Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products

(WT/DS485)

Executive Summary
of the Third Party Written Submission and
Third Party Oral Statement,
of Australia

Geneva, 9 October 2015
I IDENTIFICATION OF SPECIFIC MEASURES AT ISSUE PER ARTICLE 6.2 OF THE DSU DOES NOT REQUIRE EACH INSTANCE OF A BREACH AT ISSUE BE CITED.

1. Australia is firstly of the view that the European Union’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.1

2. Secondly, Australia is of the view that Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (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.

3. 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.

4. The Appellate Body in EC — Selected Customs Matters provides there is nothing in the DSU that would prevent action being taken against a system of a Member as a whole.2 It follows that it is open for the EU to bring a challenge against Russia regarding a systematic problem with its tariff system.

II ARTICLE II. 1(b) OF GATT PROHIBITS EVEN THE SMALLEST AMOUNT OF INCREMENT IN ORDINARY CUSTOMS DUTIES OVER THE AMOUNT PRESCRIBED IN A MEMBER’S SCHEDULE

5. Australia agrees with the view of the EU that all that is required in order to find a violation of both Articles II:1(a) and II:1(b) of the GATT 1994 is the existence of ordinary customs duties that are in excess of those provided in the Schedule.3

6. A Member’s customs duties must not exceed the duties provided for in its Schedule. This is a basic principle of the GATT 1994, and is one of the foundations upon which the agreement rests.

7. Australia supports an interpretation of ‘in excess of’ in Article II. 1(b) of the GATT 1994 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 the GATT 1994 in providing for ‘bound’ tariff limits and the interpretation of this provision by the Appellate Body in Argentina — Textiles and Apparel. The Appellate Body providing the principal obligation in the first sentence

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1 These dual purposes were provided by the Appellate Body in US — Carbon Steel, paragraph 126.
2 Appellate Body Report, EC — Selected Customs Matters, paragraph 166.
3 First Written Submission of the European Union, paragraph 38.
of Article II:1(b) requires a Member to refrain from imposing ordinary customs duties in excess of those provided for in that Member’s Schedule\(^4\).

8. Australia considers that under the Vienna Convention, as a matter of treaty interpretation, the Panel in interpreting “in excess of” in Article II:1(b) the GATT 1994 can draw from the text and the interpretation of Article III:2 the 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”\(^5\).

9. 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.

**III TEMPORARY REDUCTION OF OTHERWISE EXCESSIVE DUTIES DOES NOT ACCORD WITH ARTICLE II.1(a) OF GATT 1994**

10. 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 the GATT 1994.

11. Australia notes the importance of foreseeability for traders operating in the marketplace, and in accordance with the past jurisprudence on this issue, notes the potential of deleterious effects on competition of a regulated rate of duty which exceeds the bound rate, albeit which is temporarily reduced\(^6\).

**IV CLAIMS MAY BE MADE “AS SUCH” AND ARE NOT LIMITED TO MERELY CHALLENGING INDIVIDUAL INSTANCES OF THE APPLICATION OF DUTIES.**

12. 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.

13. This ability to make a claim “as such” is supported by the Appellate Body in Argentina-Import Measures\(^7\).

14. Allowing claims against measures “as such” serves the practical purpose of preventing future disputes by allowing the root of WTO-inconsistent measures to be eliminated per the Appellate Body in US – Corrosion-Resistant Steel Sunset Review\(^8\).

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\(^4\) Appellate Body Report, Argentina — Textiles and Apparel, paragraph 46.
\(^5\) Appellate Body Report, Japan – Alcoholic Beverages II, page. 23.
\(^6\) Panel Report, EC-IT products, at paragraph 7.761.
\(^7\) Appellate Body Report, Argentina-Import Measures, paragraph 5.101.
\(^8\) Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review, para 82.