Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products

(WT/DS485)

Third Party Oral Statement of Australia

Geneva, 16 September 2015
I. INTRODUCTION

1. Mr Chairman, Members of the Panel, thank you for the opportunity to present Australia’s views on this dispute.

2. Australia makes this third party written submission because of its systemic interest in the correct and consistent interpretation and application of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the General Agreement on Tariffs and Trade (GATT 1994).

3. The issues considered in this statement cover matters raised in the request for a preliminary ruling and the substantive case; specifically:

   a) what is reasonably required for identification of the specific measures at issue in a Panel Request.

   b) the legal standard under Article II:1 of GATT 1994 and the meaning of the phrase “in excess of” in Article II.1(b) of GATT 1994.

   c) the consistency or otherwise of a temporary reduction of a rate of duty that otherwise exceeds the bound rate under Article II.1(a) of GATT.

   d) “as such” claims under Article II:1(b) of GATT.

II. WHAT IS REASONABLY REQUIRED FOR IDENTIFICATION OF THE SPECIFIC MEASURES AT ISSUE IN A PANEL REQUEST.

4. Australia is of the view that there needs to be a balance between specificity of complaints and reasonableness.

5. As required by WTO rules, there is a need for Panel requests to be sufficiently precise and to: “identify the specific measures at issue”, as provided for in Article 6.2 of the DSU.
6. That said, excessive complexity and uncertainty in a Member’s measures should not allow it to evade its obligations, or delay the dispute settlement system with technicalities, when from a pragmatic point of view the complaining party has made a reasonable and good-faith effort to meet the specificity requirements of Article 6.2 of the DSU.

7. What is required is reasonable notice of the scope of the dispute, and notice to the parties and third parties of the nature of the complaint\(^1\). This enables the “respondent” to prepare its defence, amongst other things.

8. Australia does not agree with Russia’s assertion that in defining a measure the complaining Member: “…has to show that the customs duty collected will be in excess of the bound rate every time the duty applies”\(^2\).

9. Rather, Australia is of the view that the DSU does not require that each instance of a measure at issue be cited, provided that some other method has been used that reasonably directs the defending Member to the instances of inconsistency.

10. The EU has provided reasonable ways of directing Russia to the instances of inconsistency in the circumstances. These include the EU’s description of the measures in dispute in its claim, and the EU’s provision of an “Illustrative List” setting out relevant examples. These examples show that the measures in question produces inconsistent outcomes in at least some cases, and are likely to do so in others. This is enough.

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\(^1\) Appellate Body Report US — Carbon Steel, para 126.
\(^2\) Russia’s Request for a Preliminary Ruling, para 53.

11. A Member’s customs duties must not exceed the duties provided for in its Schedule. This is a basic principle of the GATT, establishing one of the foundations upon which the agreement rests.

12. It follows that if the duties Russia has imposed were in excess of those provided in its schedule in any instance, it would be in breach of its WTO obligations.

13. In accordance with the plain reading of Article II:1(b) of GATT, “in excess of” in Article II.1(b) of GATT should be taken to refer to even the smallest amount of increment over the amount inscribed in the schedule.

14. Australia agrees that in principle a Member may change the method of calculating the duties it charges without ipso facto breaching its obligations. But if the method results in a higher rate than the bound rate, it is inconsistent and should be changed.

15. We consider that under the Vienna Convention as a matter of treaty interpretation the Panel in interpreting “in excess of” in Article II:1(b) GATT 1994 can draw from the text and the interpretation of Article III:2 GATT 1994. The Appellate Body in Japan – Alcoholic Beverages II explained that the terms “in excess of” within Article III:2 meant that “[e]ven the smallest amount of “excess” is too much”. This is relevant to the interpretation of Article II:1(b).

16. Australia supports no allowance being made for a Member to exceed its scheduled rights.

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3 Appellate Body Report, Argentina – Textiles and Apparel, para 47.
4 Appellate Body Report, Argentina — Textiles and Apparel, para 46.
5 Appellate Body Report, Japan – Alcoholic Beverages II, p. 23.
IV. THE CONSISTENCY OR OTHERWISE OF A TEMPORARY REDUCTION OF A RATE OF DUTY THAT OTHERWISE EXCEEDS THE BOUND RATE UNDER ARTICLE II.1(a) OF GATT 1994.

17. Australia is of the view that a temporary reduction of a rate of duty, which otherwise exceeds the bound rate, should not be seen to accord with WTO requirements.

18. Traders operating in the marketplace require certainty. Temporary reductions in otherwise non-compliant rates has the potential to cause deleterious effects on competition.\(^6\)

19. Temporary compliance with obligations when permanent laws enshrine non-compliance is concerning for other Members and for businesses seeking to trade with Russia. Where compliance is temporary, inconsistency is the default. There is no reason in principle that a legislated future duty increase could not itself be considered a measure subject to challenge.

20. A degree of uncertainty in Russia’s administration of its tariff measures undermines Russia’s consistency with WTO rules.

V. “AS SUCH” CLAIMS UNDER ARTICLE II:1(b) OF GATT.

21. Australia agrees with the EU that it may make claims “as such”, on the basis of the structure and design of instruments\(^7\). Claims do not need to be limited to merely challenging individual instances of the application of the duties.

22. In Argentina — Textiles and Apparel the Appellate Body relevantly found a breach of Article II:1(b) of GATT 1994 because the: “structure and design, results with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate…”\(^8\).

\(^6\) Panel report, EC-IT products, para 7.761.
\(^7\) Appellate Body Report, Argentina-Import Measures, para 5.101.
\(^8\) Appellate Body Report, Argentina — Textiles and Apparel, para 55.
23. In line with this view, allowing claims against measures\(^9\) “as such” serves the practical purpose of preventing future disputes by allowing the root of WTO-inconsistent measures to be eliminated.

VI. CONCLUSION

24. In conclusion Australia submits that the Panel in this dispute should find that the specific measures at issue have been sufficiently and reasonably identified.

25. In doing so the Panel should take into account Australia’s observations concerning, firstly, the meaning of the phrase “in excess of”, for the purposes of Article II.1(b) of GATT 1994, to refer to even the smallest amount of increment over the amount inscribed in a Member’s Schedule.

26. Further the Panel should take into account that a temporary reduction from an infringing duty does not eliminate inconsistency with Article II:1(a) of GATT.

27. That concludes Australia’s remarks. Australia thanks the Chair and Members of the Panel for this opportunity to present its views in this dispute. We thank also the Secretariat staff for their work to date on this matter.