania and two wild boars in Poland that were diagnosed with African swine fever (ASF) end of January and beginning of February 2014 respectively, the Russian Federation imposed an import ban on the mentioned products from Lithuania and Poland. However, no imports of life pigs, pork and certain pig products from the entire EU were accepted since 27 January 2014, purportedly because the requirements of the necessary veterinary certificates were not fulfilled. In spring 2014 Russia also imposed bans against Latvia and Estonia where cases of ASF were detected.

In July 2016, the panel was established. The EU challenged the EU-wide ban on life pigs, pork and certain pig products and the four national bans as, according to the EU, all measures to prevent the spread of the disease were immediately taken in full transparency vis-à-vis Russia. Australia, Brazil, China, India, Japan, Korea, Norway, Chinese Taipei, South Africa and the United States had reserved their third-party rights.

The panel report was circulated to Members on 19 August 2016 and was a clear victory for the EU.

The EU challenged the bans as being inconsistent with several provisions of the SPS Agreement relative to: harmonization (Articles 3.1, 3.2, and 3.3), adaptation to regional conditions (Articles 6.1, 6.2, and 6.3), SPS approval procedures (Article 8 and Annex C), the scientific basis of the measures (Articles 5.1, 5.2, 5.7 and 2.2), the application of SPS measures (Articles 5.3, 5.4, and 5.6), discrimination (Articles 2.3 and 5.5), and transparency (Articles 7 and Annex B).

The panel found that contrary to Russia's claims there was an EU wide ban in place which constituted a SPS measure. Regarding the claims on harmonization, the panel found that the EU wide ban neither conformed to nor was it based on the relevant OIE international standards existing for ASF. In addition, also the national bans were overwhelmingly neither conforming to nor based on those standards with the exception of the ban on non-treated products from Latvia which were found to be based on those standards and therefore consistent with Article 3.2 of the SPS Agreement.

In respect of adaptation to regional conditions, the panel found that as of 11 September 2014, the EU had provided to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are: (i) areas within the EU territory outside Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so; as well as (ii) areas within Estonia, Latvia, Lithuania, and Poland that are free of ASF and are likely to remain so. Thus, Russia violated Article 6.3 of the SPS Agreement. Only in relation to the national ban regarding Latvia, the EU failed to provide to Russia the necessary evidence to objectively demonstrate that there are areas within Latvia that are likely to remain ASF-free. The panel also found that Russia did not

adapt the EU-wide ban and the bans on products from Estonia, Latvia, Lithuania, and Poland to the SPS characteristics of the areas from where the products originated nor to the ASF-related characteristics in Russia and thus violated Article 6.2 of the SPS Agreement.

Regarding Russia's SPS approval procedures, notably the approval of the EU regionalisation measures, the panel found that this falls within the scope of Article 8 and Annex C(1) of the SPS Agreement; and Russia required information that was not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c), and completed the procedure with undue delay, thus breaching Annex C(1)(a), with the result that the procedure was also inconsistent with Article 8 of the SPS Agreement.

Concerning the scientific claims raised, the panel confirmed the EU's view that Russia failed to perform a risk assessment on which it could base its measures and thus breached Article 5.1. and 5.2. It also found that the bans do not fulfil the conditions to qualify as provisional measures pursuant to Article 5.7. The qualified exemption from the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is thus not available to Russia.

Regarding the application of the SPS measures, the panel found that the EU-wide ban and the Member State bans are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade restrictive than required to achieve Russia's appropriate level of protection (ALOP). In light of this and the lack of rebuttal by Russia of the presumption of inconsistency with Article 2.2 arising from a finding of inconsistency with Article 5.6, the panel found the measures to be inconsistent with Article 2.2 of the SPS Agreement.

In respect of claims pertaining to discrimination, the panel confirmed the EU's view that Russia's measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. The panel also found that Russia's measures are inconsistent with Article 2.3, second sentence, because they are applied in a manner which constitutes a disguised restriction on international trade. Lastly, the panel exercised judicial economy with respect to the EU's claims under Article 5.5.

On 23 September 2016, Russia appealed to the Appellate Body ('AB') a number of errors of law and legal interpretation contained in the Panel report with respect to the attribution of the EU-wide ban and Article 6 of the SPS Agreement, and therefore prevented the DSB from adopting it. On 28 September 2016, the EU filed a cross-appeal to the Appellate Body regarding one issue of law and legal interpretation regarding Article 6 of the SPS Agreement contained in the Panel Report. The Members of the Appellate Body division hearing the appeal were: Shree B.C. Servansing, Ricardo Ramirez-Hernandez and Peter Van den Bossche.

On 23 February 2017, the Appellate Body issued its report which is a clear success for the EU as the AB upheld the panel's finding that the EU wide import ban was a measure that could be attributed to Russia and thus, it upheld the panel's finding that the ban is inconsistent with several provisions of the WTO SPS Agreement. The AB also sided with the EU's cross-appeal and found that Russia did not meet further obligations under the SPS Agreement.

In detail, the AB rejected Russia's claim that the EU-wide ban is not a measure that can be attributed to the Russian Federation. Russia argued that the basis for the ban emanates from the wording of the veterinary certificate which would be not an act attributable to

Russia. The AB considered that the measure at issue consisted of Russia's decision to deny the importation of the products at issue from the whole EU stemming from the requirement, set out in the bilateral veterinary certificates agreed between Russia and the EU, that the entire EU be free from ASF for a period of at least three years. However, according to the AB, the fact that the basis for the ban may not have been set out in Russian law does not alter the conclusion that the action of restricting imports of the products at issue is attributable to Russia. The AB also considered that the panel was not barred from reviewing the WTO consistency of the EU-wide ban due to commitments set out in Russia's terms of accession to the WTO. Irrespective of the commitment in Russia's terms of accession regarding which veterinary certificate would be operative in the conduct of certain trade to Russia from other WTO Members, Russia remains under an ongoing obligation, pursuant to Article 6 of the SPS Agreement, to adapt its measures to regional SPS characteristics.

Secondly, Russia had claimed that the panel erred in the interpretation of Article 6(3) of the SPS Agreement by not finding that this provision requires consideration of the evidence relied upon by the importing Member and that this provision also contemplates a certain period of time for the importing Member to evaluate and verify evidence provided by the exporting Member. The AB rejected Russia's claims and found that although all the pertinent evidence in respect of SPS characteristics of the relevant areas needs to be evaluated, the requirement of taking into account the evidence by the importing Member is not contained in Article 6(3). The obligations of the importing Member in connection with the process of adapting measures to regional SPS characteristics are set forth in Articles 6(1) and 6(2); Article 6(3) in turn sets out the duties of an exporting Member claiming that areas within its territory are pest- or disease-free. Therefore, the panel's task under that provision is to evaluate whether the evidence provided by the EU (as exporting Member) was sufficient to enable Russia (as the importing Member) to make a determination as to the pest status of the relevant areas. As a consequence, the AB found that the panel did not err in its interpretation of Article 6(3) by not finding that this provision requires consideration of the evidence relied upon by the importing Member. Russia had further contended that the importing Member's evaluation whether the exporting Member has provided the "necessary" evidence requires a certain amount of time to be completed. The AB disagreed with Russia and found that such duties and obligations are covered by the disciplines of Articles 6(1) and (2), and are not part of the exporting Member duties pursuant to Article 6(3). The AB found that the Panel did not err in its interpretation of Article 6(3) by not taking into account the time required for the Russian authorities to evaluate and verify the evidence provided by the EU.

Thirdly, Russia had claimed that the panel erred in its interpretation of Article 6(1) in finding that an importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within the exporting Member's territory even in a situation where the exporting Member has failed to provide the necessary evidence pursuant to Article 6(3) in order to objectively demonstrate that such areas are and are likely to remain pest- or disease-free or of low pest prevalence. Therefore the panel would have erred in finding that the ban on imports from Latvia is inconsistent with Article 6(1).

The AB recalled that the panel in the context of its analysis of Article 6(3) had found that the EU had demonstrated that there were ASF-free areas in Latvia, in accordance with Article 6(1). The panel had also found that the EU did not provide the necessary evidence that these areas were likely to remain so and that therefore the EU did not comply with Article 6(3). The exporting Member's failure to provide the necessary evidence to objectively demonstrate that areas within its territory will remain disease or pest-free thus

does have implications for the importing Member's ability to assess the SPS characteristics of such areas to adapt its measures accordingly. There can be situations however – like in India – Agricultural Products, where this is not the case. A panel should have provided a reasoning explaining why the circumstances of the dispute fall within this situation. Therefore, the AB modified the panel's finding in that respect and found that the EU failed to demonstrate that Russia did not adapt the ban to SPS characteristics of the Latvian territory. However, given the panel's (not appealed) finding that Russia failed to adapt the ban to SPS characteristics of areas within the Russian territory, the conclusion that this measure is inconsistent with Article 6(1) stands.

Regarding the EU's cross appeal, the AB agreed with the EU that the panel erred in finding that Russia recognises the concept of pest- or disease-free areas or of low pest or disease prevalence in respect of ASF and that therefore the EU-wide ban and the country-specific bans are not inconsistent with Article 6(2). The EU had argued that the panel wrongly considered that Article 6(2) requires merely an "abstract" recognition of the concept of regionalisation, for instance, in the form of a pre-existing regulatory framework. The AB found that the panel failed to explore whether or to what extent Russia's practice with respect to SPS measures provided an effective opportunity for the EU to claim that certain areas within its territory are pest- or disease free or of low pest or disease prevalence, rendering operational the concept of regionalisation. Therefore, the Appellate Body reversed the panel's findings and found that the EU-wide ban and the country-specific bans are inconsistent with Article 6(2) of the SPS Agreement.

The panel report as modified by the Appellate Body was adopted on 21 March 2017. After the adoption of the reports, the EU and Russia agreed on a reasonable period of time for Russia to comply. This period was fixed at 8½ months, expiring on 6 December 2017. On 8 December 2017 Russia informed the DSB of measures taken on 5 December 2017 to comply with the recommendations and rulings.

In the absence of a sequencing agreement with the Russian Federation, the EU requested on 19 December 2017 authorization from the DSB to suspend concessions at the level of €1,39 billion. On 20 December 2017 the Russian Federation informed the DSB that it has complied and that it objects to the level of suspension requested. A special DSB meeting took place on 3 January 2018 with the matter now referred to arbitration in line with Article 22.6 of the DSU.

On 28 February 2018 consultations were held on Russia's compliance under Article 21.5 of the DSU on the basis of the Russian request of 25 January 2018 and the EU request of 2 February 2018.

Following the EU request for the establishment of a panel, the DSB referred the matter to the original panel on 21 November 2018. **On 28 January 2020, the panel suspended its work at the request of the EU.**

2) DS 462 – Russian Federation – Recycling Fee on Motor Vehicles

Procedural stage: consultations

On 9 July 2013, the European Union requested consultations with the Russian Federation regarding Russia's measures relating to a charge, the so- called "recycling fee", imposed on motor vehicles.

According to the European Union, the Russian Federation imposes the recycling fee only on imported motor vehicles. Under certain conditions, domestic vehicles, as well as

vehicles imported from Belarus and Kazakhstan, are exempted from the fee. In contrast, there is no exemption from the fee for vehicles imported from the European Union.

The European Union also argues that the structure of the recycling fee has a detrimental impact on imported vehicles as compared with relevant domestic vehicles, because the fee is progressive and differentiates between "new vehicles" and "vehicles produced more than 3 years ago".

The European Union claims that the measures appear to be inconsistent with:

- Articles I:1, II:1(a), II:1(b), III:2 and III:4 of the GATT 1994; and
- Article 2.1 and 2.2 of the TRIMs Agreement.

The United States, Japan, China, Turkey and Ukraine requested to join the consultations and Russia accepted those requests. The consultations were held in Brussels. On 10 October 2013, the EU tabled a request for the establishment of a panel. The establishment was blocked by Russia at the first DSB meeting on 22 October 2013.

At its meeting on 25 November 2013, the DSB established a panel. China, India, Japan, Korea, Norway, Turkey, Ukraine and the United States reserved their third-party rights. Subsequently, Brazil reserved its third-party rights. **Since Russia has modified its legislation extending the “recycling fee” to domestic producers, the EU has not taken the case forward. In absence of new developments since 2013, this case will not be included in the next edition.**

DEFENSIVE CASES

1) **DS 474 – European Union – Cost Adjustment Methodologies and Certain Anti-dumping Measures on Imports from Russia**

Procedural stage: panel composition

On 4 June 2014 the Russia requested the establishment of a panel regarding “cost adjustment” methodologies used by the EU for the calculation of normal value and consequently, dumping margins in anti-dumping investigations and reviews covering: (a) the rejection of prices of sales of “like products” in the country of origin in “particular market situations”; (b) the rejection of cost and price information of producers and exporters in the country of origin, including data on energy inputs as part of the manufacturing costs; and (c) the effect of such rejection of cost and price data on the determination of dumping margins and injury caused by dumped imports, as well as on the imposition, continuation and collection of anti-dumping duties.

Russia claims that the measures are inconsistent with:

- (1) Articles 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 5.8, 6.8, 8.1, 9.2, 9.3, 11.1, 11.2, 11.3, 18.1 and 18.4, and Annex II, of the Anti-Dumping Agreement;
- (2) Articles I, VI and X:3 (a) of the GATT 1994; and
- (3) Article XVI:4 of the WTO Agreement.

The request for consultations was made on 23 December 2013. Consultations took place on 13 and 14 February 2014 in Geneva. At the request of Russia a second round of consultations took place on 25 April 2014 in Geneva. On 4 June 2014 Russia requested

the establishment of a panel which was established at the DSB meeting of 22 July 2014. **In absence of new developments since 2014, this case will not be included in the next edition.**

2) DS 476 – European Union and Certain Member States – Certain Measures Relating to the Energy Sector ("Third energy package")

Procedural stage: appeal proceedings suspended

On 30 April 2014, the Russian Federation (Russia) requested consultations with the European Union regarding certain measures in the energy sector, in particular the Third Energy Package ("TEP"). Two rounds of WTO consultations took place on 23-24 June 2014 in Geneva and on 10 July 2014 in Brussels. While Russia refrained from requesting the establishment of the panel for over 10 months, it did so on 11 May 2015. The panel was established on 20 July 2015 and composed on 7 March 2016. The first hearing took place on 4-5 September 2016. The second hearing took place on 28 February – 1 March 2017. The panel issued its (confidential) report to the parties on 24 October 2017. Due to a backlog in translation, the panel report was only circulated to WTO members on 10 August 2018.

The legal challenge mounted by Russia is two-pronged.

First, Russia challenges the consistency with the GATS and the GATT of certain provisions of the TEP and related instruments with respect to: the unbundling of transmission system operators and transmission networks from activities in the production and supply of natural gas and electricity; the certification requirements in relation to transmission system operator where the system operator or system owner is controlled by person(s) from third countries; and certain infrastructure-related exemptions, which also apply to the requirement to grant access to natural gas network capacity by transmission service operators (i.e. third party access). Russia considers these measures discriminatory, restrictive and not administered in a reasonable, objective and impartial manner.

Second, Russia challenges the consistency with the GATS and the GATT of certain regulations establishing trans-European energy infrastructure priority corridors and areas and setting forth criteria to identify "projects of common interest" (PCIs). Russia alleges that the fact that the initial list of PCIs does not include any project to facilitate the importation or transportation of natural gas from Russia results in discrimination against Russian services and service suppliers as well as against the importation of natural gas originating in Russia.

Russia claims that the measures are inconsistent with:

- Articles II, VI, XVI and XVII of the GATS and the specific commitments under GATS
- Articles I, III, X and XI of the GATT 1994

In its report, the panel rejected all Russia's claims with respect to the unbundling measure (which is pivotal for the Third Energy Package), the public body measure, the LNG measure and the upstream pipeline networks measure. The panel also rejected Russia's claims with respect to the infrastructure exemption measure, except for two conditions attached to the OPAL decision, which were found to be a trade restriction inconsistent with Article XI:1 of the GATT.

Furthermore, the panel rejected Russia's claims with respect to the third-country certification measure enshrined in the EU directive. However, the panel found the implementation of such measure by Croatia, Hungary and Lithuania to be inconsistent with the national treatment obligation under Article XVII GATS and not justified under the general exception in Article XIV(a) GATS.

As regards the TEN-E measure, the panel found it to be inconsistent with Articles I:1 and III:4 GATT and not justified under the general exception in Article XX(j) GATT.

On 21 September 2018 the EU appealed the panel report with regard to the findings where Russia prevailed (TEN-E Regulation, implementation of third country certification by Croatia, Hungary and Lithuania, and OPAL exemption decision).

On 26 September 2018 Russia cross-appealed on most of the findings where they lost at the panel stage, with the exception of the GATT claims for unbundling and the GATS Market Access findings which they accepted.

On 10 December 2019, the Division of the Appellate Body hearing the appeal decided to suspend its work pursuant to Rule 16 of the Working Procedures for Appellate Review.

3) DS 494 – European Union – Cost Adjustment Methodologies and Certain Anti-dumping Measures on Imports from Russia (second complaint)

Procedural stage: panel proceedings

On 7 May 2015, Russia requested consultations with the European Union regarding “cost adjustment” methodologies used by the EU for the calculation of dumping margins in anti-dumping investigations and reviews.

The subject matter of the request is similar to the one in another WTO dispute launched by Russia in December 2013 (DS 474). However, the current request also targets developments which occurred after the consultations and panel request in DS 474 were made (respectively in December 2013 and June 2014). These developments relate to the results of expiry reviews which were adopted concerning ammonium nitrate on 23 September 2014 (Regulation 999/2014) and concerning welded tubes and pipes on 26 January 2015 (Regulation 2015/110). Both measures have been maintained with regard to Russia. In addition, in this new request, Russia has also challenged the expiry review procedures and practice separately from the cost adjustment methodologies and has also questioned the decision to repeal measures against Ukraine.

Russia claims that the measures are inconsistent with:

Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 5.8, 6.8, 9.2, 9.3, 11.1, 11.2, 11.3, 11.4, 17.6, 18.1 and 18.4, and Annex II, of the Anti-Dumping Agreement;

Articles 10 and 32.1 of the SCM Agreement;

Articles I, VI:1, VI:2, VI:6 and X:3(a) of the GATT 1994; and

Article XVI:4 of the WTO Agreement.

Consultations were held in Geneva on 26 June 2015.

On 29 March 2016 Russia requested additional consultations in this case. Those consultations concern mainly the Commission Implementing Regulation (EU) No 999/2014 of 23 September 2014 adopted following the expiry review proceeding extending the duration of anti-dumping measures on imports of ammonium nitrate originating in Russia. The additional consultations took place on 19 May 2016.

On 7 November 2016 Russia requested the establishment of a panel. The panel was established at the DSB meeting on 16 December 2016.

Following the agreement of the parties, the panel was composed on 17 December 2018. The panel proceedings are ongoing with hearings held in the course of September and November 2019.

4) DS 521 – European Union – Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia

Procedural stage: consultations

On 27 January 2017, the Russian Federation requested consultations with the European Union with respect to the anti-dumping measures imposed by the European Union on imports of certain cold-rolled flat steel products originating in the Russian Federation pursuant to the following:

- (a) Commission Implementing Regulation (EU) 2016/181 of 10 February 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation,²
- (b) Commission Implementing Regulation (EU) 2016/1328 of 29 July 2016 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation,³
- (c) Commission Implementing Regulation (EU) 2016/1329 of 29 July 2016 levying the definitive anti-dumping duty on the registered imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation.⁴

The Russian Federation claimed that the measures appear to be inconsistent with:

- Articles 1, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.3, 3.4, 3.5, 5.2, 5.3, 5.8, 6.1, 6.2, 6.5, 6.8, 6.9, 6.13, 9.1, 9.2, 9.3, 10.6, 12.2, 18.1 and paragraphs 1, 2, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement; and
- Article VI of the GATT 1994.

The consultations took place on 8 June 2017 in Geneva. While Russia refrained from requesting the establishment of the panel for almost 2 years, it did so on 13 March 2019. At its meeting of 11 April 2019, the DSB deferred the establishment of a panel. The panel was established on 26 April 2019. China, India, Japan, Korea, Saudi Arabia, Ukraine and the United States reserved their third-party rights.

² OJ L 37, 12.2.2016, p. 1-39.

³ OJ L 210, 4.8.2016, p. 1-26.

⁴ OJ L 210, 4.8.2016, p. 27-42.

At the request of Russia of 6 March 2020, according to Article 8(7) DSU, the WTO Director General determined the composition of the Panel on 16 March 2020. Further procedural steps are currently pending due to restrictions related to the current health crisis.

X – 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 2008 in Bangkok. The Commission continues to monitor the situation. **Given that the situation is stable, this case will not be included in the next edition.**

XI – TURKEY

OFFENSIVE CASE

DS 583 – Pharmaceuticals

Procedural stage: panel composed

On 2 April 2019, the European Union requested consultations with Turkey regarding various measures concerning the production, importation and marketing of pharmaceutical products. Turkey has since 2016 implemented measures to achieve progressively the localisation in Turkey of the production of a substantial part of the pharmaceutical products consumed in Turkey. These measures are:

The localisation requirement: The Turkish authorities have adopted plans to achieve progressively the localisation in Turkey of the production of a substantial part of the pharmaceutical products consumed in Turkey. In order to achieve that objective, Turkey requires foreign producers to commit to localise in Turkey their production of certain pharmaceutical products. If such commitments are not given, are not accepted by Turkish authorities, or are not fulfilled, the pharmaceutical products concerned are excluded from the scheme for the reimbursement of the pharmaceutical products sold by pharmacies to patients operated by Turkey's social security system (the "reimbursement scheme"). That scheme covers the vast majority of sales of pharmaceutical products by pharmacies to patients. Consequently, if an imported pharmaceutical product is excluded from the reimbursement scheme, its competitive opportunities in the Turkish market are significantly impaired, as compared with domestically produced like products.

In order to comply with the above described localisation requirement (the "localisation requirement"), certain producers of pharmaceutical products commit to localise their production of certain pharmaceutical products in Turkey. In those cases where foreign producers do not give the required commitments to localise (or where their offered commitments are rejected, or are considered not to be fulfilled, by the Turkish authorities), the pharmaceutical products concerned are no longer reimbursed. The localisation requirement is designed to apply on an ongoing basis, or at least until the localisation objectives established by the Turkish government are achieved.

The specific commitments to be implemented in order to comply with the localisation requirement are established for each foreign producer in a non-transparent manner and may differ from producer to producer.

The import ban on localised products: Where the production of a pharmaceutical product has been localised in Turkey in accordance with the localisation requirement, applied in conjunction with the Turkish rules for approving the importation and marketing of pharmaceutical products, the importation of that pharmaceutical product is no longer permitted ("the import ban on localised products").

Prioritisation: Even in certain cases where imported products are not excluded from the reimbursement scheme by virtue of the localisation requirement, Turkey gives priority to the review of applications for inclusion of domestic pharmaceutical products in the list of products covered by the reimbursement scheme, as well as with respect to any pricing and licensing policies and processes, over the review of the applications of like imported products (the "prioritization measure").

The relevant WTO provisions concerned are:

- Articles III:4, X:1, and XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994);
- Article 2.1 of the Agreement on Trade Related Investment Measures (TRIMs Agreement); and
- Article 3.1.(b) of the Agreement on Subsidies and Countervailing Measures (ASCM).

The consultations in this case took place on 9 and 10 May 2019 in Geneva with a view to reaching a mutually satisfactory solution. These consultations, however, failed to resolve the dispute. At the DSB meeting of 30 September 2019, the panel was established in this

dispute. **The panel was composed on 17 March 2020. The panel proceeding is currently on-going.**

DEFENSIVE CASE

DS 595 – Safeguard measures on certain steel products

Procedural stage: consultations

On 13 March 2020, Turkey requested consultations with the European Union concerning the provisional and definitive safeguard measures imposed by the European Union on imports of certain steel products and the investigation that led to the imposition of those measures.

Turkey claimed that the measures appear to be inconsistent with: Articles 2.1, 2.2, 3.1, 4.1(b), 4.1(c), 4.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 5.2, 6, 7.1, 7.4 and 9.1 of the Agreement on Safeguards; and Articles I:1, II:1(b), XIII:1, XIII:2 and XIX:1(a) of the GATT 1994.

The EU has accepted the request to enter into consultations on 23 March 2020.

XII – 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 and subsequent codified Council Regulation (EU) 2018/196, 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.

As of May 2019, the authorized level of retaliation covers, over one year, a total value of trade that does not exceed USD 3.355,82. The new level of retaliation of USD 3.355,82 represents a decrease as compared to the previous level of retaliation until 30 April 2019, amounting to USD 682.823. The level of retaliation from 1 May 2019 has been established on the basis of the latest CDSOA distribution of anti-dumping and anti-subsidy duties collected during the fiscal year 2018 (i.e. from 1 October 2017 to 30 September 2018), published by U.S. Customs and Border Protection on 13 December 2018. Since the level of suspension could not be adjusted to the level of nullification or impairment by adding or removing products from Annex I (sweet corn, crane lorries, spectacles frames and mountings, and women or girls' cotton denim trousers and breeches), the rate of additional duty to which Annex I products are subjected was amended, i.e. it decreased from 2018's 0.3% to 0.001% in order to adjust to the level of retaliation (Commission Delegated Regulation (EU) 2019/673 of 27 February 2019 (OJ L 114, 30 April 2019).

On 25 November 2019, new disbursement report was published by U.S. Customs and Border Protection and based on those values, [on 21 February 2020, the Commission adopted] the amendment to the Regulation. New level of nullification and impairment is set to 25.506,30 USD and the additional duty on products on list in Annex I (sweet corn, crane lorries, spectacles frames and mountings, and women or girls' cotton denim trousers and breeches) is set to 0,012%. Absent objections from the European Parliament and the Council, the Regulation will enter into force on 1 May 2020.

2) 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.

3) **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. **Given that the situation is stable, this case will not be included in the next edition.**

4) **DS 317 and DS 353 – Aircraft**

Procedural stage: Article 22.6 arbitration

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 considered that the US Government has been following 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, as well as through tax reductions and exemptions and infrastructure support for the development and production of Boeing's 787 in the State of Washington, and other benefits in the states of Kansas and Illinois. (For an updated summary of the EU's WTO Challenge of US Subsidies to Boeing: http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_134957.pdf)

The EU considered that these 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.

At 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 explicitly listing 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 C. Falconer (Chairperson), Mr. F. Orrego Vicuna and V. Plasai (members). On 4 December 2006, the WTO Secretariat renamed DS317 bis, which became DS353.

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 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 2007, 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).

The panel report was circulated 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 division hearing the appeal included Ms L. Bautista (Presiding member) Mr D. Unterhalter and Ms Y Zhang (members). Oral hearings took place 16-19 August 2011 and 11-14 October 2011.

On 12 March 2012, the AB report was circulated to Members. The AB report was very positive for the EU, as it has confirmed almost all the core findings of the panel report i.e. that NASA/DOD, FSC/ETI and Washington State B&O tax subsidies cause adverse effects to Airbus, and has also brought back the Kansas/Wichita subsidies, by reversing the panel's finding that these were not injurious. The AB also confirmed that the subsidies caused significant lost sales, displacement and impedance of exports and price

suppression in the 200-300 seat LCA market, and threat of displacement of exports in the 100-200 seat market.

At the DSB meeting held 13 April 2012, the US stated its intentions to comply with the DSB rulings within 6 months from the adoption of the reports, i.e. 23 September 2012.

On 24 September 2012 the US submitted, in a document dated 23 September 2012, that it had achieved compliance. Upon review of this document, the EU requested compliance consultations on 25 September 2012, which were held on 10 October 2012.

On 27 September 2012 the EU requested the DSB to grant authorization for countermeasures at the annual amount of USD 12 billion. On 22 October 2012, the US objected to the level of suspension of concessions or other obligations and referred the matter to arbitration pursuant to Article 22.6 of the DSU. At the DSB meeting on 23 October 2012, it was agreed that the matter is referred to arbitration. At the request of the parties, the Arbitrator suspended the arbitration proceedings from 28 November 2012.

On 23 October 2012 a compliance panel was established. At the DSB, the EU also asked for the initiation of an Annex V procedure under the SCM Agreement to which the US objected.

The written stage of the compliance proceedings has been closed in August 2013. The hearing on the US compliance measures took place from 29-31 October 2013. Due to the scale and complexity of the dispute, the panel informed the DSB in May 2014, in March 2015, and in June 2016 that additional time was needed to complete its work. The compliance panel report was circulated to the WTO Members on 9 June 2017.

The panel report clearly confirmed that the US has not brought itself into compliance with the WTO findings of 2012. The US continues to provide subsidies to Boeing in violation of WTO rules. That being said, there were certain panel findings on the subsidies and adverse effects sides that are not entirely satisfactory for the EU. The panel, despite confirming massive government subsidies, erred in finding that certain federal and state measures are not subsidies under the SCM Agreement. Further, the panel erred in finding that only the Washington state tax breaks have caused adverse effects to Airbus A320 (single aisle aircraft) and that the US R&D subsidies do not cause adverse effects for the A350 XWB787 category (twin aisle aircraft) (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1670>).

In light of this, on 29 June 2017, the EU appealed the compliance report. On 10 August 2017, the United States notified the DSB of its decision to cross-appeal.

In the compliance appeal stage, the first hearing took place on 17-20 April 2018. The second hearing took place 17-21 September 2018. The Appellate Body report was circulated to the Members on 28 March 2019. On 11 April 2019, the DSB adopted the AB report and the panel report, as modified by the AB report. (http://europa.eu/rapid/press-release_IP-19-1892_en.htm)

On 20 May 2019, the EU requested the resumption of the Article 22.6 arbitration. Since none of the original panel members were available to serve as Arbitrator, at the request of the EU, on 3 June 2019 the WTO Director General determined the new composition of the Arbitrator, comprising Ms A.M Dawes (Chairperson), Ms T. Epps and Mr E. Muñoz (members). The Arbitrator resumed its work as of 5 June 2019. The arbitration proceeding for the determination of the appropriate level of countermeasures is currently on-going.

Upon the completion of the arbitrator's work the European Union will request the DSB for an authorisation to take countermeasures against the United States. As foreseen under the EU's Enforcement Regulation, the Commission has started preparations so that the EU can promptly take action based on the arbitrator's decision. As a first step, on 17 April 2019 the Commission launched a public consultation to seek views of EU stakeholders on a list of US products that may be subject to EU commercial policy measures. (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=2011>)

For more background: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=354&code=1>

5) 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 was 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 was 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 challenged 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 found the US in breach of its obligations under Article 23 (2)(a) and Article 23.1 of the DSU and recommended that the DSB requests the US to bring its measure into conformity with its obligations under the DSU. On 29 May 2008, the EC 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 took 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 2008 circulated its report, which the DSB adopted on 14 November 2008. The report reversed 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 recommended that the US, Canada and the EC initiate compliance review proceedings under Article 21.5 of the DSU. On 22 December 2008, the EC 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 to 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 of Understanding, USTR repealed the *Carousel* list of sanctions and 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, DS26). **Given that the situation is stable, this case will not be included in the next edition.**

6) DS 548 – US – Certain Measures on Steel and Aluminium Products

Procedural stage: panel proceedings

This dispute concerns the additional duties which the US introduced on certain steel and aluminium imports from most countries on 23 March 2018 and started to apply also to imports from the EU on 1 June 2018. On the same day, the EU requested dispute settlement consultations, which were held with the US on 19 July 2018 in Geneva. The EU considers these US measures to be inconsistent with: Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9.1, 11.1(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards; Articles I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1(a) and XIX:2 of the GATT 1994; and Article XVI:4 of the WTO Agreement. The US considers its measures to be justified by essential security interests pursuant to Article XXI of the GATT 1994. Six other WTO Members are also challenging these US measures in WTO dispute settlement (Canada and Mexico initially filed a similar case as well, but found an agreement with the US in July 2019, settling their own cases). The panel proceedings are ongoing. The hearings with the parties and third parties in all the seven cases took place from 29 October 2019 to 19 November 2019.

7) DS 577 – Anti-dumping and Countervailing Duties on Ripe Olives from Spain

Procedural stage: panel proceedings

On 28/1/2019 the EU requested consultations with the US concerning the imposition of countervailing (CVD) and anti-dumping (AD) duties on ripe olives from Spain. The consultations took place on 20/3/2019.

On 17/5/2019 the EU requested the establishment of a panel challenging the duties as well as the underlying legislation as inconsistent with:

- Articles 19.1, 19.3, 19.4, 1.2, 2.1, 2.1(a), (b) and (c), 2.2 and 2.4 of the SCM Agreement, because the US is countervailing subsidies that are not specific;
- Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, because the US did not carry out a pass-through analysis to assess to what extent subsidies to olive growers pass-through to the processors of ripe olives;
- Article VI:3 of the GATT 1994, Articles 15.1, 15.2 and 15.5 of the SCM Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994, and Articles 3.1, 3.2 and 3.5, and Article 12.2.2 of the Anti-Dumping Agreement in relation to the injury determination; and
- Article VI:3 of the GATT 1994, and Articles 1.1(a), 1.1(b), 10, 14, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 as regards the calculation of the final subsidy rate for one of the companies.

The panel was composed on 18 October 2019. **The panel proceeding is currently ongoing.**

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 five hormones. The new directive entered into force on 14 October 2003.

The adoption of new rules based on a revised risk assessment brought 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 informed Canada and the US of 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 requested consultations with both Canada and the US against the application of countermeasures. The object of this case are the US and Canadian 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 during negotiations with the EC on a provisional solution to the dispute. Sanctions that were scheduled to be eliminated on 23 March 2009 have been eliminated from that date. On 13 May 2009 a Memorandum of Understanding was signed with the United States under which the EC granted MFN market access opportunities for high quality beef, and the U.S. reduced the sanctions applied to EC products.

The memorandum provided for three phases:

Phase 1 lasted three years. The United States maintained a reduced level of sanctions on EU products of USD 38 million instead of USD 116 million. The United States also agreed 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 opened 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 was in line with all EU import requirements, including that it must be hormone-free.

The Memorandum provided 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 provided a roadmap for the WTO dispute on Beef Hormones pending a definitive solution that may be agreed under phase 3. The Memorandum was without prejudice to the EC and United States legal position in the Hormones dispute. The EC and United States agreed however not to request a compliance panel for the first 18 months following the beginning of phase 1. If a compliance panel had been launched after this date, such a panel would not have rendered its report to the parties during phase 1 or phase 2. The status of such panel report, if any, was to 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 repealed the *Carousel* list of sanctions and 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.

The European Parliament and Council increased the size of the TRQ as from 1st of August 2012.

As no agreement could be reached with the United States to enter into phase 3 and as the legal obligations of both sides under phase 2 expired on 1.2.2014, the EU and the United States agreed on a revision of the existing Memorandum in order to maintain the status-quo. Phase 2 was extended until 31 July 2015 and the steps to be taken for final settlement under phase 3 as well as the management of the TRQ were clarified. The automatic termination of the Memorandum in case there was no agreement to move to phase 3 was also deleted. The revision of the Memorandum will allow for more time to find a final settlement to this dispute. Following the consent of the European Parliament in December 2013, the Council adopted the revised Memorandum on 28 January 2014 and it entered into force on the same day.

On 28 December 2016, the US published a notice of review concerning a reinstatement of trade sanctions which is ongoing. Following consultations between the EU and US on the operation of the Memorandum, the Commission presented on 3/9/2018 a Recommendation for a Council decision authorizing the opening of negotiations with the US on the importation of hormone-free high quality beef. The negotiating directives were adopted on 19 October 2018.

On 15 July 2019 the Council adopted a decision on the signing of the agreement allocating a share of the Tariff Rate Quota for High Quality Beef to the US, and forwarded the decision on its conclusion to the European Parliament for its consent. The

agreement was signed on 2 August 2019. The European Parliament gave its consent on 28 November 2019.

The agreement entered into force on 14 December 2019. The EU opened the new quotas with an allocation to the US as from 1 January 2020. The US terminated the proceeding with a determination not to reinstate action as from the same date.

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. The panel report was circulated on 29 September 2006. 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 12 June 2019. Related disputes with Canada and Argentina have been terminated following the notification of a mutually agreed solution to the WTO DSB.

3) DS 316 and DS 347 – Aircraft

Procedural stage: Article 22.6 arbitration completed with authorisation for countermeasures granted / second compliance proceedings in appeal stage (suspended)

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 considered 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 DDG 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 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 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 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 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. The panel report was circulated 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. 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 included Mr D. Unterhalter (Presiding member), Ms L. Bautista and Mr P. Van den Bossche (members).

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 circulated 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 2011, EU submitted to the DSB its compliance report stating full compliance with the DSB recommendations and rulings. 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;
- 2) a request for authorizing sanctions under Article 22.2 of the DSU of an amount ranging between USD 7 and 10 billion per year.

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 was suspended, pending the ruling by the DSB in the (first) compliance proceedings.

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

On 30 March 2012, the US requested the establishment of a compliance panel under Art. 21.5 DSU. At a special DSB meeting held on 13 April, the panel was established. The matter was referred to the original panel (DS316).

The compliance panel issued its report on 22 September 2016. The compliance panel rejected US claims that the repayable support for the Airbus models A350 XWB and A380 qualify as "prohibited subsidies". Further, the panel also confirmed that a significant part of the subsidies granted to Airbus, namely all repayable launch investment aid pre-A380, in particular those for the A320, had already come to an end before the end of the compliance period. However, the panel found that the EU has not complied with the DSB rulings and recommendations and that the RLI continues to cause adverse effects to the US in the single aisle, twin aisle and very large aircraft markets as 'actionable subsidies'. The report also held that the A350XWB RLI, which did not yet exist during the original proceedings, is within the scope of the compliance proceedings and constitutes an actionable subsidy causing adverse effects.

On 13 October 2016, the EU appealed several findings of the compliance panel report. In particular, the EU appealed 1) the panel's interpretation of Article 7.8 of the SCM Agreement. According to the EU, the panel erred in interpreting Article 7.8 of the SCM by requiring the EU to "remove the adverse effects" found from an actionable subsidy in original proceedings, even if that subsidy has been "withdrawn" and is no longer "maintained"; 2) the methodology used by the compliance panel in calculating the appropriate market benchmark for determining whether the A350XWB confer a benefit; 3) the reasoning of the compliance panel in assessing the alleged adverse effects on Boeing of the subsidies granted to Airbus.

On 10 November 2016, the US cross-appealed the compliance report. Both sides have submitted the submissions by January 2017. The first hearing in the case took place on 2-5 May 2017 and the second one on 25-29 September 2017.

The Appellate Body's report in the compliance proceedings was issued on 15 May 2018, and adopted together with the panel report at a DSB meeting on 28 May 2018.

The Appellate Body report is positive for the EU as the AB significantly reduced the scope of the EU's compliance obligations. The Appellate Body ruled that the EU has no compliance obligations in respect of pre-A380 subsidies (ie. French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340) as they have expired before the end of the implementation period (June 2011). The Appellate Body agreed with EU that a Member cannot be required to take measures to withdraw adverse effects of subsidies that have expired before the implementation period.

The EU's attempts to reverse the Panel's finding on subsidization of A350XWB were not successful, with the Appellate Body upholding that French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a specific subsidy because they were

granted at below market rates. EU arguments on the "product effect" theory for the A380 were rejected.

Concerning adverse effects caused by A380 and A350 XWB RLI, the Appellate Body significantly reduced the findings that the panel had made with regard to types of adverse effects, and product markets. The Appellate Body reversed the panel findings on lost sales, displacement and impedance and found that there are no compliance obligations for adverse effects in the single-aisle LCA market. With regard the twin-aisle (A350XWB/787/777) and Very Large Aircraft (A380/747) LCA market, the Appellate Body reduced the EU's compliance obligations. For twin-aisle the Appellate Body found only lost sales, while for the VLA segment it found adverse effects only in the form of lost sales and impedance. In both these markets the Appellate Body reversed the Panel's finding on displacement, and for the twin aisle market also on impedance. The Appellate Body rejected US claims to consider A350 XWB RLI as prohibited import substitution subsidies. (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1841>)

To address its few remaining compliance obligations, on 17 May 2018, EU notified to the WTO a second set of compliance measures, and informed the DSB of these measures on 28 May. (http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156901.pdf)

On 30 May 2018, the EU launched (second) compliance proceedings under Article 21.5 of the DSU to seek a WTO assessment on this second set of compliance measures. The compliance panel was established on 27 August 2018. A meeting with the parties was held on 7-8 May 2019, and the parties filed their integrated executive summaries on 2 July 2019. The (second) compliance panel report has been issued on 2 December 2019. The compliance panel rejected the EU's main arguments and found that the EU has failed to comply with earlier rulings.

On 6 December 2019 the EU filed an appeal, considering that significant aspects of the report that cannot be regarded as legally correct, and are very problematic from a systemic perspective (WT/DS316/43). The EU appeal covers a number of findings by the panel, including its interpretation of Article 7.8 of the SCM Agreement regarding the terms “withdraw the subsidy” and “take appropriate steps to remove the adverse effects”, in particular with respect to the terminated A380 programme, but also with respect to the A350XWB. While an Appellate Body division has been assigned to hear and decide on this appeal, on 10 December 2019, the work on this appeal – together with other 9 on-going appeals – has been suspended.

In parallel, on 28 June 2018, the US initiated the re-start of the Article 22.6 sanctions arbitration to determine its sanction rights vis-à-vis the EU. Following the resignation of the Chair of the Arbitrator and the unavailability of one of the members of the Arbitrator, on 28 June 2018, the United States requested the Director-General to appoint a new Chair and a new member of the Arbitrator. On 9 July 2018, the Director-General composed the Arbitrator, comprising Mr F. Khilji (Chairperson), Mr S. Gallacher and Mr Th. Jacobsz. The Arbitrator resumed its work as of 13 July 2018. A meeting with the parties took place 11-13 February 2019.

The decision of the WTO arbitrator was issued on 2 October 2019.

According to the decision, “the level of countermeasures commensurate with the degree and nature of adverse effects determined to exist” amount to USD 7,5 bn [EUR 6,9 bn] and therefore the US may request authorisation from the DSB to take countermeasures

with respect to the EU and certain member States at a level not exceeding, in total, USD 7,5 bn annually. These countermeasures may take the form, *inter alia*, of suspension of tariff concessions.

Commissioner Malmström issued a statement upon the publication of the decision (<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2068>)

On the day of the publication of the WTO arbitrator's decision, the USTR announced that it intends to apply countermeasures on the EU worth \$7.5 billion annually, and it released a final product list. USTR has opted to apply a 10% tariff on all Airbus models. No tariffs are imposed on imports of aircraft parts. A tariff of 25% is applied on a wide range of products of all EU MS, both Airbus and non-Airbus Member States, predominantly agricultural products.

On 14 October, the US received authorisation from DSB and the additional tariffs started applying on 18 October 2019.

For more background: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2>

On 14 February 2020, USTR released a revision of the retaliatory measures. The revised tariffs are effective as of 18 March 2020, and comprise an increase in the additional duty rate imposed on aircraft imported from the EU from 10% to 15%, and "minor modifications" in other areas. There were no increases or major adjustments in the tariffs in place on agricultural and processed agricultural products.

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 (unlike 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 panel report was 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. It provides that upon settlement by the signatories to the Geneva Agreement on Trade in Bananas (EU and Latin American banana suppliers) of the pending banana disputes and claims, the dispute shall be settled as between the United States and the EU. 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.

On 8 November 2012, the EU and Latin American banana suppliers (Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela) notified the DSB that the relevant banana disputes are settled as of 27 October 2012. **Given that the situation is stable, this case will not be included in the next edition.**

5) DS 389 – Poultry Antimicrobial Treatment (AMT)

Procedural stage: panel requested

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 held consultations with the US on 11 February 2009.

On 8 October 2009, the United States requested the establishment of a panel. At its meeting on 23 October 2009, the DSB deferred the establishment of a panel. At its meeting on 19 November 2009, the DSB established a panel. Australia, China, Korea and Norway reserved their third-party rights. Subsequently, Guatemala, New Zealand and Chinese Taipei reserved their third-party rights. **In absence of new developments since 2009, this case will not be included in the next edition.**

6) DS 559 – EU Additional Duties on Certain Products from the United States

Procedural stage: panel proceedings

This dispute concerns the additional import duties which the EU levies on various imports from the US since 22 June 2018, in response to the US steel and aluminium duties which the EU considers to be safeguard measures. The US considers these duties to be in breach of Articles I and II of the GATT 1994, and not justified by Article 8 of the Agreement on Safeguards. On 16 July 2018, the US requested dispute settlement consultations with the EU, which were held with on 28 August 2018 in Geneva. The US has parallel ongoing disputes against four other WTO Members (China, India, Russia and Turkey) on the same grounds. (The disputes with Canada and Mexico were settled in May 2019.) The panel proceedings are ongoing. The first hearings, with both the parties and the third parties, in all the five cases, took place between 19 September 2019 and 4 October 2019.

B) CASES UNDER BILATERAL AGREEMENTS

I – KOREA – LABOUR COMMITMENTS

On 17 December 2018 the European Union requested government consultations under the TSD Chapter of the EU Korea FTA. It focuses on two obligations in the TSD Chapter: i) the obligation to make continuous and sustained efforts to ratify pending fundamental ILO Conventions and ii) obligation to respect in law and practice the core ILO principles of freedom of association and right to collective bargaining.

Regarding i) Korea has still not ratified 4 out of 8 fundamental ILO Conventions (C87 and C98 on the freedom of association and the right to collective bargaining and C29 and C105 on forced labour). Regarding ii) we raised concerns regarding certain provisions in the Korean law which appear to limit the freedom of association, to allow interference in collective bargaining agreements and criminal prosecution of trade union members participating in peaceful strikes.

Government consultations took place on 21 January 2019. The Korean government engaged constructively but the consultations were not able to resolve all the issues. While Korea has made progress on some of the points we had raised during the consultations (criminal prosecution of trade union members, interference in collective bargaining agreements), other points (narrow definition of workers excluding self-employed and dismissed workers from the freedom of association, administrative discretion to certify trade union) remain unresolved.

Further political efforts (including Commissioner Malmström travelling in April 2019 to Seoul) could not provide sufficient assurance that Korea will ratify the 4 outstanding Fundamental ILO Conventions and amend the Korean legislation so that it fully complies with the ILO fundamental principles. Therefore the European Union requested on 4 July 2019 the establishment of a Panel of Experts pursuant to Article 13.15 of the EU Korea FTA.

The panel of expert has been formally established on 30 December 2020.⁵ The panel is composed of Professor Laurence Boisson de Chazournes (selected by the EU) and Professor Jaemin Lee (selected by Korea), as well as Mr Thomas Pinansky, selected by them as a chairperson. An organisational meeting between the Parties and the

⁵ See press release at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2095>

Panel took place in January 2020. In the first half of January interested parties had the opportunity to submit *amicus curiae* submissions. First written submissions have been exchanged in January and February 2020. Originally the Parties had agreed on holding a hearing mid-April in the WTO premises in Geneva which would be open to the public. Due to the restrictions related to the current health crisis, the date of the hearing will be decided in light of the evolution of the situation. The key steps in the procedure are published on the DG TRADE website (<https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>).

II – UKRAINE – WOOD EXPORT BAN

Since 2005, Ukraine applies an export prohibition for a number of wood species in the form of unprocessed wood and sawn wood. The product scope of this export prohibition was extended in 2015, and this for a period of 10 years, to cover the export of all unprocessed wood other than pine wood. As of 2017, the temporary export prohibition for unprocessed wood has been also extended to pine wood.

The export restrictions applied by Ukraine appear to be incompatible with Article 35 of the Association Agreement that prohibits export restrictions and measures having an equivalent effect. The restrictions on the export of wood enforced by Ukraine have led to a substantial reduction of trade between the European Union and Ukraine with regard to the covered products.

As political efforts failed to resolve the issue, the Commission decided on 22 November 2018 to start dispute settlement proceedings under the bilateral Association Agreement by holding consultations with Ukraine. The consultations took place in Kiev on 7 February 2019. They failed to resolve the issue but confirmed that the export prohibition for unprocessed wood is incompatible with Article 35 of the Association Agreement.

On 20 June 2019, the European Union requested the establishment of an arbitration panel to examine the matter.

The panel has been formally established on 28 January 2020 and is composed of: Christian Häberli (Switzerland/Chairperson), Giorgio Sacerdoti (EU) and Victor Muravyov (Ukraine). The key steps in the procedure are published on the DG TRADE website (<https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>). The panel hearing, initially scheduled for 30-31 March in Kyiv (Ukraine), had to be postponed due to restrictions related to the current health crisis. Deadlines will be adapted between the Panel and the Parties depending on further developments related to the current health crisis.

III – SACU – SAFEGUARD MEASURE ON POULTRY

On 14 June 2019, the European Union formally requested consultations with Southern African Customs Union (SACU), comprising South Africa, Botswana, Lesotho, Namibia and Eswatini, under Part III – Dispute avoidance and settlement of the bilateral EU-SADC EPA. The request concerns the imposition in September 2018 of a safeguard measure on exports of frozen bone-in chicken cuts from the EU.

The safeguard measure takes the form of increased tariff duties, subject to progressive reduction over a period of four years. The safeguard was set at 35.3% for the first 6

months, which were reduced to 30% in March 2019. Yearly reductions will follow in March 2020 to 25% and in March 2021 to 15%. The safeguard will expire on 11 March 2022.

The Commission believes that the safeguard measure was adopted in violation of the principles of Article 34 of the EU-SADC EPA, which sets the rules for the imposition of safeguard measures.

Consultations took place on 13 September 2019 in Gaborone, Botswana with a view to reaching a mutually satisfactory solution. While SACU engaged in the consultations constructively, they insisted on the full compatibility of the measure with the provisions of the EU-SADC EPA. Although not customary during consultations, SACU also asked the EU delegation questions. The EU tried as much as possible to reply to such questions in a comprehensive way, in order to show willingness to engage with SACU in a constructive manner. The consultations confirmed the EU position that the safeguard measure is not in line with the provisions of the EU-SADC EPA. The EU is currently considering the next steps. **The key steps in the procedure are published on the DG TRADE website (<https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>).**

C) CASES UNDER THE TRADE BARRIERS REGULATION (TBR)

I – CANADA – PROSCIUTTO DI PARMA

Latest 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. **In absence of new developments, this case will not be included in the next edition.**

IV – KOREA – PHARMACEUTICALS

Latest 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 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 – 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. **Given that the situation is stable, this case will not be included in the next edition.**

VI – 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. **Given that the situation is stable, this case will not be included in the next edition.**

VII – 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. **In absence of new developments, this case will not be included in the next edition.**

VIII – TURKEY – UNCOATED WOOD FREE PAPER

On 7 July 2017 the European Commission decided in accordance with Article 9(1) of Regulation (EU) 2015/1843⁶ to initiate a Union examination procedure following a complaint lodged by an industry association on an obstacle to trade.

The examination procedure concerned the import surveillance system introduced by Turkey for uncoated wood free paper. That import surveillance system, which according to the complaint introduced a specific import licencing requirement, would apply only to paper imported into Turkey at a customs value of 1 200 USD per tonne or less, a threshold which would cover all imports from the European Union.

According to the complaint, it was impossible for an importer to obtain such import licence due to the specific information requirements of the licencing procedure. To obtain an import licence, the Turkish authorities allegedly requested information to which only the producers of the paper have access. For this reason, importers would allegedly see no

⁶ Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 272, 16.10.2015, p. 1).

alternative than to declare a customs value above 1 200 USD per tonne of imported paper even if the actual import value is below this amount.

The complaint also claimed that such a declaration of value in excess of the actual value creates, as a secondary effect, an additional charge for the importer of the product as the refund for value-added tax paid upon importation is allegedly limited to the amount of value-added tax collected on the actual sales price and the actual sales price is always below the declared import price. The value-added tax on the difference between those prices would therefore constitute an additional tax levied on imported paper.

The complaint claimed that the measures adopted by Turkey could be incompatible with Articles 5 and 50 of the Customs Union Agreement, Articles III:2 and XI:1 of GATT 1994 and the WTO Agreement on Import Licensing Procedures.

During the investigation conducted by the Commission, the Republic of Turkey revoked the application of the import surveillance system with regard to uncoated wood free paper. Therefore, the Commission suspended the procedure in Commission Implementing Decision (EU) 2018/322 of 2 March 2018 *on suspending the examination procedure concerning obstacles to trade consisting of measures adopted by the Republic of Turkey affecting trade in uncoated wood free paper* (OJ L 62/36 of 5 March 2018). **In absence of new developments, this case will not be included in the next edition.**

**LIST OF PENDING WTO DISPUTE SETTLEMENT CASES INVOLVING THE
EU AS COMPLAINANT OR DEFENDANT**

(as of March 2020)

Trading partner	EU offensive case	EU defensive case
Argentina	Measures affecting the importation of goods (DS438)	TRQ on garlic (DS349)
		Certain measures concerning the importation of biodiesel (DS443)
		Certain EU and Member States measures concerning biodiesels (DS459)
Brazil	Measures affecting imports of retreaded tyres (DS332)	Generic medicines in transit (DS409)
	Certain measures concerning taxation and charges (DS472)	
Canada	Continued suspension of obligations in the Hormones dispute (DS321)	Hormones (DS48)
China	Provisional Anti-Dumping Duties on Fasteners from the EU (DS407)	Certain measures affecting the renewable energy generation sector (DS452)
	Duties and other Measures concerning the Exportation of Certain Raw Materials (DS509)	European Union – Measures Related to Price Comparison (DS516)
	Certain Measures on the Transfer of Technology (DS549)	
Colombia	Measures Concerning Imported Spirits (DS502)	
	AD Duties on Frozen Fries (DS591)	
India	AD measures on certain products from the EC and/or MS (DS304)	AD and CVD measures on PET (DS385)
	Certain taxes and other measures on imported wines and spirits (DS380)	Generic medicines in transit (DS408)
	ICT Products (DS582)	
Indonesia	Measures relating to raw materials (DS592)	Certain measures concerning palm oil and oil palm crop-based biofuels (DS593)
Philippines	Discriminatory taxation of spirits (DS396)	
Russia	Recycling Fee on Motor Vehicles (DS462)	Cost Adjustment Methodologies and Certain Anti-dumping Measures (DS

		474)
	Measures on pigs, pork and certain pig products concerning African Swine Fever (DS475)	Third energy package (DS476)
		Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint) (DS 494)
		Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia (DS521)
Thailand	Customs valuation of certain products from the EC (DS370)	
Turkey	Pharmaceuticals (DS583)	Safeguard measures on certain steel products (DS595)
United States	"Byrd amendment" (DS217)	Hormones (DS26)
	Section 110(5) of the US Copyright Act ("Irish Music") (DS160)	Measures affecting the approval and marketing of biotech products (GMOs) (DS291)
	Section 211 of the Omnibus Appropriations Act (Havana Club) (DS176)	Aircraft – Airbus (DS316 and DS 347)
	Aircraft – Boeing (DS317 and DS353)	Banana import regime (DS27)
	Continued suspension of obligations in the Hormones dispute (DS320)	Poultry (DS389)
	Certain Measures on Steel and Aluminium Products (DS548)	Additional Duties on Certain Products from the United States (DS559)
	AD/CVD on Ripe Olives from Spain (DS577)	