

***RUSSIA—TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND  
MANUFACTURING PRODUCTS***

**(DS485)**

**THIRD PARTY SUBMISSION OF  
THE UNITED STATES**

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<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
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<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on the issues arising in this dispute between the European Union and the Russian Federation (Russia). In this submission, the United States will provide comments on certain legal issues involving the interpretation and application of Article II of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Articles 3, 4, and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

2. The United States will first provide comments on legal issues involving the interpretation and application of the DSU in the context of Russia's request for a preliminary ruling. The United States will then address certain legal issues arising under Article II of the GATT 1994 in the context of the arguments presented by the European Union and Russia with respect to the measures at issue.

## II. BACKGROUND

3. In its first written submission, the European Union requests that the Panel find several Russian measures inconsistent with Russia's obligations under Article II:1(a) and (b) of the GATT 1994 because Russia allegedly fails to accord to the commerce of another Member treatment no less favorable than that provided for in its Schedule, and because Russia allegedly imposes ordinary customs duties in excess of those provided in its Schedule.

4. Specifically, the European Union identifies twelve measures, each of which it alleges constitutes a breach of Article II:1(a) and (b) of the GATT 1994. Regarding the first six measures identified, the European Union claims that Russia applies *ad valorem* duty rates that exceed the bound *ad valorem* duty rates set out in Russia's Schedule for certain paper and paperboard products.<sup>1</sup>

5. Similarly, with respect to the instruments identified as measures 7-11, the European Union alleges that Russia's applied duty rates differ in form and structure from the bound rates set out in its Schedule, resulting in excess duties in instances where the customs value of the relevant goods falls below a certain amount.<sup>2</sup> Specifically, according to the European Union, for these tariff lines Russia applies a combined duty rate where its Schedule provides for either an *ad valorem* duty rate (measures 7-9) or a combined duty rate requiring the imposition of the lower amount of a specific and combined duty rate (measures 10-11), in breach of Article II:1(a) and (b) of the GATT 1994.

6. The twelfth and final measure the European Union identifies is Russia's alleged "systematic application" of a "type/structure" of duty that varies from the bound duty "in a way that leads to the application of duties in excess of those provided for in the Schedule for those goods."<sup>3</sup> The European Union terms this measure a "systematic duty variation (SDV)." The European Union points to measures 7-11 as illustrative examples but seeks a general finding that

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<sup>1</sup> European Union's Initial Written Submission, paras. 41-78.

<sup>2</sup> European Union's Initial Written Submission, paras. 79-125.

<sup>3</sup> European Union's Initial Written Submission, para. 126.

the alleged “systematic application” of duties in excess of bound rates, without a mechanism to prevent such excess application, results in a breach of Article II:1(a) and (b) of the GATT 1994.

### III. RUSSIA’S REQUEST FOR PRELIMINARY RULING

7. With respect to Russia’s request for a preliminary ruling, the United States provides the following comments relating to the proper interpretation and application of Articles 3, 4, and 6 of the DSU.

#### A. Article 6.2 of the DSU

8. Russia argues that, in certain respects, the European Union has failed to identify the measures at issue with the level of specificity required by Article 6.2 of the DSU.

9. First, Russia argues that the European Union’s reference to “significant other tariff lines” at paragraph 11 of the panel request is “too vague and does not allow for the identification of specific instruments that the reference aims to cover.”<sup>4</sup> The United States, however, understands that the European Union’s reference to “significant other tariff lines” was intended as support for the European Union’s claim that Russia’s measures “systematically” operate to impose duties in excess of Russia’s bound rates. For example, paragraph 11 of the European Union’s panel request states in relevant part:

[T]he legal instruments referred to below *systematically* provide, in relation to a significant number of tariff lines, for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule in a way that leads to the application of duties in excess of those provided for in the Schedule for those goods whenever the customs value is below a certain level...<sup>5</sup>

10. The United States observes that the Appellate Body has found that a Member can seek to challenge another Member’s measures “as a whole” and that challenges to the “design or structure of a system” are also permissible.<sup>6</sup> Thus, to the extent the Panel understands paragraph 11 of the EU panel request as setting out an “as a whole” or systemic challenge, the United States considers that the Panel should assess whether the European Union’s identification of the

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<sup>4</sup> Russia’s Request for Preliminary Ruling, para. 10.

<sup>5</sup> European Union Request for Establishment of a Panel, 11<sup>th</sup> paragraph.

<sup>6</sup> Appellate Body, *EC—Selected Customs Matters*, para. 175 (“By referring to the ‘design and structure’ of the European Communities’ system of customs administration, the United States sought to demonstrate how and why the instruments identified in the first paragraph of the panel request, as a whole, are administered in a manner leading to a lack of uniformity in their administration. Thus, the United States’ contention on the ‘design and structure’ of the European Communities’ system of customs administration was made as an argument to substantiate its ‘as a whole’ challenge set out in the panel request. We therefore disagree with the Panel’s characterization of the United States’ contention on the ‘design and structure’ of the European Communities’ system of customs administration as a claim in itself. We noted earlier that the ‘as a whole’ challenge of the United States is set out in the panel request consistently and according to the specificity requirements contained in Article 6.2 of the DSU. We therefore see no reason why the Panel was precluded from considering the United States’ arguments on the ‘design and structure’ of the European Communities’ system of customs administration.”)

legal instruments through which the “significant other tariff lines” are implemented<sup>7</sup> meets the specificity requirements of Article 6.2 of the DSU.

11. To be clear, however, the question of whether the EU panel request meets the Article 6.2 specificity requirement with respect to the EU’s 12<sup>th</sup> claim (involving an alleged “systematic duty variation”) is a separate and distinct legal issue from whether, as a substantive matter, the European Union has established the existence of such a measure, and if so, whether such measure breaches Russia’s obligations under Article II of the GATT 1994.

12. Second, Russia argues that the EU panel request is insufficiently clear because the European Union’s first written submission “challenges a number of measures ‘*as such*’”, while the panel request makes “no mention...of a measure that contradicts Article II of the GATT 1994 ‘*as such*’”.<sup>8</sup> The United States understands Russia to argue (or at least suggest) that Article 6.2 of the DSU, *in addition* to requiring that panel requests “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly,” *also* requires that Members use specific terminology like “as such” or “as applied”. Article 6.2, however, includes no such requirement.

13. Indeed, the Appellate Body has found that a measure need not “fit squarely within” the “as such” or “as applied” categories in order for the measure to be susceptible to WTO challenge<sup>9</sup>—an observation that refutes the suggestion that Article 6.2 requires Members to explicitly use the words “as such” or “as applied” in a panel request.

14. Third, Russia also argues that the reference to “certain other goods” in the 7<sup>th</sup> paragraph of the European Union’s panel request is too “vague” and is therefore inconsistent with the specificity requirements of Article 6.2 of the DSU.<sup>10</sup> The United States, however, understands the phrase “certain other goods” to refer to the tariff lines explicitly identified in 8<sup>th</sup> and 9<sup>th</sup> paragraphs the European Union’s panel request, (*i.e.*, tariff lines: 1511 90 190 2, 1511 90 990 2 (palm oil), 8418 10 200 1 (combined refrigerator – freezers), 8418 10 800 1, and 8418 21 100 0 (refrigerators and combined refrigerator – freezers)). To the extent the Panel shares this understanding, the United States considers that the Panel could find that the European Union has, in fact, adequately specified these measures consistent with the requirements of Article 6.2 of the DSU.

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<sup>7</sup> The United States understands these instruments to be Common Customs Tariff Decisions Nos. 10, 9, 54, 7, 52, 47, 103, as specified in the 12<sup>th</sup> paragraph of the European Union’s Request for Establishment of a Panel.

<sup>8</sup> Russia’s Request for Preliminary Ruling, paras. 15-16.

<sup>9</sup> Appellate Body, *US—Continued Zeroing*, para. 179. (“We share the Panel’s view that the distinction between “as such” and “as applied” claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm.”).

<sup>10</sup> Russia’s Request for Preliminary Ruling, para. 8.

## B. Articles 4 and 6 of the DSU

15. Russia also alleges that the European Union has attempted to expand the scope of the dispute in contravention of Articles 4 and 6 of the DSU – specifically, by including measures in its panel request that that the European Union did not list in its Request for Consultations.<sup>11</sup> While the United States takes no position on the factual merits of Russia’s assertions, the United States notes that several past reports have found that Articles 4 and 6 *do not* “require a precise and exact identity between the specific measures and WTO provisions included in the request for consultations and the specific measures and WTO provisions identified in the request for the establishment of a panel.”<sup>12</sup> As discussed below, this conclusion is consistent with the text of the DSU.

16. For example, with respect to the WTO legal provisions cited in a panel request, the Appellate Body found that:

it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the ‘legal basis’ in the panel request may reasonably be said to have *evolved from the ‘legal basis’ that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint.*<sup>13</sup>

17. In this regard, the United States recalls that DSU Article 4.4 requires a Member to provide “an indication of the legal basis of the complaint” in its consultation request, while DSU Article 6.2 requires a “brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Thus, the consultation request’s more general “indication” of the legal basis may not contain all of the content in the panel request’s “brief summary.”

18. With respect to the measures, however, these two DSU provisions are different and suggest the same content for the measures. DSU Article 4.4 states that the consultation request shall include an “identification of the measures at issue” while DSU Article 6.2 establishes that the panel request shall “identify the specific measures at issue.” That is, the panel request is to be more “specific” but the “measures at issue” are the same. Accordingly the Appellate Body has found that:

Whether a complaining party has “expand[ed] the scope of the dispute” *or changed the “essence” of the dispute through the inclusion of a measure in its panel request* that was not part of its consultations request must be determined on a case-by-case basis.<sup>14</sup>

19. That is, a formally later in time measure may be included in the panel request as a “specific measure at issue” if it is, in effect, the same (or of the same essence) as a “measure at issue” identified in the consultation request. For example, if a Member challenges a duty or

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<sup>11</sup> See Russia’s Request for Preliminary Ruling, para. 28.

<sup>12</sup> Appellate Body, *Brazil — Aircraft*, paras. 131 and 132.

<sup>13</sup> Appellate Body, *Mexico — Anti-Dumping Measures on Rice*, para. 138 (emphasis added).

<sup>14</sup> Appellate Body, *US — Shrimp (Thailand) / US — Customs Bond Directive*, para. 293 (emphasis added).

import prohibition in substance and identifies in its consultation request the current legal instrument through which the duty or prohibition is imposed, the Member may include in its panel request a subsequent measure (legal instrument) through which the duty or prohibition is maintained as of that date. By citing the subsequent measure (legal instrument), the Member has not changed the measure at issue or the scope of its challenge, for the original and subsequent measure (legal instrument) are of the same essence.<sup>15</sup>

20. For these reasons, if the Panel concludes that any newly cited measures that purportedly appear in the European Union’s panel request are of the same “essence” as those set forth in the European Union’s consultation request, the Panel should find that such measures are properly within its terms of reference.

### C. Articles 3.4 and 3.7 of the DSU

21. Russia alleges that the European Union seeks to challenge a measure that “simply does not exist”<sup>16</sup> and therefore requests that the Panel find that the measure at issue—namely, “the import duty applied to tariff line 4810 92 100 0” (measure 6)—falls outside the Panel’s terms of reference in accordance with Articles 3.4 and 3.7 of the DSU.<sup>17</sup> Specifically, Russia emphasizes that the duty currently applied with respect to tariff line 4810 92 100 0 “is fully consistent with [Russia’s] commitments”<sup>18</sup> and argues that the Panel should therefore decline to entertain allegations that Russia “*might* introduce a level of duty that is not consistent with its WTO obligations in the future.”<sup>19</sup>

22. The United States agrees that a WTO dispute settlement panel cannot examine a measure that did not exist at the time of panel establishment, and cannot make findings with respect to measures that a Member “*might*” take in the future. On the other hand, as a jurisdictional matter, if the panel request alleges that a certain measure existed at the time the matter was referred to the panel, the DSU is clear that the panel must under its terms of reference as established by the DSB pursuant to Article 7 of the DSU “examine” the issue of whether or not the complaining Member has met its burden of showing the existence and content of the alleged measure and, then, its inconsistency with the covered agreements.

23. Accordingly, the Panel should consider the European Union’s allegation regarding the existence of a measure requiring the application of a 15 percent *ad valorem* duty on tariff line 4810 92 100 0 (measure 6), as well as Russia’s characterization of the measure at issue as a “[non-]existent measure.”<sup>20</sup> In this regard, the United States observes that although the European Union acknowledges that the “currently applicable duty” for tariff line 4810 92 100 0 (*i.e.*, 5% *ad valorem*) is “equal to the bound rate” inscribed in Russia’s tariff schedule, the European

<sup>15</sup> See Panel, *China—Raw Materials*, paras. 7.5-7.33; *EC—IT Products*, para. 7.139.

<sup>16</sup> Russia’s Request for Preliminary Ruling, para. 54.

<sup>17</sup> Russia’s Request for Preliminary Ruling, para. 63.

<sup>18</sup> Russia’s Request for Preliminary Ruling, para. 56.

<sup>19</sup> Russia’s Request for Preliminary Ruling, para. 60.

<sup>20</sup> See, Russia’s Request for Preliminary Ruling, para. 57 (“We believe that a panel may only examine an existent measure.”)

Union alleges that – at the time of panel establishment – a measure existed that “clearly require[d]” Russian customs authorities to begin applying a duty of 15% starting January 1, 2016.

24. *Assuming arguendo* that the facts are as alleged by the European Union, the United States considers that a measure identified in the panel request and requiring the application of a 15% duty at a certain future date is a measure properly within the Panel’s terms of reference and with respect to which the Panel must make findings under its terms of reference and the DSU.<sup>21</sup> A measure that provides for a delayed implementation date is still a “measure” that exists and can be identified. The GATT 1947 panel in *US – Superfund*, reasoned similarly when it found that it could properly examine a tax measure that was not yet in effect, but where relevant legislation made clear that imposition of the tax was “mandatory” and specified the date upon which the tax would go into effect.<sup>22</sup>

#### IV. GENERAL LEGAL STANDARD UNDER ARTICLE II THE GATT 1994

25. As described in Section II above, the European Union claims that each of the twelve measures identified are inconsistent with Article II:1(a) and (b) of the GATT 1994.

26. Article II (Schedules of Concessions) imposes an obligation on an importing Member to accord to products of other Members treatment no less favorable than that provided for in its Schedule. Article II:1(a) and (b) provide in relevant part:

1. (a) Each contracting party shall accord to the commerce of the other contracting parties 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 contracting party, which are the products of territories of other contracting parties, 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.

27. Article II:1(a) and the first sentence of Article II:1(b) apply to ordinary customs duties, which the European Union identifies as the type of duties at issue in this dispute.<sup>23</sup> Article II:1(a) makes clear that a Member’s tariff bindings as set out in its Schedule of Concessions are a ceiling. The first sentence of Article II:1(b) sets forth a specific kind of practice that would be inconsistent with paragraph (a) in providing that the products listed in Part I of a Member’s Schedule shall, on their import, be exempt from “ordinary customs duties in excess of those set

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<sup>21</sup> See DSU Article 7.1 (terms of reference), 11 (objective assessment of “the matter” identified in the panel request and terms of reference), 19.1 (a panel “shall” make a recommendation where it finds a measure WTO-inconsistent).

<sup>22</sup> See GATT Panel, *US – Superfund*, para. 5.2.2.

<sup>23</sup> European Union’s First Written Submission, para. 39.

forth and provided therein.”<sup>24</sup> Accordingly, should a breach of Article II:1(b) be established, it would follow that a breach of Article II:1(a) has also occurred.

28. In short, to the extent that a Member imposes ordinary customs duties in excess of those provided in Part I of its Schedule, it is in breach of its obligations contained in Article II:1(a) and (b) of the GATT 1994.

## V. CLAIMS THAT RUSSIA APPLIES ORDINARY CUSTOMS DUTIES IN EXCESS OF BOUND RATES

29. The first eleven measures identified by the European Union all concern the claim that Russia’s imposition of ordinary customs duties are in excess of those provided in Russia’s Schedule, in breach of Article II:1(a) and (b) of the GATT 1994. In particular, the European Union challenges “as such” Russia’s applied duties as defined in certain instruments of the Common Customs Tariff of the Eurasian Economic Union (CCT). As for any claim, the burden of proof falls on the complaining Member (here, the European Union) to make its *prima facie* case. The Appellate Body has explained that in evaluating a measure challenged “as such,” the starting point of the analysis is the measure on its face.<sup>25</sup> Other evidence, such as that involving the application of the measure, may also be examined.<sup>26</sup>

30. As noted, Article II imposes an obligation on Members to accord to products of other Members treatment no less favorable than that provided for in the importing Member’s Schedule. Prior reports applying Article II have found that where a measure operates to necessarily deny the treatment set out in the Member’s Schedule, a breach of Article II has been established.

31. For example, the panel in *China – Auto Parts* stated that its inquiry under Article II:1 was “limited to [the] very narrow question [of] whether any aspect of the criteria set out in the measures will necessarily lead to a breach of China’s obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994.”<sup>27</sup> The panel in *EC – IT Products* similarly found that if a complaining Party is “able to establish that the measures operate in such a way as to necessarily deny” the treatment to which the Member has committed, then “a breach of Article II has been established.”<sup>28</sup> In sum, if the European Union demonstrates that the measures at issue in certain circumstances will necessarily impose tariffs in excess of those provided in Russia’s Schedule, the European Union will have established a breach of Russia’s obligations set forth in Article II:1(a) and (b) of the GATT 1994.

32. The United States also notes its agreement with the European Union’s position that the Panel’s determination as to whether Russia has breached its obligations under Article II:1(a) and

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<sup>24</sup> Appellate Body, *Argentina – Textiles and Apparel*, para. 45.

<sup>25</sup> Appellate Body, *US – Corrosion-Resistant Steel Sunset Review*, para. 168 (“When a measure is challenged ‘as such’, the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required.”)

<sup>26</sup> See, e.g., Appellate Body, *US – Carbon Steel*, para. 157.

<sup>27</sup> Panel, *China – Auto Parts*, para. 7.540.

<sup>28</sup> Panel, *EC – IT Products*, para. 7.116.

(b) does not require consideration of trade effects.<sup>29</sup> Nothing in the text of Article II:1(a) and (b) requires a complaining Member to demonstrate specific trade effects.

33. The United States will address the first eleven measures below in three categories, in accordance with the European Union’s description of these measures. The first category concerns measures 1-6, for which the European Union alleges for certain tariff lines that Russia applies *ad valorem* duties in excess of the bound *ad valorem* rates. The next category concerns measures 7-9, for which the European Union alleges that Russia applies combined duties in excess of the bound *ad valorem* rates. The final category concerns measures 10-11, for which the European Union alleges that Russia applies combined duties in excess of the bound combined duty rates. For each measure, the European Union alleges an “as such” breach of Article II:1(a) and (b) of the GATT 1994.

#### A. Measures 1-6

34. With respect to measures 1-6, the European Union claims that Russia applies *ad valorem* duties in excess of the bound *ad valorem* rates inscribed in its Schedule. The United States observes that the European Union has apparently identified specific instances where Russia explicitly mandates the imposition of *ad valorem* duties in excess of the bound rates set forth in Russia’s Schedule. If the Panel were to agree that the European Union has established as a matter of fact that Russia’s measures operate as alleged (that is, to impose duties at the levels alleged), this showing would be sufficient to demonstrate that these measures are inconsistent “as such” with Russia’s obligations under Article II:1(a) and (b) of the GATT 1994.

35. With respect to tariff line 4810 92 100 0 (measure 6), the fact that the measure is not yet in effect would not preclude the finding that that the measure is in breach of Article II of the GATT 1994. The pertinent issue is not the measure’s effective date, but whether or not the measure existed as of the time of panel establishment. And, here, the European Union asserts that the measure did exist at the time of panel establishment. Specifically, the European Union argues that the measure in existence at the time of panel establishment, requires, an increase (as of December 31, 2015) in the applied *ad valorem* rate to 15%, up from 5% bound rate inscribed in Russia’s tariff schedule. Russia, appears to acknowledge that the legal instrument identified by the European Union does, in fact, provide for an increase to 15% as of December 31, 2015.<sup>30</sup>

36. Russia’s response does not appear to be convincing. In particular, Russia asserts that this increase has been effectively “suspended” pursuant to a subsequent measure—specifically, the “Decision of the Board of the Eurasian Economic Commission of 2 June 2015 No. 85” (“Decision No. 85”)—which purportedly renders that current 5% rate permanent as of September 1, 2015.<sup>31</sup> On that basis, Russia argues that the measure providing for an increase to a 15% *ad valorem* rate

<sup>29</sup> European Union’s First Written Submission, para. 40.

<sup>30</sup> Russia’s Initial Written Submission, para. 28 (“While providing generally for an *ad valorem* duty of 15%, this measure does not apply from 20 April 2013 until 31 December 2015. Instead, this duty constitutes *ad valorem* duty of 5% during this period of time and accordingly is equal to the bound rate set at 5% for this tariff line”) (internal citations omitted).

<sup>31</sup> Russia’s Initial Written Submission, para. 29.

“simply does not exist.”<sup>32</sup> However, as indicated, Decision No. 85 was not promulgated until after panel establishment (that is, on June 2, 2015). In this regard, the United States notes that – as provided by the text of Article 7 of the DSU – complaining parties are entitled to legal findings on measures *as they existed on the date of Panel establishment*.<sup>33</sup> Accordingly, the United States is of the view the measure requiring an increase to an *ad valorem* rate of 15% on December 31, 2015 *is* properly within the Panel’s terms of reference; and the EU is therefore entitled to legal findings with respect to that measure, *even if* the measure has been “suspended” or was otherwise withdrawn following establishment of the Panel.

37. In sum, the Panel’s ultimate disposition of this claim should turn on the Panel’s factual determination of whether or not the EU has shown that a Russian measure (or measures) in existence at the time of panel establishment required that the rate for tariff line 4810 92 100 0 (measure 6) would increase to 15 percent on December 31, 2015.

## **B. Measures 7-9**

38. Regarding the tariff lines identified in measures 7-9, the European Union alleges that where the value of the goods falls below a certain amount, the applied rate is in excess of the *ad valorem* rate set out in Russia’s Schedule. The United States agrees with the EU that a *prima facie* breach is established where the complaining Member demonstrates that a measure requires the imposition of duties in excess of bound rates *as a mathematical matter* in certain factual scenarios.

39. Russia responds that these measures may not be challenged “as such” because Article II:1(b) does not require that applied duties be of the same type or structure as the bound rate.<sup>34</sup> The United States agrees with Russia that the Appellate Body in *Argentina – Textiles and Apparel* explained that Article II:1(b) imposes an obligation in relation to the maximum rate of duty to be applied to a product, but not an obligation to apply the same type of duty as the type provided in a Member’s Schedule.<sup>35</sup> This observation, however, does not amount to a rebuttal of the EU’s *prima facie* case. The United States understands that the European Union does not challenge these measures on the basis of their structure or form alone, but rather because in certain circumstances Russia’s applied combined duties will necessarily result in the application of duties in excess of the bound rate provided in Russia’s Schedule.

40. To the extent that Russia is arguing that evidence of individual instances of application are necessary to establish an as-such breach of GATT 1994 Article II:1(a) and (b), the United States disagrees. As set out above, if a complaining Party is “able to establish that the measures operate in such a way as to necessarily deny” the treatment promised, then “a breach of Article II has been established.”<sup>36</sup>

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<sup>32</sup> Russia’s Initial Written Submission, paras. 29-30.

<sup>33</sup> This matter is discussed further below in section V.B.

<sup>34</sup> Russia’s Initial Written Submission, para. 119.

<sup>35</sup> Appellate Body, *Argentina – Textiles and Apparel*, para. 46.

<sup>36</sup> Panel, *EC – IT Products*, para. 7.116.

41. With respect to Russia’s argument that it is not obligated to design any ceiling or cap mechanism,<sup>37</sup> the United States simply notes that it understands the European Union does not argue that a ceiling mechanism is required. Rather, the European Union has observed that no such mechanism exists to prevent Russia’s applied rates from exceeding its bound rates for these tariff lines and therefore that a breach in certain circumstances necessarily will result.

42. Finally, the United States disagrees with Russia’s position that the Panel may not make findings on the above-referenced measures 7 and 8 concerning tariff lines 1511 90 190 2 (palm oil and its fractions) and 1511 90 990 2 (palm oil and its fractions) because those measures will expire (or have expired) during the panel proceeding. If – as appears to be the case – these measures existed at the time of panel establishment, they are properly within the Panel’s terms of reference. This is plain from the text of Articles 6.2 and 7.1 of the DSU, which establishes a panel’s terms of reference. According to Article 7.1, panels shall have the following terms of reference unless the disputing Parties agree otherwise:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

43. The “matter referred” to the DSB to be examined by the Panel is, pursuant to Article 6 (Establishment of Panels), set out in the panel request as “the specific measures at issue” and the “brief summary of the legal basis of the complaint”<sup>38</sup> Accordingly, a number of previous reports have concluded that a measure in existence at the time of panel establishment is properly within a panel’s terms of reference and that it is the legal situation that exists as of panel establishment that is to be examined by the panel – as a result of the DSB’s establishment of a panel with standard terms of reference.<sup>39</sup>

### C. Measures 10-11

44. Regarding the tariff lines identified in measures 10 and 11, the European Union claims that Russia applies combined duty rates (combining an *ad valorem* rate and a specific element) to certain goods for which Russia’s Schedule provides for a formula which requires Russia to impose the lower of the amounts, namely the lower of the amount based on the application of the *ad valorem* rate and the amount based on the application of a combined rate (measures 10-11). Similar to the U.S. comments on measures 7-9 discussed above, the United States agrees that to the extent these measures mandate as a mathematical matter the application of duties in excess of the bound rates set forth in Russia’s Schedule, the European Union has established a breach of Article II:1(a) and (b).

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<sup>37</sup> Russia’s Initial Written Submission, paras. 129-133.

<sup>38</sup> DSU Article 6.2.

<sup>39</sup> See Appellate Body, *EC – Selected Customs Matters*, para. 184; Appellate Body, *Chile – Price Band System*, para. 269; Appellate Body, *EC – Bananas III (Article 21.5 – Ecuador II)*; *EC – Bananas III (Article 21.5 – US)*, paras. 269-271.

45. As discussed above, the United States also agrees that the European Union, in making an “as such” challenge to these measures, is not required to produce evidence of individual instances of application to establish a breach of Articles II:1(a) and (b) of the GATT 1994. As the European Union observes in its first written submission, however, it may produce such evidence to further support its claim.

## **VI. THE EUROPEAN UNION’S CLAIM THAT RUSSIA ENGAGED IN A “SYSTEMATIC DUTY VARIATION” (MEASURE 12) IN BREACH OF ARTICLE II:1(A) AND (B)**

46. The final measure the European Union identifies is an alleged “systematic duty variation (SDV)”, which – according to the European Union – is a “systematic application” of a type and structure of duty that varies from the bound duty “in a way that leads to the application of duties in excess of those provided for in the Schedule for those goods.”<sup>40</sup> In advancing such a claim, the European Union bears the burden of proving the existence of a measure that constitutes a rule or norm of general and prospective application. In this regard, the United States notes that a mere showing of repeated actions is not sufficient to establish the existence of a rule or norm of general application.<sup>41</sup> To the extent that the EU is arguing that the “SDV” measure is embodied in one or more written instruments, the Panel would need to examine whether those instruments, with perhaps other supporting evidence, establish the existence of such a measure. For example, as observed by the Appellate Body in *Argentina—Import Measures*

A complainant challenging a *single measure composed of several different instruments* will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.<sup>42</sup>

47. On the other hand, to the extent the EU is arguing for the existence of an unwritten measure, the United States recalls the Appellate Body’s discussion of the requirements that must be met to establish the existence of an alleged unwritten measure that constitutes a rule or norm of general and prospective application. For example, the Appellate Body found that:

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<sup>40</sup> European Union’s Initial Written Submission, para. 126.

<sup>41</sup> See Panel, *US – Zeroing (Japan)*, paras. 7.50-7.52 (“We recognize that an analysis of an “as such” claim regarding a measure not embodied in legislation or regulation or other type of written instrument raises particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application, especially because, in our view, consistent practice is to be distinguished from the notion of a rule or norm of general and prospective application”). Other panels have also rejected arguments that a “practice” can be a measure that gives rise to a breach of WTO obligations. See, e.g. Panel Reports, *US – Export Restraints*, para. 8.126 (“[P]ast practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of doing something or requiring some particular action...US ‘practice’ therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.”); *US – Steel Plate (India)*, paras. 7.19-7.22 (rejecting claim that the U.S. practice in the application of facts available was a challengeable measure).

<sup>42</sup> Appellate Body, *Argentina—Import Measures*, para. 5.108. (emphasis added)

A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.<sup>43</sup>

In sum, for the European Union to prevail on its claim involving an alleged systematic duty variation, the European Union will need to first establish the precise content and the existence of this alleged measure, and then show that the measure results in a breach of Article II of the GATT 1994.

## **VII. CONCLUSION**

48. The United States thanks the Panel for providing an opportunity to comment on the issues raised in this proceeding.

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<sup>43</sup> Appellate Body, *Argentina—Importation of Goods*, para. 5.110. (emphasis added)