Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products

(WT/DS485)

Third Party Submission of Australia

Geneva, 2 September 2015
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I. INTRODUCTION

1. Australia considers that these proceedings initiated by the European Union under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concern basic obligations concerning the obligations of WTO Members under the General Agreement on Tariffs and Trade 1994 (GATT) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

2. The issues which Australia addresses in this submission are:
   
   (a) Identification of the specific measure at issue – Article 6.2 of the DSU.
   
   (b) The Legal standard under Article II:1 of GATT.
   
   (c) The meaning of “in excess of” in Article II. 1(b) of GATT.
   
   (d) The temporary reduction of a rate of duty that exceeds the bound rate under Article II.1(a) of GATT.
   
   (e) Claims “as such” under Article II:1(b) of GATT.

II. DISPUTE SETTLEMENT UNDERSTANDING

A. SPECIFIC MEASURES AT ISSUE - ARTICLE 6.2 OF THE DSU

3. 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:

   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.

4. 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.

5. 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.

6. 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.

7. 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 the other claims made by the EU, being that Russia has applied duties in excess of that provided for in its Schedule.

8. 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 claim in its Panel Request adequately satisfies this. In addition, in its First Written Submission the EU submits 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.

9. 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.

10. 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.

11. 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:

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…

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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 Common Customs Tariff of the Eurasian Economic Union.
12. 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.

III. GENERAL AGREEMENT ON TARIFFS AND TRADE

A. LEGAL STANDARD UNDER ARTICLE II OF GATT

13. Australia agrees with the view of the European Union that all that is required in order to find a violation of both Articles II:1(a) and II:1(b) of GATT is the existence of ordinary customs duties that are in excess of those provided in the Schedule\(^5\).

14. This accords with the text and interpretation by the Appellate Body of Articles II:1(a) and (b) of GATT.

15. Articles II:1(a) and (b) state (emphasis added):

(a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

16. GATT Article II:1(a) provides an obligation upon a member not to provide less favourable treatment than that provided for in its schedule. GATT Article II:1(b) states that imported products of Members shall be exempt from customs duties in excess of those specified in the importing Member’s schedule.

17. The Appellate Body in Argentina – Textiles and Apparel has provided guidance on the interpretation of Article II:1(a) and (b) of GATT 1994. At paragraph 47, the Appellate Body states in relation to Article II:1(a):

…a Member must accord to the commerce of the other Members ”treatment no less favourable than that provided for” in its Schedule.

18. The Appellate Body in Argentina – Textiles and Apparel further clarifies the meaning of ‘less favourable’ in relation to Article II:1(b) at paragraph 47:

It is evident to us that the application of customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes ”less favourable” treatment under the provisions of Article II:1(a).

19. Australia supports the interpretation provided in Argentina – Textiles and Apparel, that a Member’s customs duties must not exceed the duties provided for in its

\(^5\) First Written Submission of the European Union, paragraph 38.
schedule. It follows that if the duties Russia has imposed were in excess of those provided in its Schedule it would be in breach of its WTO obligations.

1. **Meaning of “in excess of” in Article II. 1(b) of GATT**

20. Australia supports an interpretation of ‘in excess of’ in Article II. 1(b) of GATT as referring to even the smallest amount of increment over the amount inscribed in the schedule. This accords with the plain reading of Article II:1(b) of GATT, the object and purpose of GATT in providing for ‘bound’ tariff limits and the interpretation of this provision by the Appellate Body.

21. The Appellate Body in *Argentina — Textiles and Apparel* at paragraph 46 provided:

> A tariff binding in a Member’s Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties in excess of those provided for in that Member’s Schedule.

22. The Appellate Body has thus confirmed that the tariff bindings provided in a Member’s Schedule provide an upper limit on the amount of duty that may be imposed.

2. **Temporary reduction – Article II.1(a) of GATT**

23. Australia supports the position taken by the EU that a rate of duty which exceeds the bound rate, and is temporarily reduced does not accord with the requirements of Article II:1(a) of GATT.

24. This accords with the view provided by the panel in *EC-IT products*, at paragraph 7.761:

> …we are of the view that the duty suspension measure does not eliminate the inconsistency with Article II:1(a) because there remains the potential of deleterious effects on competition.

25. Australia notes the importance of foreseeability for traders operating in the marketplace, and agrees that there is the potential of deleterious effects on competition of a regulated rate of duty which exceeds the bound rate, albeit which is temporarily reduced.

**B. CLAIMS “AS SUCH” ARTICLE II:1(b) of GATT**

26. Australia agrees with the EU’s ability to make claims “as such”, directly on the basis of the structure and design of instruments containing rules or norms of general and prospective application, and for claims not to be limited to merely challenging individual instances of the application of the duties (“as applied”) as provided in paragraph 122 of its First Written Submission.
27. This ability to make a claim “as such” is supported by the Appellate Body in
*Argentina-Import Measures*, which provides at paragraph 5.101:

> It is well established that instruments of a Member containing rules or norms can be
> challenged "as such" in WTO dispute settlement, independently of whether or how
> those rules or norms are applied in particular instances.

28. Australia notes that the Appellate Body in *Argentina – Textiles and Apparel* provided
that the type of duty itself is not addressed by Article II:1(b) of GATT, stating at
paragraph 46:

> A tariff binding in a Member's Schedule provides an upper limit on the amount of
duty that may be imposed, and a Member is permitted to impose a duty that is less
than that provided for in its Schedule. The principal obligation in the first sentence of
Article II:1(b), as we have noted above, requires a Member to refrain from imposing
ordinary customs duties in excess of those provided for in that Member's Schedule.
However, the text of Article II:1(b), first sentence, does not address whether applying
a type of duty different from the type provided for in a Member's Schedule is
inconsistent, in itself, with that provision.

29. In this matter, as pointed out by the EU at paragraph 124 of its First Written
Submission, the focus of its concern is the imposition of ordinary customs duties in
excess of those provided for in that Member's Schedule. The form of the customs duty
is only at issue to the extent that it allows this excess:

> As has been clarified, the extent to which the design and structure of the duties leads
to a violation of Articles II:1(b) and II:1(a) of the GATT 1994 depends entirely on the
customs value of an imported product, in some cases expressed in combination with
another characteristic of the product such as its volume or weight, and can be easily
deduced in advance.

30. The importance of being able to take action “as such” in these circumstances is
addressed by the Appellate Body in *US–Corrosion-Resistant Steel Sunset Review*
which states at paragraph 82:

> allowing claims against measures, as such, serves the purpose of preventing future
disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

31. As a practical matter it is important that actions can be taken “as such” in these
circumstances, as it would otherwise require a new action to be commenced each time
a customs duty was exceeded.

**IV. CONCLUSION**

32. For the reasons set out above, Australia submits that the Panel in this dispute should
uphold that the specific measures at issue have been sufficiently identified. Further,
that the Panel should take into account Australia’s observations concerning, firstly,
“excess of”, for the purposes of Article II.1(b) of GATT, to refer to even the smallest
amount of increment over the amount inscribed in a Member’s Schedule. Secondly,
to take into account that a temporary reduction from an infringing duty does not
eliminate inconsistency with Article II.1(a) of GATT.