

Introduction

In recent years, the European Union (EU)¹ has become the respondent of several international trade disputes, which have been dealt with within the framework of the World Trade Organization (WTO).² In the *Bananas* and *Hormones* cases, the EU's continuous non-compliance with WTO law has justified the imposition of retaliatory measures by other WTO members to counter their economic disadvantage and/or to enforce compliance by the EU.³ This has led to, *inter alia*, the USA lawfully imposing retaliatory measures in accordance with the WTO Dispute Settlement Understanding (DSU), choosing a variety of products being imported from EU Member States to the USA, such as batteries, bed linen and paperboard boxes, to be levied with a 100 per cent *ad valorem* duty when entering the USA.⁴ All 'retaliation victims' in the *Bananas* and

¹ The EU has legal personality – Article 47 Treaty on European Union (TEU) – and succeeded the European Communities. This book uses the name 'EU' when referring to the EU in its current form and when referring to the European Communities prior to the adoption of the Lisbon Treaty, unless otherwise specified.

² The EU has been a member of the WTO since 1 January 1995: see Council Decision 94/800/EC of 22 December 1994, OJ 1994 L 336, p. 1, and Article XI, para. 1 Marrakesh Agreement Establishing the WTO. For a list of disputes in which the EC/EU has been a respondent, see wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results.

³ *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26, WT/DS48, WT/DS320, WT/DS321; and *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Bananas)*, WT/DS27.

⁴ See Article 22(6) Dispute Settlement Understanding (DSU); *EC-Bananas*, Minutes of DSB meeting, WT/DSB/M/59, Doc. No. 99-2233, 3 June 1999; *EC-Hormones*, Minutes of DSB meeting, WT/DSB/M/63, Doc. 99-2799, 6 July 1999; *EC-Bananas*, WT/DS27/ARB, Decision by the Arbitrators (retaliation authorised by the Dispute Settlement Body (DSB) on 19 April 1999); *EC-Hormones*, WT/DS26/ARB, Decision by the Arbitrators (retaliation authorised by DSB on 26 July 1999). See also USTR Office, Press Release 99-35, 9 April 1999, 'USTR Announces Final Product List in Bananas Dispute' (products included: bath preparations, handbags, wallets and similar articles, felt paper and paperboard boxes,

Hormones cases have thus been operating in sectors different from those concerned by the EU measures that had been held to be non-compliant with WTO law – i.e. EU legislation on the banana market or the beef market. As a consequence, affected traders brought compensation actions before the EU courts, requiring them to deal with the interrelationship between international and European law as well as the availability of judicial remedies under EU law.⁵

The EU's non-compliance with, on the one hand, its WTO law obligations and adopted WTO rulings, and, on the other hand, its tolerating of some traders being hit by retaliation without establishing any internal compensation mechanism give rise to complex legal questions, which are often of constitutional significance. These questions can be roughly divided into two interlinked groups: (1) those concerning the effect and enforceability of the EU's WTO law obligations within the EU legal order, in particular the EU courts' legality review of EU conduct; and (2) those concerning the availability of judicial remedies, in particular with regard to (a) the scope of EU liability for breaches of 'pure' EU law (such as the general principles of EU law) and (b) the existence and scope of a liability principle in the absence of unlawfulness for particularly severe consequences as a result of the conduct of the EU for some.

The decision of the European Court of Justice (ECJ) in *FIAMM et al.* has clarified the Court's position on the scope of EU liability and denied the right to compensation in the particular context of international retaliation under the WTO system.⁶ The author of this book does

lithographs, bed-linen, batteries and coffee or tea makers) – Federal Register/Vol. 64, No. 74/Monday, 19 April 1999/Notices, 19209ff. (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=99-9703-filed.pdf); USTR Office, Press Release 99-60, 19 July 1999, 'USTR Announces Final Product List in Beef Hormones Dispute' (products included: pork, Roquefort cheese, onions, truffles, dried carrots, goose liver, fruit juice, chicory and mustard) – Federal Register/Vol. 64, No. 143/Tuesday, 27 July 1999/Notices, 40638ff (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=99-19174-filed.pdf).

⁵ For notification of actions, see: Case T-69/00, *FIAMM SpA and FIAMM Technologies Inc. v. Commission and Council*, OJ 2000 C 135/30; Case T-151/00, *Le Laboratoire du Bain v. Council and Commission*, OJ 2000 C 247/54; Case T-301/00, *Groupe Fremaux and Palais Royal Inc. v. Council and Commission*, OJ 2000 C 355/32; Case T-320/00, *CD Cartondruck GmbH & Co. KG v. Council and Commission*, OJ 2000 C 355/39; Case T-383/00, *Beamglow Ltd. v. Council et al.*, OJ 2001 C 61/21; *Giorgio Fedon & Figli S.p.A., Fedon S.r.l. and Fedon America USA Inc. v. Commission and Council*, OJ 2001 C 275/10. Case T-297/00, *Claude-Anne de Solène v. Council*, OJ 2000 C 355/30, was removed from the register on 2 April 2003 and Case T-109/03, *Arran Aromatics Ltd. and others v. Commission*, OJ 2003 C 135/33, was removed from the register on 13 July 2006.

⁶ Cases C-120 and 121/06 P, *FIAMM et al.* [2008] ECR I-6513.

not agree with the Court on all counts and therefore puts forward a detailed critique of the Court's position, in particular with regard to the following issues:

- (1) The EU courts' approach has not left much room for hope for applicants challenging EU measures in the light of WTO law and rulings for some time now. It is questioned here, however, whether the courts have provided sufficient legal reasoning when requiring 'direct effect' of WTO law in the particular context of compensation actions. The courts' reasoning for not differentiating between compensation actions and those actions dealing with the validity of EU measures provides justification for further evaluation of its validity and critical assessment.⁷
- (2) The courts' complete denial of retaliation victims' right to compensation in *FIAMM et al.* has left natural and legal persons who are negatively affected as a result of EU conduct without any judicial protection. Such a severe consequence justifies a re-examination of the scope of protection of rights and remedies under EU law. This entails a critical assessment of the focus of the [now] General Court (GC) on the external dimension of EU conduct in the context of international trade disputes when dealing with compensation actions.⁸ Given that even the ECJ in *FIAMM et al.* seems to have left open to what extent general principles of EU law might justify a right to compensation, it is considered significant to assess their potential applicability in the context of international trade disputes for future cases.⁹
- (3) Furthermore, the ECJ's denial of the existence of an EU law liability principle based on severe consequences of EU conduct – rather than on the unlawfulness of the conduct itself – calls for a critique. More specifically, because of the Court's focus on Member States' principles on liability for legislative activity, it failed to assess the existence and scope of principles dealing exclusively with compensation for severe consequences of such activity. In this context, the Court did not even address the resulting gap of judicial protection, despite the comprehensive analysis and suggestions of Advocate General Maduro, which preceded the ECJ's judgment.¹⁰

As the above introduction of core issues of the present critique already suggests, this book does not deal with the EU's *external* responsibility towards other WTO members – a topic that has already been the

⁷ See for detailed discussion Chapters 3 and 6.

⁸ Case T-69/00, *FIAMM and FIAMM Technologies* [2005] ECR II-5393. ⁹ See Chapter 4.

¹⁰ Advocate General Maduro in Cases C-120 and 121/06 P, *FIAMM et al.*, Opinion of 20 February 2008. For a detailed discussion, see Chapter 5.

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subject of much academic writing.¹¹ The aim of this book is rather to analyse and critically evaluate the current status of EU law on *internal* responsibility – as developed by the EU courts in their case law on EU liability under (now) Article 340(2) of the Treaty on the Functioning of the European Union (TFEU)¹² – for EU conduct with an external dimension and, more specifically, EU liability for conduct in the context of international trade disputes. This evaluation comprises an assessment of the effect of WTO law and its infringements on the EU legal system, with a particular focus on the legality review of EU courts in the course of compensation actions. Within the context of this critique, adjustments of the courts' approach in the specific context of international trade disputes are suggested. Therein, fundamental rights and general principles of EU law are taken into account, placing the issues in question into the context of EU constitutional law.

This book thus brings together the strand of the law on EU liability under Article 340(2) TFEU with the issues of effect and enforceability of international trade law within the EU legal order. It assesses the EU courts' approach with regard not only to the interrelationship between the WTO and the EU legal order but also the role of 'pure' EU law for identifying a right to compensation of retaliation victims. Conclusions are drawn on how the EU courts could and should offer judicial protection to those individuals being damaged as a consequence of political decisions made in the general interests of the EU. It is argued that the external dimension of EU conduct in the context of international trade disputes should not diminish in principle the scope of judicial review and fundamental rights protection.

¹¹ See, e.g., C. Carmody, 'Remedies and Conformity under the WTO Agreement', *Journal of International Economic Law*, 5(2) (2002), 307–29; T. Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union', *Common Market Law Review*, 35(2) (1998), 325–78; J. Kearns and S. Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5', *JIEL*, 5(2) (2002), 331–52; B. Martenczuk, 'Decisions of Bodies Established by International Agreements and the Community Legal Order' in V. Kronenberger (ed.), *The EU and the International Legal Order: Discord or Harmony?* (The Hague: Asser Press, 2001), pp. 141–63; A. Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective', *JIEL*, 4(1) (2001), 131–44; S. Charnovitz, 'An Analysis of Pascal Lamy's Proposal on Collective Preferences', *JIEL*, 8(2) (2005), 449–72; P. Eeckhout, 'Remedies and Compliance' in D. Bethlehem, D. McRae, R. Neufeld and I. Van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009), pp. 438–59.

¹² According to Article 340(2) TFEU, 'the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

The book is structured as follows. After providing the case history and context of the research undertaken (Chapter 1), the legal basis and general scope of EU liability is assessed, taking into account the impact of international law in this context and suggesting a waiver of the requirement of direct effect in the context of compensation actions (Chapter 2). Subsequently, the book assesses the right to compensation for infringements of WTO law by analysing the EU courts' current approach in cases in which applicants tried to enforce the EU's WTO law obligations (Chapter 3). It then turns to the potential right to compensation for infringements of 'pure EU law' by evaluating the reach or implications of general principles of EU law, taking into account the external dimension of EU conduct in the context of international trade disputes (Chapter 4). The impact of EU general principles on the EU's liability regime is further evaluated by looking at a right to compensation in the absence of unlawfulness, which would be based on the severe consequences of the EU's conduct rather than its unlawfulness; this includes a critique of the ECJ's denial of the existence of such a liability principle under EU law (Chapter 5). In its final chapter, the book draws together conclusions reached in previous chapters and thereby articulates its overall argument, illustrating the weaknesses of the current state of law. Placing the issues addressed in their international and constitutional law context, the chapter includes recommendations on how to improve the current situation of retaliation victims with regard to the availability and scope of judicial protection before the EU courts (Chapter 6).

1 Setting the scene: WTO disputes, retaliation and the EU courts' reception of WTO law

The aim of this chapter is to provide the basis for analysis and critical assessment in the subsequent chapters of the EU courts' approach and reasoning regarding EU liability in the context of international trade disputes. Presenting the international dimension or context of the legal issues in question, this chapter starts with providing an overview of the so-called *Hormones* and *Bananas* cases brought against the EU before the WTO DSB. It is those disputes under international law that triggered retaliation that allegedly caused damage to traders later asking for compensation from the EU. Subsequently, the chapter turns to the domestic EU law dimension of this topic and discusses the EU courts' case law on the effect of WTO law and rulings within the EU legal order, looking in particular at the scope of the courts' legality review of EU conduct against the benchmark of WTO law. The analysis includes judgments rendered in the context of actions aiming at the *annulment* of EU measures by the EU courts. Even though it is submitted that these should not be directly relevant for the assessment of *compensation* actions, an analysis of the pertinent case law helps to understand the historical development of the courts' approach regarding the overall implications of the EU's WTO law obligations. This background will allow for a contextual analysis of the more specific case law on EU liability in Chapter 3. The overview in the present chapter also covers the most recent judgments dealing specifically with EU liability for damage allegedly occurring in the context of the *Hormones* and *Bananas* disputes. However, as the aim of this chapter is to provide the factual starting point for this research, the presentation of case law is limited to the courts' actual *conclusions*; the evaluation and critique of the courts' *reasoning* as well as some suggestions for modification are provided in subsequent chapters.

As stated in the Introduction and indicated above, the research presented in this book entails an analysis of the interrelationship between the European and WTO legal regimes, the identification of challengeable EU conduct and the legal position of affected individuals. The damage suffered by retaliation victims admittedly occurred as a consequence of another (non-EU) WTO member's imposition of retaliatory measures. However, retaliation is nevertheless triggered by EU conduct, which – as discussed in more detail in Chapters 4 and 6 – in principle has to be in compliance with the entire body of EU law and thus needs to be reviewable in the light of it, independently of its compliance with WTO law. However, the (now) General Court (GC) in *FIAMM* ended its review of EU legislation once it had denied the enforceability of WTO law as a benchmark for the lawfulness of EU conduct. In response to the GC's approach, the third section of this chapter disentangles the different aspects of EU conduct in the context of international trade disputes, identifying their legal bases and the body of law to be complied with by the EU institutions. This is meant to contribute to the further clarification of the appropriate scope of legality review undertaken by the EU courts where the conduct of EU institutions is relevant under or possibly regulated by more than one legal regime. It also provides the basis for a more detailed assessment in Chapter 4 of the scope and applicability of general principles of EU law where the EU courts are asked to review EU conduct that has an international dimension (i.e., where it is not limited to domestic EU effects but also affects the EU's international trade relations).

1.1 Relevant international trade disputes so far: the *Hormones* and *Bananas* cases brought before the WTO

On 1 January 1995, the Agreement Establishing the World Trade Organization (hereinafter the 'WTO Agreement') and, *inter alia*, the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Sanitary and Phytosanitary Measures (hereinafter the 'SPS Agreement'), the Agreement on Technical Barriers to Trade (hereinafter the 'TBT Agreement') and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) entered into force for the EU.¹ Thus, not only all Member States of the EU, but also the EU

¹ Council Decision 94/800/EC of 22 December 1994, OJ 1994 L 336/1.

itself has since become a WTO member.² Because of the EU's exclusive competence in most trade matters (see Article 207 TFEU),³ the EU represents all Member States at the WTO⁴ and is itself (see Article 47 TEU)⁵ party to disputes before the WTO DSB.⁶

1.1.1 *The Hormones case*

When the WTO Agreement entered into force for the EU, three EU Directives from 1981 and 1988 prohibited the importation of hormone-treated meat and meat products.⁷ A further Council Directive 'concerning the prohibition on the use in stockfarming of certain substances having a hormonal . . . action' came into force in 1996 and repealed the former Directives, but maintained the import ban and extended it to another hormone.⁸ The EU claimed that the legislation was motivated by public health, environmental and consumer protection concerns.⁹

In January 1996, the USA requested consultation with the EU, claiming that measures taken under the Directive restricted or prohibited imports of meat and meat products from the USA and other WTO members and therefore infringed several provisions of the GATT, the

² Article XI(1) of the WTO Agreement.

³ For detailed commentary on (now) Article 207 TFEU, see R. Bierwagen in H. Smit, P. Herzog, C. Campbell and G. Zagel (eds.), *Smit & Herzog on the Law of the European Union*, Vol. 3 (Newark, NJ: Lexisnexis Matthew Bender, 2010); M. Hahn, 'Commentary on Article 207 TFEU' in C. Callies and M. Ruffert (eds.), *EUV/AEUV*, 4th edn (Munich: C. H. Beck Verlag, 2011), pp. 2013–78.

⁴ For a general overview on 'the EU and the WTO', see: http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/index_en.htm.

⁵ For a detailed commentary on Article 47 TEU, see G. Zagel in H. Smit, P. Herzog, C. Campbell and G. Zagel (eds.), *Smit & Herzog on the Law of the European Union*, Vol. 1 (Newark, NJ: Lexisnexis Matthew Bender, 2010).

⁶ The EU has already been a complainant of disputes with Argentina, Australia, Brazil, Canada, Chile, China, India, Republic of Korea, Mexico, the Philippines, Thailand and the USA. The EU has already been a respondent of disputes with Argentina, Australia, Brazil, Canada, Colombia, Ecuador, Guatemala, Honduras, India, Republic of Korea, Mexico, Norway, Panama, Peru, Taiwan (Chinese Taipei), Thailand, Uruguay and the USA. See disputes by country on www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm and <http://trade.ec.europa.eu/wtdispute/search.cfm?code=1> and code=2.

⁷ Council Directive 81/602/EEC of 31 July 1981, OJ 1981 L 222/32; Council Directive 88/146/EEC of 7 March 1988, OJ 1988 L 70/16; Council Directive 88/299/EEC of 17 May 1988, OJ 1988 L 128/36.

⁸ Council Directive 96/22/EC of 29 April 1996, OJ 1996 L 125/3, 23 May 1996 (effective as of 1 July 1996).

⁹ T. Cottier and M. Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland* (Berne: Staempfli Publishers Ltd., and London: Cameron May Ltd., 2005) 782.

SPS Agreement and the TBT Agreement, as well as the Agreement on Agriculture.¹⁰ On request of the USA of April 1996, a panel was established in May and composed in July 1996.¹¹ After Canada's request for consultation with the EU in June 1996,¹² Canada requested the establishment of a panel in September,¹³ which was established by the DSB in October and composed in November 1996.¹⁴ In November 1996, the EU and Canada agreed that the composition of the latter panel would be identical to the composition of the panel established at the request of the USA.¹⁵

The panel found in both cases – its reports were circulated in August 1997 – that the EU ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with the provisions of the SPS Agreement.¹⁶ An appeal of the EU brought in September 1997¹⁷ was unsuccessful; the Appellate Body partly upheld the finding of the panel in January 1998 and held that the EU was required to lift the hormone ban in the absence of any scientific risk assessment of harm.¹⁸ On 13 February 1998, the DSB adopted the Appellate Body report and the panel report,

¹⁰ See *European Communities – Measures Concerning Meat and Meat Products (Hormones (US))*, Request for Consultations by the United States, WT/DS26/1, Doc. No. 96-0359, 31 January 1996; the USA referred to Article III or XI GATT, Articles 2, 3 and 5 SPS Agreement, Article 2 TBT Agreement and Article 4 Agreement on Agriculture; for a summary of the dispute before the WTO, see www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

¹¹ *EC-Hormones (US)*, Request for the Establishment of a Panel by the US, WT/DS26/6, Doc. No. 96-1664, 25 April 1996; *EC-Hormones (US)*, Constitution of a Panel – Note by the Secretariat, WT/DS/26/7, Doc. No. 96-2686, 9 July 1996.

¹² *European Communities – Measures Concerning Meat and Meat Products (Hormones (Canada))*, Request for Consultations by Canada, WT/DS48/1, Doc. No. 96-2602, 8 July 1996.

¹³ *EC-Hormones (Canada)*, Request for the Establishment of a Panel by Canada, WT/DS48/5, Doc. No. 96-3680, 17 September 1996.

¹⁴ *EC-Hormones (Canada)*, Constitution of a Panel – Note by the Secretariat, WT/DS48/6, Doc. No. 96-4791, 12 November 1996.

¹⁵ See *EC-Hormones (US and Canada)*, Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R, Doc. No. 98-0099, 16 January 1997, first paragraph of the Introduction: Statement of the Appeal.

¹⁶ See *EC-Hormones (US)*, Complaint by the US – Report of the Panel, WT/DS26/R/USA, Doc. No. 97-3368, 18 August 1997; and *EC-Hormones (Canada)*, Complaint by Canada – Report of the Panel, WT/DS48/R/CAN, Doc. No. 97-3371. The panel found the (then) EC measure to be inconsistent with Articles 3.1, 5.1 and 5.5 SPS Agreement.

¹⁷ See *EC-Hormones (US and Canada)*, Notification of an Appeal by the EC under Paragraph 4 of Article 16 of the DSU, WT/DS/26/9, Doc. No. 97-4084, and WT/DS48/7, Doc. No. 97-4091, 25 September 1997.

¹⁸ See *EC-Hormones (US and Canada)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS48/AB/R, Doc. No. 98-0099, 16 January 1998.

as modified by the Appellate Body, holding the EU import ban to be in violation of the SPS Agreement.¹⁹

Subsequently, an arbitrator granted the EU a ‘reasonable period of time’ (Article 21.3(c) DSU,²⁰ until 13 May 1999) to comply with the DSB reports.²¹ After the expiry of this ‘grace period’ – and the failure of the EU to comply with the DSB reports – the USA and Canada requested authorisation to impose retaliatory measures against the EU by suspending concessions (Articles 22.2, 22.6 DSU).²² The original panel was asked by the DSB to arbitrate on the level of suspension of concessions and determined the level of nullification suffered by the USA to be equal to US\$116.8 million²³ and the level of nullification suffered by Canada to be equal to CDN\$11.3 million.²⁴ On 26 July 1999, the DSB authorised the suspension of concessions to the EU by the USA and Canada in the respective amounts determined by the arbitrators as being equivalent to the level of nullification suffered by them.²⁵ The USA and Canada suspended concessions to the EU and imposed duties on goods being exported from the EU and imported to the USA or Canada.²⁶

In October 2003, the EU communicated to the DSB that, with the new Directive (2003/74/EC) in force, it had fully implemented the recommendations and rulings of the DSB; as a consequence, the suspension of concessions to the EU by the USA and Canada were no longer justified.²⁷ However, neither the USA nor Canada acceded to the request of the EU.²⁸

In November 2004, the EU filed a request for consultations with the USA and Canada, asserting that these countries should have removed

¹⁹ *EC-Hormones (US and Canada)*, WT/DS26/13 and WT/DS48/11, Doc. No. 98/0587, 19 February 1997.

²⁰ Annex 2 to the WTO, OJ 1994 L 336/324.

²¹ *EC-Hormones (US and Canada)*, Arbitration under Art. 21.3(c) of the DSU, Award of the Arbitrator, WT/DS26/15 and WT/DS48/13, Doc. No. 98-2227, 29 May 1998.

²² *EC-Hormones (US and Canada)*, Recourse to Art. 22(2) DSU, WT/DS26/19, Doc. No. 99-2091, 19 May 1999 and WT/DS48/17, Doc. No. 99-2097, 20 May 1999.

²³ *EC-Hormones (US)*, WT/DS26/ARB, Doc. No. 99-2855, 12 July 1999, paras. 79, 83, 84, Annex 1.

²⁴ *EC-Hormones (Canada)*, WT/DS48/ARB, Doc. No. 99-2860, 12 July 1999, paras. 68, 72, 73, Annex 1.

²⁵ See a summary of the disputes: www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm; www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm.

²⁶ See WTO Arbitrators Decisions of 12 July 1999 (notes 23 and 24 above), Annex II for products lists.

²⁷ *EC-Hormones (US and Canada)*, WT/DS26/22, WT/DS48/20, Doc. No. 03-3759, 28 October 2003.

²⁸ See a summary of the disputes: www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm; www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm.