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NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

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

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OBJECTIVE: *For information*

REMARKS: LATEST DSU DEVELOPMENTS AS OF 17 JUNE 2016

- *In DS479 Russia – Antidumping duties on light commercial vehicles from Germany and Italy*, the second substantive meeting took place on 7 June 2016.
- *In DS494 European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint)* the additional consultations took place on 19 May 2016.
- *In DS472 Brazil – taxation*, the second substantive meeting with the parties took place on 31 May to 1 June 2016.

PUBLIC

- *In DS473 EU – anti-dumping measures on biodiesel from Argentina), the EU appealed certain findings of the panel report on 20 May 2016.*
- *In DS217 – Continued Dumping and Subsidy Offset Act (“Byrd amendment”), the EU adjusted the level of retaliation as of 1 May 2016. It decreases to a 0.45% additional duty.*

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

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INTRODUCTION

At present, the EU is actively involved in 46¹ WTO disputes: in 24 of these cases the EU is the complaining party while in the remaining 22 cases the EU is on the defending side. These cases relate to the EU's relations with 10 of its trading partners (Argentina, Brazil, Canada, China, India, Indonesia, Pakistan, Philippines, Russia, Thailand and the US).

Dispute settlement activities against the US continue to represent the majority of EU's active disputes. The EU is the complaining party in 6 of the disputes and the defendant in 5 cases (GMOs, hormones, bananas, poultry and aircraft). Regarding the substance of EU's offensive cases with the US, a major part concerns the misuse of trade defence instruments.

Our cases with China concern services, anti-dumping measures and raw materials on the offensive side and antidumping, poultry tariff and feed-in-tariff measures on the defensive side.

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

I - ARGENTINA

OFFENSIVE CASE

DS438 – 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.

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.

¹ Each case is counted separately.

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.

Accordingly, the EU requested the establishment of a Panel on 6 December 2012. The US and Japan have requested the establishment of a Panel on the same day on the same measures. Their request, together with the EU's request and Mexico's request, which was filed on 21 November, were all on the agenda of the DSB of 17 December 2012 for the first time. Argentina blocked the establishment of a panel at that meeting. At the DSB meeting of 28 January, the panel was automatically established.

In May 2013, the WTO Director-General appointed the three panellists that would hear and decide on this dispute. The first substantive meeting with the Parties took place in September 2013. The second substantive meeting with the Parties took place in December 2013 followed by an exchange of views on the replies of the Parties to panel's questions. The final panel report was circulated to the WTO Members on 22 August 2014. Argentina has lodged an appeal on 26 September to the final panel report and the EU has cross-appealed. The hearing before the Appellate Body took place on 3 and 4 November 2014. The Appellate Body (AB) circulated its report on 15 January 2015. The report is a full victory for the EU. The Appellate Body upheld most of the findings of the panel.

In particular, it 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 Appellate Body 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 Appellate Body 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 Dispute Settlement Body adopted the Appellate Body report and the panel report, as modified by the Appellate Body report at its meeting on 26 January 2015. At the following meeting on 23 February 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 is 11 months and 5 days from the date of adoption of the Appellate Body and panel reports which 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 is currently analysing the situation.

DEFENSIVE CASES**(1) DS 349 –EC –TRQ on garlic** (procedural stage: consultations)

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

(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.

(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.

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.

(4) DS 473 – Anti-dumping measures on biodiesel (procedural stage: appeal)

On 19 December 2013 Argentina requested consultations with the European Union concerning (a) the provisional and definitive anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Argentina as well as the investigation underlying the measures; and (b) Article 2(5) of the basic anti-dumping regulation which refers to adjustment or establishment of costs associated with the production and sale of products under investigation in the determination of dumping margins.

The challenged measures are:

(i) Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating, *inter alia*, in Argentina (OJ L 141, 28.5.2013, p.6);

(ii) Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating, *inter alia*, in Argentina (OJ L 315, 26.11.2013, p. 2);

(iii) Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ L 343, 22.12.2009, p. 51).

Argentina claims that the measures are inconsistent with: Articles 1, 2.1, 2.2, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6.2, 6.4, 6.5, 6.5.1, 9.3, 18 and 18.4 of the Anti-Dumping Agreement; Article VI of the GATT 1994; and Article XVI:4 of the WTO Agreement.

Consultations were held in Geneva on 31 January 2014. The panel was established on 25 April and composed on 23 June 2014. The panel report was circulated to the WTO membership on 29 March 2016.

The panel rejected a number of claims brought by Argentina in particular the claim that the second subparagraph of Article 2(5) of the EU's basic anti-dumping regulation is inconsistent "as such" with several provisions of the Anti-Dumping Agreement (ADA) and the GATT 1994 ("as such" claims). In dismissing the "as such" claims, the panel took into account that Article 2(5), second subparagraph, laid out a series of options for the EU authorities in establishing the costs of production; on its face the provision is formulated in permissive terms and that it does not require that the costs reported in the producer's records be replaced by costs in another country but that it only permits the authorities to establish or adjust the costs on the basis of information from another country which is allowed under WTO law. The panel also rejected a number of Argentina's claims in relation to fair comparison; the determination of profits applied in the construction of the Argentine producers' normal value; and on the EU's non-attribution analysis.

While the panel rejected the "as such" claims presented by Argentina and other claims, it ultimately found that the "as applied" anti-dumping measures on imports of biodiesel originating from Argentina are inconsistent with certain provisions of the WTO Anti-dumping Agreement and of the GATT 1994. First, the panel concluded that the EU acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. Second, the panel found that the EU acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" for inputs that was not the cost prevailing "in the country of origin", namely, Argentina. Third, the panel also found a breach of Article 9.3 as a consequence of violating Article 2, and finally, breaches of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in the EU's examination of the impact of the dumped imports on the domestic industry, insofar as it relates to production capacity and capacity utilization. With regard to the latter finding, the panel looked at the circumstances of the case and concluded that the EU did not persuade the panel that it exercised sufficient care in assessing the accuracy and reliability of certain revised data submitted by the EU industry.

On 20 May 2016, the EU appealed certain findings of the Panel Report, in particular: the finding that the European Union acted inconsistently with Article 2.2.1.1 of the ADA by "failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers"; the finding that the EU violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by "using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value"; and finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by "imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement". The EU also appealed certain consequential findings based on the contested ones.

On 25 May 2016 Argentina cross-appealed certain of the panel's findings as well. In particular, Argentina cross-appealed the findings in relation to Argentina's claims under Articles 2.2.1.1 and 2.2 of the ADA and VI:(b)(ii) of the GATT 1994 concerning Article 2(5) of the Basic Regulation (the "as such" claims) as well as certain of the panel's findings with respect to its claims concerning the anti-dumping measures on biodiesel (the "as applied" claims). Specifically Argentina cross-appealed the findings on Argentina's claims concerning: fair comparison between normal value and export price and the injury caused by the overcapacity of the EU industry not being attributed to the dumped imports.

The appeal procedure is ongoing.

II – BRAZIL

OFFENSIVE CASE

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

On 20 June 2005, the EC requested WTO consultations with Brazil on its measures affecting the importation of retreaded tyres from the EC. Brazil maintains an import ban on retreaded tyres and also applies financial fines on the importation as well as storage,

transportation and sale of imported retreaded tyres. Imports from other Mercosur countries are exempted from these measures. The EC considers that these measures are inconsistent with Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994. Consultations were held on 20 July 2005. The DSB established the panel at its meeting on 20 January 2006. The panel publicly circulated its final report on 12 June 2007. Based on a procedural agreement with Brazil, the appeal was delayed so that it has started on 3 September 2007.

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

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

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

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

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

(2) DS 472 - Certain Measures Concerning Taxation and Charges (procedural stage: **panel proceedings)**

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 (DS497). The establishment of the panel in DS497 took place on 28 September 2015. The procedure for this dispute and for DS472 have been merged and are ongoing. The first substantive meeting took place on 23 to 25 February 2016. **The second substantive meeting took place on 31 May to 1 June.**

DEFENSIVE CASES

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

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

The EU measures challenged are: (i) Council Regulation (EC) No. 1383/2003 of 22 July 2003; (ii) Commission Regulation (EC) No. 1891/2004 of 21 October 2004; (iii) Council Regulation (EEC) No 2913/92 of 12 October; (iv) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004; (v) Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. The request also covers the following Dutch measures: (i) relevant provisions of the Patents Act of the Kingdom of the Netherlands, 1995, as amended, including, but not limited to, the provisions of Chapter IV thereof, especially Articles 53 and 79, and relevant rules, regulations, guidelines and administrative practices; (ii) Relevant provisions of the General Customs Act of the Netherlands, as amended, including, but not limited to, Articles 5 and 11 and relevant rules, regulations, guidelines and administrative practices; (iii) Customs Manual VGEM (30.05.00 Intellectual Property Rights, Version 3.1) including, but not limited to, the provisions of Chapter 6 and of other relevant Chapters; (iv) the Public Prosecutor's Office Guide to Intellectual Property Fraud 20005A022 of 1 February 2006 and the Public Prosecutor's Office Directive (2005R013); (v) Relevant provisions of the Criminal Code of the Netherlands including, but not limited to, the provisions of Article 337, and relevant rules, regulations, guidelines and administrative practices; (vi) Relevant provisions of the Criminal Procedure Code of the Netherlands and relevant rules, regulations, guidelines and administrative practices; and, (vii) national courts' jurisprudence finding that goods in transit infringe patents (or supplementary protection certificates) in the Netherlands, including, but not limited to, due to the operation of a legal fiction pursuant to which the legal status of goods in transit is to be assessed *as if* they had been manufactured in the Netherlands.

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

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

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

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

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

III – CANADA

OFFENSIVE CASES

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

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

DEFENSIVE CASES

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

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.

IV – China

OFFENSIVE CASES

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

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

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

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

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

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

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

On 31 August 2011 China appealed the Panel Report. Amongst others, China appealed the panel's findings regarding the applicability of Article XX GATT 1994 to the commitments in paragraph 11.3. of its Accession Protocol, the interpretation of the term "critical shortage" in Art. XI:2 (a) GATT and the interpretation of the natural resource conservation justification in Art. XX (g) GATT 1994.

The Oral Hearing by the Appellate Body (AB) took place from 7 - 9 November 2011 in Geneva. The division of the AB was composed of Mr. Ramirez-Hernandez (Chairman), Ms. Hillman and Mr. Oshima.

The Appellate Body report was circulated on 30 January 2012. The Appellate Body Report confirmed all the main findings of the Panel. None of the modifications undertaken by the Appellate Body on the Panel's findings has changed the Panel's conclusion that China's export restrictions; i.e. the export duties and export quotas, are in violation of WTO rules and of China's commitments, and cannot be justified under WTO law. Most importantly, the Appellate Body upheld the Panel's finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations under Paragraph 11.3 of the Accession Protocol to justify export duties that are found to be inconsistent with China's obligations. For procedural reasons (Article 6.2 GATT 1994) the Appellate Body was not in a position to rule on the additional claims with regard to China's quota and license administration measures and minimum export pricing.

The Panel and Appellate Body reports were adopted at the DSB meeting of 22 February 2012.

At the DSB meeting of 23 March 2012 China presented its intentions to comply with the DSB recommendations and rulings and asked for a reasonable period of time to do so (RPT). The parties agreed on a RPT of 10 month and 9 days which gives China until 31 December 2012 to implement the ruling.

On 28 December 2012, China issued the 2013 Tariff Implementation Program and on 31 December 2012, the 2013 Catalogue of Goods subject to Export Licensing Administration. According to the notices, the application of export duties to certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, and the export quotas to certain forms of bauxite, coke, fluorspar, silicon carbide and zinc, which were found inconsistent with the WTO rules by the Panel and Appellate Body in these disputes, has been removed. Both notices took into effect on 1 January 2013.

At the DSB meeting of 28 January 2013, China claimed to have fully implemented the DSB recommendations and rulings through these measures. However, an export licencing requirement remains on all products previously subject to an export quota. While the EU welcomed the implementing measures taken by China, the EU also raised concerns this licensing requirement and its administration, hoping that it will not be an obstacle for exports. The Commission will continue to closely monitor the situation and the development of exports, and more particular the impact of these new licensing requirements.

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

On Friday, 7 May 2010, the European Union requested WTO dispute settlement consultations with China on China's provisional anti-dumping duties on certain iron or steel fasteners from the European Union. As from 28 December 2009, China has imposed provisional anti-dumping duties on certain iron or steel fasteners of 16.8% for the sole co-operating exporter, and of 24.6% for all other EU exporters. The EU considers that the imposition of these provisional duties is incompatible with WTO law, both on procedural and on substantive grounds. The EU challenges the following measures: The Ministry of Commerce of the People's Republic of China, Notice no. 115 (2009), including its annex, imposing provisional anti-dumping duties on certain iron or

steel fasteners from the European Union, and Article 56 of the Regulations of the People's Republic of China on Anti-Dumping. The EU considers that these measures violate Articles 2.2, 2.2.2, 2.4, 3.1, 3.4, 3.5, 6.1.3, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.10, 12.2.1, 18.1 of the *Anti-Dumping Agreement*, Articles I:1, VI:1 and X:3(a) of the *GATT 1994*, and Article 23 DSU.

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

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

3) DS 432 China – Measures related to the Exportation of Rare Earths, Tungsten, and Molybdenum (procedural stage: implementation)

On 13 March 2012 the EU, together with the US and Japan, requested consultations with China on China's export restrictions regarding various forms of Rare Earths, Tungsten, and Molybdenum. The export restrictions are mainly export duties and quotas as well as additional requirements and procedures linked to the quota administration.

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

The consultations took place on 25 and 26 April 2012 in Geneva but did not bring a solution to the dispute.

On 27 June 2012 the EU, together with the US and Japan, requested the establishment of a Panel. At its meeting on 10 July 2012, the Dispute Settlement Body (DSB) deferred the establishment of a panel. The Panel was established at the DSB meeting of 23 July 2012. On 24 September 2012, the WTO Director-General determined as panellists: Mr Nacer Benjelloun-Touimi (Chairman; Morocco); Mr Hugo Cayrús (Uruguay); Mr Darlington Mwape (Zambia). Third parties are: Argentina, Australia, Brazil, Canada, Colombia, the European Union (with respect to WT/DS431 and WT/DS433), India, Indonesia, Japan (with respect to WT/DS431 and WT/DS432), the Republic of Korea, Norway, Oman, Peru, the Russian Federation, the Kingdom of Saudi Arabia, Chinese Taipei, Turkey, the United States (with respect to WT/DS432 and WT/DS433), and Viet Nam.

Oral Hearings took place in Geneva from 26 to 28 February and from 17 and 18 June 2013.

On 26 March 2014, the WTO circulated the final panel report to all WTO Members. The panel report was a full victory for the EU and its co-complainants, the US and Japan. The Panel found that China's export duties, export quotas and certain challenged quota administration requirements are inconsistent with China's obligations under the GATT and under its Accession Protocol.

More particular, the Panel found that China's export duties applied to various forms of rare earths, tungsten, and molybdenum are inconsistent with Paragraph 11.3 of China's Accession Protocol and cannot be justified under Article XX (b) GATT as invoked by China. The Panel re-examined the question of applicability of the general exceptions of Article XX GATT to China's export duty obligation in Article 11.3 in great depth but came to the same conclusion as the Appellate Body in the first raw materials case. One Member of the Panel issued a dissenting opinion arguing for the applicability of Article XX GATT. However, all members of the Panel agreed that even if Article XX

GATT was applicable, China has not been able to demonstrate that its export duties are justified for environmental reasons under Article XX (b) GATT nor that they satisfied the requirements of GATT Article XX chapeau.

On the export quotas, the Panel found that they are inconsistent with Article XI:1 GATT and are not justified for conservation purposed under Article XX (g) GATT. Most importantly, even against the more complex facts in this case, in particular on rare earth, and despite all the efforts China undertook to demonstrate its domestic restrictions on the products at issue, the Panel confirmed the findings of the first raw materials case, i.e. that conservation is not concerned with where extracted resources are consumed. The Panel did not agree with China that its sovereign right over its natural resources allows it to control international markets and the domestic and international allocation and distribution of rare earths. China, as a sovereign WTO Member, can control the amount of rare earths it extracts, but once such resources enter the market, they are subject to WTO rules, which prohibit quotas unless justified under one or more of the GATT exceptions. In addition, the Panel concluded that several aspects of China's export quotas disfavour and discriminate against foreign users and that the rationale for this discrimination is not based on conservation considerations. China therefore did not demonstrate that the measures are applied in a manner that satisfies the chapeau of Article XX GATT.

The Panel also found certain requirements (prior export performance and minimum capital requirements) linked to China's quota administration and allocation are inconsistent with China's commitments undertaken in its Accession Protocol as well as in the Working Party report on trading rights (Paragraph 5.1 of the Accession Protocol and Paragraphs 83, 84 of the WP). While the Panel accepted that China is entitled to seek to justify these restrictions on the trading rights of enterprises exporting rare earths and molybdenum pursuant to Article XX(g) of the GATT, the Panel concluded that China failed to make a prima facie case that they actually are justified pursuant to Article XX (g) GATT.

China appealed the panel report on 25 April 2014. An oral hearing took place in Geneva 4-6 June 2014. On 8 August 2014, the Appellate Body issued its report. The Appellate Body rejected virtually all claims brought by China upon appeal and constituted therefore a clear victory for the EU and its co-complainants. China's appeal was already very limited in scope, only addressing questions of legal interpretation that could have not changed the result in this case. In particular, China appealed the non-application of Article XX GATT to its export duty commitments undertake in para 11.3 of its Accession Protocol. The Appellate Body, although examining at length the "new" arguments brought forward by China, confirmed its ruling in Raw Materials I, i.e. that Article XX GATT cannot be invoked for this specific commitment. In addition, China appealed some of the legal interpretation undertaken by the Panel in Article XX (g) GATT (conservation of natural resources), where China claimed that the Panel erred in not taking sufficiently account of the actual effects of China's export quotas (for example, that the quotas were not filled in 2012) and that the Panel wrongly read a separate requirement of "even-handedness" into Article XX (g) to the extent that it required China to prove that the burden of conservation is evenly distributed between foreign and domestic consumers and producers. While the Appellate Body rejected the first claim outright, it agreed with China that indeed Article XX (g) GATT does not require the imposing Member to prove that the burden of conservation is evenly distributed. However, the Appellate Body also found that this legal flaw did not affect the findings of the Panel under Article XX (g) GATT as the Panel did not engage in an assessment of whether or not the burden of conservation is evenly distributed. The Panel

rather found that there was no domestic restriction in place that would counterbalance the restrictions imposed on foreign consumers in the name of conservation. The Appellate Body therefore upheld the findings of the Panel and rejected China's appeal.

The panel and Appellate Body reports were adopted at the DSB meeting of 29 August 2014. At the DSB meeting of 26 September 2014, China stated its intentions to comply and the need for a reasonable period of time for implementation. On 8 December 2014, the EU and China notified the WTO that they agreed on a reasonable period of time of 8 months and 3 days which will expire on 2 May 2015. On 31 December 2014, China issued the 2015 Catalogue of Goods subject to Export Licensing Administration. According to the notice, the export quotas on certain forms of rare earths, tungsten and molybdenum, which were found to be inconsistent with the WTO rules, were removed.

As of 1 May 2015, China also lifted the export duties on rare earths, tungsten and molybdenum products subject to the dispute. On 13 May, China and the EU signed a sequencing agreement clarifying the EU's right to request a potential compliance panel in the future if deemed necessary. Currently the Commission is closely monitoring the situation, also with regard to an increase in domestic taxes, like the resource tax.

4) DS 460 China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union

On 16 August 2013 the European Union (EU) requested the establishment of a panel concerning People's Republic of China's (China) anti-dumping duties imposed on imports of certain high-performance stainless steel seamless tubes (HP-SSST) from the EU, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2012] (the "Preliminary Determination notice") and Notice No. 72 [2012] (the "Final Determination notice"), including any and all annexes and any amendments thereof. The consultations which followed the EU's request for consultations with China of 13 June 2013 failed to resolve the dispute.

The EU claims that these measures are inconsistent with Articles, 2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6.4, 6.5, 6.7, 6.8, 6.9, 7.4 and 12.2 of the WTO Anti-dumping (AD) Agreement and with Article 1 of the AD Agreement and Article VI of the GATT 1994 as a consequence of the breaches of the AD Agreement described above.

The panel was established at the meeting of the WTO Dispute Settlement Body of 30 August 2013. The same panel will rule on this case and the case introduced earlier this year by Japan concerning the same measures (DS454). The first substantive meeting took place on 25 and 26 February in Geneva. The second substantive meeting took place on 20 and 21 May 2014.

The report of the panel was circulated to the WTO Members on 13 February 2015.

On 20 May 2015, China notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report. On 26 May 2015, the European Union notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report.

On 14 October 2015, the Appellate Body report was circulated to Members. At its meeting on 28 October 2015, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

On 19 February 2016 China and the European Union agreed that the reasonable period of time for China to implement the recommendations and rulings of the Dispute Settlement Body is 9 months and 25 days from the 28 October 2015 date of adoption of the DSB recommendations and rulings. Accordingly, the reasonable period of time expires on 22 August 2016.

Key findings of the Panel

The Panel upheld many of the claims under Articles 3.1, 3.2, 3.4 and 3.5, but did not side with the European Union on all matters. In particular, the Panel rejected the claim under Article 3.2 that MOFCOM was required — and failed — to assess whether price undercutting by the subject imports had the actual effect of placing downward pressure on domestic prices.

The European Union claimed that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of certain reports to remain confidential without a proper showing of “good cause” for such treatment by the petitioners. The Panel upheld the claims brought by the European Union.

The European Union claimed that MOFCOM failed to comply with the Article 6.9 obligation to disclose essential facts regarding its dumping determinations. The Panel rejected the EU's claim concerning MOFCOM's use of a narrative description to disclose essential facts in respect of its dumping determination. The Panel noted that MOFCOM had provided narrative descriptions of the essential facts that referred to factual information already in the exporters' possession.

The European Union made a number of claims in respect of MOFCOM's dumping determination. These claims concerned (i) the use of SG&A amounts (Articles 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement); (ii) the fairness of the comparison (Article 2.4 of the Anti-Dumping Agreement); and (iii) the alleged double-counting of certain administrative expenses (Article 6.7 and Annex I:7 of the Anti-Dumping Agreement). The Panels upheld the European Union's Article 2.2.2 claim concerning SG&A amounts, and exercised judicial economy in respect of the remaining claims concerning that matter. The Panels upheld the European Union's fair comparison claim under Article 2.4. The Panels upheld a procedural aspect of the European Union's claim under Article 6.7 and Annex I:7 concerning the alleged double-counting of certain administrative expenses.

Key findings on appeal

Data for SG&A amounts: The Appellate Body upheld the Panel's finding that the European Union's claims under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement were properly within the Panel's terms of reference. The Appellate Body also upheld the Panel's finding that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine selling, general and administrative (SG&A) costs for Salzgitter Mannesmann Stainless Tubes GmbH (SMST), one of the EU companies investigated by MOFCOM, on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

Good cause: The Appellate Body upheld the Panel's finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the four reports at issue to remain confidential without objectively assessing “the petitioners' showing of ‘good cause’”. The Appellate Body saw no error in the Panel's conclusion that, in the absence of *any evidence* that

MOFCOM objectively assessed the “good cause” alleged, it had no basis to conclude that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown “good cause” for their requests for confidential treatment.

Disclosure of essential facts: The Appellate Body reversed the Panel's finding rejecting the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, and found instead that China acted inconsistently with that provision because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping with respect to the EU companies investigated by MOFCOM. The Appellate Body explained that it did not see how the mere fact that the investigating authority may be referring to data that are in the possession of an interested party would mean that it has disclosed the essential facts in a coherent way, so as to permit an interested party to understand the basis for each of the intermediate findings and conclusions reached by the authority and the decision whether or not to apply definitive measures such that it is able properly to defend its interests.

MOFCOM's price effects analysis: Contrary to the Panel, the Appellate Body found that Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products, and that the investigating authority may not disregard evidence suggesting that the prices of dumped imports have no, or only a limited effect on domestic prices. The Appellate Body added that while an examination of whether there is a price differential between imported and domestic products may be a useful starting point for an analysis of price undercutting, it does not provide a sufficient basis for an investigating authority to satisfy its obligation under Article 3.2.

DEFENSIVE CASES

1) - DS 452 – EU- Certain measures affecting the renewable energy generation sector (consultation stage)

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.

2) - DS492 – EU – Measures Affecting Tariff Concessions on Certain Poultry Meat products (procedural stage: panel)

On 8 April 2015 China requested consultations with the European Union regarding measures to modify the EU tariff concessions on certain poultry meat products.

The measures are the result of two EU requests to modify the EU tariff concessions on certain poultry meat products under Article XXVIII of the GATT 1994 in 2006 and in 2009.

These modifications in 2007 came about following the WTO panel lost to Brazil and Thailand (DS 269/DS286) on the tariff classification of some poultry products (mainly meat with some added salt) following a GATT Article XXVIII procedure. Following the WTO rules the increase of these duties was accompanied, after negotiation with interested parties, by the opening of tariff-rate quotas (TRQ) for the products concerned. A second exercise under Article XXVIII GATT was launched in June 2009 by the European Union and concerned 8 further tariff lines for processed poultry meat.

China claims that the measures are inconsistent with Articles I, II, XIII and XXVIII of the GATT 1994. Consultations took place in Geneva on 26 May 2015. China requested the establishment of a panel on 8 June 2015. The panel was established on 20 July 2015. The panel was composed on 3 December 2015 and the panel procedure is ongoing.

V – COLOMBIA

OFFENSIVE CASES

1) DS 502 – Colombia - Measures Concerning Imported Spirits (procedural stage: consultations)

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 and the Commission is in the process of analysing the information obtained, while monitoring the legislative process ongoing in the Colombian Senate where a reform law on spirits is being debated.

VI – INDIA**OFFENSIVE CASES**1) DS304 – Anti-Dumping Measures (procedural stage: consultations)

On 8 December 2003, the EC requested consultations with India on 27 antidumping measures imposed on a variety of EC exports, including pharmaceuticals, chemicals, paper, textile and steel. The problems in the Indian cases mainly referred to the highly insufficient injury and causality analysis, the failure to provide meaningful disclosure documents and a continuous disregard of arguments presented by EC exporters and the EC.

Following the consultations held in February 2004, India opened a review process which has led to the termination of most of the contested measures, including those of most economic interest for EC exporters (steel and pharmaceutical products). The issue has been raised again in the margin of the third round of consultations concerning case DS380.

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

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

On 15 December 2008, the EC sent an updated version of the consultations request, covering possible discrimination in Karnataka. Consultations were held on 29 January 2009. They confirmed that Karnataka tax measures are in breach of Article III:2 of the GATT 1994 by subjecting imported wines to higher taxation on domestic like products. Andhra Pradesh subsequently implemented new tax measures. An additional updated request for consultations was therefore sent on 4 May 2009. Consultations covering the entire scope of this dispute, including new claims on Andhra Pradesh, took place in Delhi on 16-17 July 2009. They confirmed the discriminatory nature of the taxes and other measures at issue and unveiled additional breaches of WTO rules. The capital Delhi implemented new discriminatory tax measures in June 2009. The EC updated the scope of consultations accordingly, and including so far unexplored aspects of the monopolies in Andhra Pradesh and Tamil Nadu and requested the fourth round of consultations on 16 November 2009. The consultations took place on 18 and 19 February 2010 and recorded slow but steady progress, including new rules by Andhra Pradesh at the end of January 2010 setting out a) new, lower rates of taxation on imported wines and spirits and b) the issuance of tenders for imports wines and spirits from outside India. The state of Tamil Nadu eliminated the identified *de jure* discriminations and Delhi announced the reform on its taxation system of alcoholic beverages. The Commission, together with the EU wines and spirits industry, is closely monitoring the developments on the grounds as well as the implementation of the announced developments. Any possible improvement of market access in India is also

assessed in the light of parallel efforts under the EU/India FTA negotiations to tackle the high Indian tariff rates for wines and spirits.

DEFENSIVE 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, for the moment, taken any further steps.

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

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

The EU measures challenged by India are: (i) Council Regulation (EC) No. 1383/2003 of 22 July 2003; (ii) Commission Regulation (EC) No. 1891/2004 of 21 October 2004; (iii) Council Regulation (EEC) No 2913/92 of 12 October; (iv) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004; (v) Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. The request also covers the following Dutch measures: (i) relevant provisions of the Patents Act of the Kingdom of the Netherlands, 1995, as amended, including, but not limited to, the provisions of Chapter IV thereof, especially Articles 53 and 79, and relevant rules, regulations, guidelines and administrative practices; (ii) Relevant provisions of the General Customs Act of the Netherlands, as amended, including, but not limited to, Articles 5 and 11 and relevant rules, regulations, guidelines and administrative practices; (iii) Customs Manual VGEM (30.05.00 Intellectual Property Rights, Version 3.1) including, but not limited to, the provisions of Chapter 6 and of other relevant Chapters; (iv) the Public Prosecutor's Office Guide to Intellectual Property Fraud 20005A022 of 1 February 2006 and the Public Prosecutor's Office Directive (2005R013); (v) Relevant provisions of the Criminal Code of the Netherlands including, but not limited to, the provisions of Article 337, and relevant rules, regulations, guidelines and administrative practices; (vi) Relevant provisions of the Criminal Procedure Code of the Netherlands and relevant rules, regulations, guidelines and administrative practices.

India has alleged that these measures are inconsistent with Article V:2, V:3, V:4, V:5; and V:7 and X:3 of the GATT 1994; Article 28 of the TRIPS Agreement read together with Article 2 of the TRIPS Agreement, Article 4bis of the Paris Convention of 1967,

and paragraph 6(i) of the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health; Article 31 of the TRIPS Agreement read together with of the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health; Articles 41, 42 of the TRIPS Agreement.

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

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

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

VII – INDONESIA

DEFENSIVE CASES

1) - DS 442 – AD measures on imports of certain fatty alcohols from Indonesia (procedural stage – panel)

On 27 July 2012 Indonesia requested WTO consultations with the EU on the subject of Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia. This concerns provisional anti-dumping duties on certain chemical products imposed by the EU in May 2011 and definitive anti-dumping duties imposed by the EU in November 2011. The measures concern also India and Malaysia. It is the first WTO case launched by Indonesia against the EU. The EU accepted the request for consultations on 20 August 2012. Consultations were held on 13 September in Geneva. On 1 May 2013 Indonesia made the first request to establish a panel in case DS 442. Their second request was accepted in the DSB meeting of 25 June 2013. Indonesia requested the composition of a Panel on 19 September 2014. The panel was established on 31 August 2015.

2) - DS480 – AD measures on imports of biodiesel from Indonesia (procedural stage – panel)

On 10 June 2014 Indonesia requested consultations with the European Union concerning (a) Article 2(5) and Article 2(6)(b) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ["Basic AD Regulation"] as well as any subsequent amendments, replacements, implementing measures and related instruments or practices; and (b) the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Indonesia, and the underlying investigation.

The challenged measures are:

(i) Article 2(5) and Article 2(6)(b) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ L 343, 22.12.2009, p. 51);

(ii) Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating, *inter alia*, in Indonesia (OJ L 141, 28.5.2013, p.6);

(iii) Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating, *inter alia*, in Indonesia (OJ L 315, 26.11.2013, p. 2).

Indonesia claims that the measures are inconsistent with: Articles 1, 2.1, 2.2, 2.2.1.1, 2.2.2, 2.2.2(i), 2.2.2(iii), 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 6.5, 6.5.1, 6.9, 7.1, 7.2, 9.2, 9.3, 15, 18.4 of the Anti-Dumping Agreement; Article VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the Marrakesh Agreement.

Consultations between the EU and Indonesia were held on 24 July 2014. Indonesia requested the establishment of a panel on 30 June 2015. The panel was established on 31 August 2015. The panel was composed on 4 November 2015.

VIII – PAKISTAN

DS 486 - Countervailing measures on imports of certain polyethylene terephthalate (PET) from Pakistan.

On 29 October 2014, Pakistan requested consultations with the European Union regarding countervailing measures on imports of certain polyethylene terephthalate (PET) from Pakistan. The duties were first imposed provisionally with Commission Regulation (EU) No 473/2010 of 31 May 2010 (OJ L 134/25) and then as definitive countervailing measures with Council Implementing Regulation (EU) No 857/2010 of 27 September 2010 (OJ L 254/10). The EU determined that certain provisions of Pakistani Tax law and government programs allowed a preferable treatment of PET exports and constitute countervailable subsidies contingent upon export performance. Pakistan challenges the EU findings on these subsidies and also challenges the finding of a causal link between the subsidies and the injury to the EU industry and certain aspects of the investigation underlying those measures (transparency claims).

Pakistan alleges the EU measures appear to be inconsistent with Articles I.1(a)(1)(ii), (iv), 1.1(b), 3.1(a), 12.6 12.8 14(b), 19.3, 22.3 and 22.4 of the SCM Agreement, Annexes 1(h), I(i), H(I)(2), II(II)(1), II(II)(2), III(II)(2), and III(II)(3) and VI(1)-(8) of the SCM Agreement and Article VI of the GATT 1994.

The consultations were held on 17 December 2014. On 13 February 2015, Pakistan filed a request for the establishment of a panel. The panel was composed on 13 May 2015. The US and China reserved their third-party rights. On 1 October 2015, the measures expired, and the EU requested the Panel to terminate the proceedings. Pakistan opposed and asked the panel to continue. The EU filed a request for preliminary ruling to the Panel on 3 March 2016 arguing that the Panel should terminate its work in accordance with Articles 3.4, 3.7, 3.8, 7.1 and 11 of the DSU, arguing, *inter alia* that the countervailing duty measures challenged by Pakistan were withdrawn, even before the Panel commenced its work, and that hence there is no dispute anymore that should be settled. Pakistan asked the Panel to reject EU's request for preliminary ruling arguing that it is entitled to have a ruling despite the expiry of the measures. The proceedings are currently ongoing.

IX – 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.

X - RUSSIA**OFFENSIVE CASES**

1) - DS 475 – Russian Federation – import ban on life pigs, pork and certain pig products originating in the EU (procedural stage – panel proceedings)

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 live 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. According to the European Union, all measures to prevent the spread of the disease were immediately taken in full transparency vis-à-vis Russia.

The European Union argued that Russia has not ensured that the measures at issue are adapted to the sanitary characteristics of the area from which the products at issue originate and to which they are destined, as required by Article 6.1 of the SPS Agreement. It appears that, in assessing the sanitary characteristics of the affected area, Russia failed to take into account, inter alia, the level of prevalence of ASF (few incidences in feral pigs in geographically limited areas close to the eastern external border of the EU), the existence of eradication and control programs and appropriate criteria or guidelines developed by the relevant international organizations. It is considered that Russia does not recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, as required by Article 6.2 of the SPS Agreement. Russia failed to recognise the EU territory, excluding the restricted areas, as a non-affected area, despite the implementation of appropriate regionalisation measures.

The European Union also claimed that the Russia has also not ensured that the measures at issue are applied only to the extent necessary to protect human or animal life or health. It does not appear necessary for Russia to restrict imports from non-affected areas of the EU; or with respect to all the products at issue. The Russian measures appeared not to be based on scientific principles and lack a scientific basis, whether specific or general, for restricting imports from non-affected areas of the EU; or with respect to all the products at issue.

Furthermore, the European Union claimed that the ban is neither "based on" nor "conforms to" to the relevant international standards, guidelines or recommendations, as provided for in Articles 3.1 and 3.2 of the SPS Agreement. The measures also do not appear to be consistent with Article 3.3 of the SPS Agreement as there does not seem to be any scientific justification for departing from the relevant international standards, guidelines or recommendations by the OIE, nor would the measures at issue appear to be a consequence of the level of sanitary protection sought by Russia.

Moreover, the European Union claimed that Russia does not ensure that the measures at issue are based on an assessment, as appropriate to the circumstances, of the risks to animal life or health, taking into account risk assessment techniques developed by the relevant international organizations, as required by Article 5.1 of the SPS Agreement. Russia neither provided, nor referred to, any such risk assessment.

The European Union further claimed that, when determining the appropriate level of sanitary protection, Russia failed to take into account, or properly take into account, the objective of minimizing negative trade effects, as required by Article 5.4 of the SPS Agreement. The measures do not appear to be not more trade-restrictive than required to achieve their appropriate level of sanitary protection, taking into account technical and economic feasibility, as required by Article 5.6 of the SPS Agreement. Russia failed to take into account that there are other measures, which are reasonably available taking into account technical and economic feasibility, that achieve Russia's appropriate level of sanitary protection and that are significantly less restrictive to trade. The alternative measures would be those that take into account the principles of regionalisation, as determined in the OIE Terrestrial Code on Zoning and Compartmentalisation (Chapter 4.3) and set out in Article 6 of the SPS Agreement.

The European Union considered that the Russian measures against the EU discriminate arbitrarily or unjustifiably between WTO-Members where identical or similar conditions prevail, including between their own territory and that of other Members, as required by Article 2.3 of the SPS Agreement.

Furthermore, Russia responded to isolated cases of ASF in two Member States of the EU by closing the Russian market to all imports of the products at issue from the EU. By comparison, in the event of outbreaks of ASF in Russia, Russia does not close the entire Russian market to all domestic products at issue. For this reason also, Russia appears to act inconsistently with Articles 2.3 and 5.5 of the SPS Agreement.

Lastly, the European Union claims that the Russian Federation's approval procedures do not conform to the requirements set out in Annex C of the SPS Agreement and that the notifications to the WTO done by the Russian Federation were incomplete and delayed.

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

- Articles 2, 3, 5, 6, 7, 8 SPS Agreement.

Consultations were held with the Russian Federation in Geneva on 30 April and 1 May 2014.

On 27 June 2014, the EU requested the establishment of a panel. The establishment was blocked by Russia at the first DSB meeting on 10 July 2014.

At its meeting on 22 July 2014, the DSB established a panel. The Director-General of the WTO appointed on 4 December 2014 the panellists. Australia, Brazil, China, Chinese Taipei, India, Japan, Korea, Norway, South Africa and the United States reserved their third-party rights.

The second hearing took place in September 2015 and included a session with experts. Due to the complexity of the case, the panel report is expected to be published in summer 2016.

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.

3) - DS479 Anti-dumping duties on Light Commercial Vehicles (LCVs) from Germany and Italy (procedural stage – **panel**)

On 21 May 2014 the EU requested WTO dispute settlement consultations with Russia on Russia's anti-dumping duties on Light Commercial Vehicles (LCVs) from Germany and Italy.

Anti-dumping duties have been introduced on the territory of the Customs Union ('CU') of Belarus, Kazakhstan and Russia on imports of LCVs from Germany, Italy and Turkey on 14 May 2013 by a decision of the Eurasian Economic Commission. As Russia is the only Member of the Customs Union who is also a WTO Member, the WTO challenge is directed to Russia.

The European Union claimed that the measures appear to be inconsistent with Russia's obligations under the following provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"):

- Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement.
- Articles 3.1 and 3.2 of the AD Agreement.
- Articles 3.1 and 3.4 of the AD Agreement.
- Articles 3.1 and 3.5 of the AD Agreement.
- Article 4.1 of the AD Agreement.
- Article 6.5 of the AD Agreement.
- Article 6.5.1 of the AD Agreement.
- Article 6.9 of the AD Agreement.
- Articles 12.2 and 12.2.2 of the AD Agreement.
- Russia's anti-dumping measures on LCVs from the Germany and Italy further appear to be inconsistent with Articles 1 and 18.4 of the AD Agreement and Article VI of the GATT 1994 also as a consequence of the breaches of the AD Agreement described above.

The consultations took place on 18 June 2014. The EU requested the establishment of a Panel on 15 September 2014. The Panel was established on 20 October 2014 and

composed on 18 December 2014. The panel proceedings are currently ongoing. The first substantive meeting took place on 9 and 10 March 2016. **The second substantive meeting took place on 7 June 2016.**

4) - DS 485 Russia- Tariff Treatment of Certain Agricultural and Manufacturing Products (procedural stage – panel)

On 31 October 2014, the European Union requested consultations with the Russian Federation regarding the tariff treatment of certain products.

According to the European Union, Russia subjects a number of goods to import duties inconsistent with its Schedule of Concessions and Commitments annexed to the GATT 1994. In particular, Russia applies duties in excess of bound rates, in several different ways.

Firstly, for certain goods, including paper and paperboard, the applied ad valorem duty rates – as provided for in the relevant legal instruments– exceed the ad valorem bound rates. By way of example, for five tariff lines (4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9 and 4810 19 900 0) the applied duty of 15% or 10% clearly exceeds the bound rate which is set at 5%.

Secondly, for certain other goods, including palm oil and its fractions, refrigerators and combined refrigerator - freezers, those instruments provide for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule. The structure and design of the specific variations at issue result in duties being levied in excess of those provided for in the Schedule for these goods in cases where the customs value is below a certain level. This concerns for example the following tariff lines: 1511 90 190 2, 1511 90 990 2 (palm oil) and 8418108001, 8418102001, 8418211000 (refrigerators and combined refrigerator – freezers).

According to the European Union, these measures appear to be inconsistent with Russia's obligations under the covered agreements and, in particular with Article II:1 (a) and (b), Article VII of the GATT 1994 and with the Agreement on Implementation of Article VII of the GATT 1994, Articles 1 through 7 and Annex I.

The consultations took place on 28 November 2014.

On 26 February 2015, the EU filed a request for the establishment of a panel. The panel was established on 25 March 2015. The panel was composed on 18 June 2015 and the panel proceedings are ongoing.

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 Russian Federation (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 the Russian Federation (Russia) requested the establishment of a panel which was established at the DSB meeting of 22 July 2014.

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

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 legal challenge mounted by Russia appears to be three-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 GATT of certain capacity allocation measures introduced by the TEP. Such measures differentiate between the sale of capacity at interconnection points (auction) and the sale of capacity at entry points (first come first served basis). Russia alleges that the capacity for natural gas originating in Russia is disproportionately defined as entering through interconnection points, thus subject to auction, which would result in discrimination against Russian natural gas.

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

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.**

XI – THAILAND

OFFENSIVE CASE

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

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

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

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

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

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

The Commission services are currently monitoring the situation.

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, the level of retaliation is adjusted every 1 May depending on the amount distributed in the most recent distribution from duties collected on EU products. **The current level of retaliation amounts to USD 887 696 (Commission Delegated Regulation (EU) 2016/654 of 26 February 2016, OJ L 114, 26.04.2016, p. 1). The rate of additional duty to which Annex I products are subjected is amended, i.e. it decreases from last year's 1.5% to 0.45 % in order to adjust to the level of retaliation. The additional 0,45% customs duty applies to four products, i.e. sweet corn, crane lorries, spectacles frames and mountings, and women or girls' cotton denim trousers and breeches. The Commission has updated the annual amount of authorized retaliation from 1 May 2016**

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.

4) DS 317 and DS 353 – Aircraft (procedural stage: 21.5 panel)

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

The EC considers that the US Government has been following now for a number of years a policy of systematic and persistent subsidisation of Boeing through a number of measures involving, *inter alia*, paying research and development costs through NASA, the Department of Defense, the Department of Commerce and other government agencies. The latest and most flagrant violation consists in massive subsidies in the form, *inter alia*, of tax reductions and exemptions and infrastructure support for the development and production of Boeing's 787 in the State of Washington, as well as other benefits in the states of Kansas and Illinois. (For a summary of the EU's WTO Challenge of US Subsidies to Boeing, See the Commission fact sheets at: http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_134957.pdf -- note that a more recent version will be made available on 27 or 28 September 2007 on the following page: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=354&code=1>).

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

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

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

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

submitted on 18 November. The Facilitator submitted his report on the above procedure to the Panel on 24 February 2006.

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

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

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

The first meeting of the Panel with the parties took place on 26 and 27 September 2007. The Parties had also agreed that parts of the hearing should be open to the public. As a result, a public screening of the open parts of the hearings was scheduled to take place at the WTO on 28 September 2007.

The Parties filed their rebuttal submissions on 19 November 2007 (instead of 6 November 2007 as initially scheduled), as well as their responses to the Panel's questions on 5 December 2007. The first meeting of the Panel with the Third Parties took place on 15 January 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 in this case is chaired by Ms. L. Bautista accompanied by Mr. D. Unterhalter and Ms. Y Zhang. First session of the oral hearing took place in the middle of August (16-19 August) in Geneva where the Appellate Body focused on the financial contribution, benefit and specificity issues. The second session took place on 11-14 October and covered Annex V and Adverse Effects issues.

On 12 March 2012, the AB report was circulated to Members. The AB report is 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 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 proceedings has been closed in August 2013. The hearing on the US compliance measures took place from 29 till 31 October 2013. According to the last announcement of the Panel, it expected to finish its work by mid-2016.

For a complete update of facts and arguments used by the EC and the US in their submissions and in the Panel and Appellate Body hearings, and more background information on the case, see:

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

5) DS 487 - United States – Conditional Tax Incentives for Large Civil Aircraft (procedural state: panel)

On 19 December 2014, the EU requested consultations with the US on the decision by Washington State to extend until 2040 its illegal subsidies to Boeing, amounting to an estimated US\$8.7 billion. The WTO already declared the original Washington State subsidies to Boeing incompatible with WTO rules back in 2012 in DS 353.

The Washington State measure conditions billions of dollars in subsidies upon the use of aircraft components manufactured in Washington State. The EU considers that these measures are prohibited subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

Consultations took place on 2 February 2015 but failed to resolve the issue. The EU subsequently requested the establishment of a panel. The panel was established on 23 February 2015 and composed on 22 April 2015.

The EU filed its First Written Submission on 9 December 2015. The US provided its First Written Submission on 19 January 2016. Third Parties filed their first written submissions on 26 January 2016. The First Substantive meeting with the panel was held on 24/25 February 2016. The Parties had agreed that parts of the hearing should be open to the public.

The parties filed answers to the panel's question on 9 March 2016. The Second Substantive meeting was held on 5 April 2016 and a second set of answers to panel questions was filed on 18 April. The panel is expected to circulate its report before the end of 2016

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

On 8 November 2004, the EC requested consultations with both Canada and the US against the application of countermeasures. The EC's challenge 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. The EC, on 22 December 2008, complied with the DSB recommendation and ruling by requesting consultations with the US and Canada under Article 21.5 of the DSU. On 15 January 2009, USTR announced 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).

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.

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 in December 2015.

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: 21.5 panel)

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

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

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

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

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

Pursuant to the new timetable set by the Panel, the US filed its first written submission on 15 November 2006. The US submitted a non-confidential version of the US first written submission on 10 January 2007.

The EC had filed a request for preliminary rulings on 7 November 2006 relating to a number of measures which in the view of the EC, are not properly before the Panel. The Panel on 22 December 2006 indicated that Parties should "proceed on the understanding that all of the alleged measures challenged by the United States continue to fall within the scope of this proceeding". The Panel on 11 July 2007 issued a ruling to respond to the EC request for a preliminary ruling. It ruled that a number of the measures which the EC claimed were outside the scope of the Panel did indeed fall within its scope. For one other measure challenged by the US, the Panel ruled that its falling within its scope was a question of fact that would be decided at a later stage.

The EC filed its 745-page long first written submission on 9 February 2006. The first meeting of the Panel with the parties took place on 20 and 21 March 2007. Following this meeting, the EC made available the non-confidential version of its first written submission and of its oral statements at the meeting, as well as an executive summary on its website (these documents can be found at: <http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2>). The Parties had also agreed that parts of the hearing should be open to the public. As a result, a public screening of the open parts of the hearings took place at the WTO on 22 March 2007. Following this meeting, the Panel also sent detailed questions to the parties, to which the parties answered on 30 April 2007.

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

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

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

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

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

On 9 December 2011, the US submitted

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

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

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

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

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

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 written stage of the proceedings has been closed. The meeting with the panel took place in April 2013. In December 2015, the panel announced that it expects to complete its work by the end of June 2016.

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

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

On 29 June 2007, the US requested the establishment of a WTO panel under Article 21.5 DSU on the EC import regime for bananas (the US was part of the original *Bananas III* proceedings). The US did not request prior consultations (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.

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

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

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

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

The Commission 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.

B) 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.

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.

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.

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.
