Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products

(WT/DS485)

Australia’s Third Party Response to the Panel regarding the Russian Federation’s request for a Preliminary Ruling of 24 August 2015

Geneva, 2 September 2015
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I. INTRODUCTION

1. Australia provides these comments on Russia’s request for a preliminary ruling because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant agreements, in particular the General Agreement on Tariffs and Trade 1994 (GATT) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

II. THE SUBSTANCE OF RUSSIA’S PRELIMINARY RULING REQUEST

2. Australia hereby responds to Russia’s request for a preliminary ruling in dispute WT/DS485 pursuant to its letter to the Panel dated 24 August 2015.

A. Terms of reference of a panel

3. Australia is not persuaded that Russia’s request for a preliminary ruling is made out. Australia does not agree with Russia’s contention that the claims made by the European Union are outside the Panel’s terms of reference. In particular, Australia does not agree that the EU has failed to identify the “specific measures at issue” in its Panel Request or that the EU’s Request for the Establishment of a Panel expands the scope of the dispute beyond the Request for Consultations.

B. Specific measure at issue: significant number of tariff lines

4. Australia acknowledges the need for panel requests to be sufficiently precise and to “identify the specific measures at issue”. Article 6.2 of the DSU states (emphasis added):

   The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5. Australia further notes the dual purposes which a request for establishment of a panel must serve. As provided by the Appellate Body in US — Carbon Steel, at paragraph 126:

   The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant’s case.

6. Australia is of the view that the EU’s request sufficiently serves these dual purposes of defining the scope of the dispute, and also the purpose of providing notice to the parties and third parties of the nature of the complaint.
7. Russia’s concerns include, firstly, the EU’s reference to a ‘significant number of tariff lines’ in the EU’s panel request. In its Request for a Preliminary Ruling Russia states at paragraph 10:

    This element in European Union’s Request for Establishment of a Panel fails to comply with the provisions of Article 6.2 of the DSU, because it fails to “identify the specific measure at issue”. In particular, the reference to “significant number of tariff lines” is too vague and does not allow for the identification of specific instruments that the reference aims to cover.

8. Australia notes that the EU’s claim in relation to the “significant number of tariff lines” is the twelfth measure that the EU has identified in its Panel Request. This twelfth measure has a common basis with other claims made by the EU, being that Russia has applied duties in excess of those provided for in its Schedule.

9. Article 6.2 of 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. Australia is of the view that the EU’s description of the “twelfth measure” in its Panel Request adequately satisfies this requirement. In addition, the EU in its First Written Submission provides to the panel an Illustrative List containing a number of examples, stating at paragraph 130 of its First Written Submission:

    For each of those examples, the tariff line, product description, bound and applied duties are shown. All of those individual CCT tariff lines contravene Article II of the GATT 1994.

10. Russia in its request for a preliminary ruling points to this Illustrative list as not being sufficient to identify the measure, stating at paragraph 11:

    In paragraphs 130 – 131 of the European Union First Written Submission it is clearly stated that this is an “Illustrative List” and “the claims of the European Union with respect to the SDV are not, however, limited to the specific examples listed in the Illustrative List”. The “illustrative” nature of the list is the evidence of it not being clearly identified.

11. Australia is of the view, however, given the number of instances concerned, that the EU has provided a reasonable way of directing Russia to the instances of inconsistency.

12. In further support of the EU’s claim Australia notes the right of the EU to bring a challenge against a system as a whole. This accords with the approach supported in EC — Selected Customs Matters, in which the Appellate Body stated, at paragraph 166:

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1 EU’s First Written Submission, paragraph 32.
2 Ibid, paragraph 32.
3 Illustrative List of discrepancies, Exhibit EU-19 attached to the EU’s First Written Submission.
4 CCT refers to the “Common Customs Tariff of the Eurasian Economic Union” per the EU’s First Written Submission at paragraph 29.
We agree with the Panel that ‘there is nothing in the DSU nor in the other WTO agreements that would prevent a complaining Member from challenging a responding Member’s system as a whole or overall.’ We also agree with the Panel that a challenge that a system ‘as a whole or overall’ is WTO-inconsistent must be presented in a manner that meets the two distinct requirements in Article 6.2 of the DSU…

13. The Appellate Body provides there is nothing in the DSU that would prevent action being taken against a system of a Member as a whole. It follows that it is open for the EU to bring a challenge against Russia regarding a systematic problem with its tariff system.

C. Specific measure at issue: measures “as such” – not raised in panel request

14. Russia claims that the EU failed to identify in its Request for the Establishment of a Panel any measure “as such” as a challenged measure, whereas in the EU’s the First Written Submission the EU challenges a number of measures “as such”. Russia has requested the Panel to issue a preliminary ruling that the claims of the EU in respect of any measure “as such” fall outside the Panel’s terms of reference.

15. Regarding Russia’s concerns about issues not raised in the EU’s first panel request which were raised in its First Written Submission, Australia, notes the approach taken by the Appellate Body in US — Continued Zeroing, at paragraph 168-169 (emphasis added):

…the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings.

16. The Appellate Body in US — Continued Zeroing found that the degree of specification required is that the “nature of the measure” and the “gist of what is at issue” be identified. The Appellate Body noting the “existence of such measures” can be investigated at the panel hearing itself.

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5 Russia’s request for a preliminary ruling paragraphs 15 to 19.
17. Australia further notes the panel in Japan – Film provides further guidance on identification of measures, stating at paragraph 10.8:

   In our view, the requirements of Article 6.2 would be met in the case of a ‘measure’ that is subsidiary or so closely related to a ‘measure’ specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.

18. In line with the jurisprudence above, Australia is of the view that while the EU did not use the term “as such” in its panel request, Russia has been provided with sufficient notice of the kind of measures the EU has sought to challenge, so as to be able to defend itself.

D. That the EU’s Request for the Establishment of a Panel Expands the Scope of the Dispute beyond the Request for Consultations

19. Russia claims the EU in its Request for the Establishment of a Panel includes a number of new claims, which expands the scope of the dispute and changes the essence of the complaint set out in EU’s Request for Consultations, and so these “new claims” should therefore be outside the panel’s term of reference.

20. As provided by the Appellate Body in Brazil — Aircraft there is no requirement of “precise and exact identity” between consultations request and panel request, stating a paragraph 132:

   We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.

21. Russia is correct in that there is a nexus between the consultations request and a panel request, which is that the complaining party cannot expand the scope of the dispute. In US — Upland Cotton, the Appellate Body stated at paragraph 293 that:

   As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the “precise and exact identity” between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise.”

22. The issues the Russia has raised, being the EU’s claim in connection with tariff line 4810 92 100 07, the claim in relation to a “ceiling” and claims connected with “systematic duty variation” which were made in the EU’s panel request, in our view do not “expand” the scope of the EU’s inquiry which all relates to the EU’s claim that Russia has exceeded its bound tariff limits.

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6 Russia’s request for a preliminary ruling paragraphs 25 to 48.
7 Ibid paragraphs 31 to 38.
8 Ibid paragraphs 39 to 43.
9 Ibid paragraphs 44 to 48.
III. SUMMARY

23. The EU’s claim raises concerns with Russia compliance with its tariff obligations. Compliance with tariff obligations is an important issue and a basic obligation under WTO agreements. Australia is of the view that Russia’s case for a preliminary ruling has not been made out.