RUSSIA — TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

(DS485)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

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Argentina – Import Measures (AB)	Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, adopted 26 January 2015
Argentina – Import Measures (Panel)	Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R, as modified by the Appellate Body Report, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, Adopted 26 January 2015
Argentina – Textiles and Apparel (AB)	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998
Argentina – Textiles and Apparel (Panel)	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
Japan – Apples (Panel)	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Continued Zeroing (Panel)	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, as modified by Appellate Body Report WT/DS350/AB/R

US – COOL (Panel)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001
US – Shrimp (Thailand) / US – Customs Bond Directive (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
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QUESTIONS FOR ALL THIRD PARTIES

1. In what circumstances will the inclusion of a measure in a panel request that was not included in a consultations request "expand the scope" or "change the essence" of a dispute?

1. Under Articles 4 and 6 of the DSU, a measure must be subject of consultations and must be identified in the panel request in order to form part of the "matter" referred to the DSB and to be examined by the panel pursuant to its terms of reference under Article 7. For this reason, whether the inclusion of a "measure" in a panel request that was not included in a consultations request is nonetheless part of the "matter" referred to the panel, depends upon the "measure" subject of consultations and the "measure" newly identified.

2. As the United States has explained, while a new legal instrument is a measure itself and therefore is not the same measure as previously identified instrument, there could be circumstances where the new legal instrument in form replaces a prior instrument but the "measure" complained of remains the same. For example, the Member may have identified the measure subject to its request for consultations in a narrative form -- the duty applied to a product or a prohibition or restriction applied to imports – such that the subsequent legal instrument is part of that very measure. The notion of whether a subsequent legal instrument identified in a panel request expands the scope or changes the essence of a dispute is an application of this understanding of Articles 4 and 6 of the DSU, and whether such an instrument comes within the scope of the "matter" must be determined on a case-by-case basis. [1]

3. Certain findings in past disputes are instructive. In *EC – IT Products*, the issuance of an annual update to the tariff schedule of the EU, which did not modify the rates at issue was deemed by the panel to be a purely formal change of the currently applicable instrument that did not modify the measure (the duty applied to the identified products through decision by the EU) subject to the panel's examination; the panel used the "essence" of the dispute language to describe its analysis.

4. In *US – Shrimp (Thailand)/ US – Customs Bond Directive*, India's panel request included the legal instruments that provided legal authority for the "custom bond directive" measure at issue in that dispute. In its consultation request, however, India had not identified these legal instruments (but only the specific custom bond directive measure that it sought to challenge). The Appellate Body found these instruments were outside of the panel's terms of reference because the respondent United States – on view of India's consultation request – could not have reasonably anticipated that these instruments would fall within the scope of the dispute. Specifically, the Appellate Body reasoned:

> A responding Member *would not be in a position to anticipate reasonably the scope of a dispute* if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference.[2]

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[1] *See,* U.S. Third Party Submission, para. 18 (quoting *US – Shrimp (Thailand)/ US – Customs Bond Directive (AB)*, para. 293.) (emphasis added).
[2] *US – Shrimp (Thailand)/ US – Customs Bond Directive (AB)*, para. 294.

5. In addition to the inquiry whether the newly identified measure is in fact the same in substance and therefore falls within the measure on which consultations were requested, this finding indicates that one factor that a Panel may also assess is whether the responding Member could have reasonably anticipated that the newly identified measures would fall within the Panel's terms of reference.

2. With reference to Article II:1(a) of the GATT 1994, what is the "treatment" provided for in a Member's schedule? Does this term encompass more than a Member's tariff bindings?

6. The United States considers that the "treatment" in a Member's Schedule relates to a Member's obligation to apply duties no higher than those that set forth in its Schedule, to respect any other terms and conditions set out in that Schedule, and to respect any other commitments in relation to treatment of "commerce" of Members as reflected in its Schedule. The United States has already explained that, "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)."[3] To the extent a Member sets out conditions in which it would not apply duties in conformity with its Schedule, this may also constitute a breach of Article II:1(a). For further discussion, please see the U.S. answer to Question 3.

3. With regard to the interpretation and application of Article II:1(a) and II:1(b), please answer the following questions:

a. Do the third parties agree with the interpretation of Article II:1(a) and (b) adopted by the panel in the panel report in EC – IT Products at paragraphs 7.744-7.763, and in particular the finding that one and the same measure can be inconsistent with Article II:1(a) and yet consistent with Article II:1(b)?

7. As the United States explained in its third party submission, where a measure imposes ordinary customs duties in excess of those set forth in its schedule – in contravention of Article II:1(b) – it follows that the measure also accords "less favourable treatment" than that provided for its Schedule within the meaning of Article II:1(a).[4] The United States therefore agrees with the panel's observation in *EC – IT Products* that "a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a)."[5]

8. The converse, however, is not necessarily true. That is, a measure *could* operate to accord "less favourable treatment" than that provided for in a Member's schedule, *without* necessarily imposing duties in excess of the Members' bound rates.

9. The findings in *EC – IT Products* are also instructive on this point. In that dispute, the EC maintained a measure that provided for the application of duties in excess of those inscribed in the EC's Schedule. The EC, however, had indefinitely "suspended" application of the excessive duty measure and, at the time of the dispute, was not actually imposing

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[3] U.S. Third Party Submission, paras. 27-28.
[4] *See*, U.S. Third Party Submission of the United States, para. 27.
[5] *EC – IT Products*, para. 7.747.

duties in excess of its bound rates. The panel, however, reasoned that the duty measure – even if suspended – could still have "deleterious effects on competition." On that basis, the panel found that the suspended duty measure was therefore inconsistent with Article II:1(a).[6]

10. At the same time, the Panel found that there was no breach of Article II:1(b) because the EC had, in fact, suspended the duty measure. Specifically, the panel reasoned that "there is no inconsistency with Article II:1(b) to the extent the duty suspension [measure] is applied …. It follows, therefore, that there is no inconsistency with Article II:1(a) by virtue of an inconsistency with Article II:1(b)."[7]

> ***b. With reference to paragraph 18 of Japan's third party written submission, does the issue of "predictability" of trade as referred to in the panel report in EC – IT Products arise, if at all, also in the context of an inquiry under Article II:1(b)? If not, how is this different from an inquiry under Article II:1(a)?***

11. No. The issue of "predictability" of trade is not a relevant consideration for purposes of determining whether a measure is consistent with Article II:1(b). By its terms, Article II:1(b) is explicitly and solely concerned with whether a Member applies "ordinary customs duties *in excess of* those set forth" in its Schedule. Once it is demonstrated that a Member is applying duties in excess of those in its Schedule, an Article II:1(b) breach is established, even if the duty measure at issue has no other injurious trade effects.

12. In contrast, assessing whether a measure is inconsistent with Article II:1(a) involves the broader question of whether the measure accords "less favourable" treatment than that provided for in a Member's Schedule. To be sure, an application of duties in excess of those set out in a Member's schedule is sufficient to establish a breach of Article II:1(a). In addition, as noted above, previous panels have reasoned that – *contra* Article II:1(b) – an inquiry under Article II:1(a) also may consider a measure's potential impacts on trade.[8].

> ***c. With reference to paragraph 6 of Norway's third party oral statement, is the issue of whether a suspended duty "creates the potential of deleterious effects" a factual element to be established with reference to the impact of the specific measure at issue and thus requires a case-by-case assessment, or is it an element that can be presumed to exist regardless of the type of suspended duty (including the magnitude of the difference between the temporary duty rate and the suspended duty rate, the duration of the suspension, the imported products at issue, etc.)?***

13. At the outset, the United States emphasizes that a breach of Article II:1(a) is established by demonstrating that a Member accords "less favourable" treatment to imported products than provided for in the Member's Schedule. By its terms, the *degree* of less favourable treatment is not a relevant consideration for purposes of establishing a breach of Article

[6] *EC – IT Products*, para. 7.761; *See also*, para. 7.760 ("Thus, while a suspension on imports of certain LCD displays has formally been in effect for five years or more, the suspension is not permanent in nature, and is subject to a formal extension or amendment. In addition, we note that the measure at issue (as well as prior measures) implementing the autonomous duty suspension does not set out specific conditions for its withdrawal or nonrenewal. Thus the duty suspension in force at a particular time may expire, be repealed, or be amended to increase or decrease coverage.")
[7] *EC – IT Products*, para. 7.750.
[8] *Argentina – Textiles and Apparel (Panel)*, para. 6.31; *EC – IT Products*, para. 7.761.

II:1(a). That is, a measure that accords *moderately* or *slightly* less favourable treatment would be in breach of of Article II:1(a), as a measure that accords s*ignificantly* less favourable treatment.

14. The United States cautions against an analytical approach that involves use of a term not defined in the GATT 1994 (in this case, a "suspended duty"), as well as the abstract question of whether a measure that falls within that undefined term necessarily is – or is not – consistent with any particular WTO obligation. Rather, for any measure at issue, the question of whether such a measure is inconsistent with a WTO obligation depends on the facts on the record in the dispute and an interpretation of the relevant WTO obligation; the label given to any particular measure may not be determinative. Furthermore, the United States cautions against an analytical approach that relies on "presumptions." Rather, the question should be whether or not the complaining Member has met its *prima facie* burden of establishing a breach of a WTO obligation. And, assuming the *prima facie* burden has been met, the question then turns to whether the responding Member has successfully rebutted the *prima* facie showing.

15. Turning to the facts of this dispute, based on the evidence and arguments presented by the EU, the United States considers that the EU has presented a *prima facie* case that that the Russian measures at issue involving duty suspensions result in "less favourable" treatment to imported products within the meaning of Article II:1(a). Specifically, the United States observes that the EU has established that the Russian measures are temporary in nature and that, by virtue of other measures, the tariff treatment accorded to identified products will not conform to Russia's WTO commitments. Thus, these measures provide for treatment less favourable than that provided for in Russia's schedule of tariff commitments because Russia's tariff commitments involve an ongoing obligation to assess a duty not in excess of the level specified. Furthermore, Russia in its submissions to date has not presented any evidence or arguments that would rebut the *prima facie* case presented by the EU.

4. With reference to sections II:2(b) of Colombia's third party written submission and I(b) of Colombia's third party oral submission, please answer the following questions:

d. Do the third parties (other than Colombia) agree that Article VII:2 of the GATT 1994 and the Customs Valuation Agreement are relevant to the interpretation of Article II of the GATT 1994? What role (if any) should they play in this case?

16. The WTO Agreement is a single undertaking, and provisions in different articles of a single agreement – or in different agreements -- may as a theoretical matter be relevant context for interpreting a particular WTO provision. However, the United States is not aware of language in Article VII:2 of the GATT 1994 or in the *Customs Valuation Agreement* that would be relevant for an interpretative issue arising in this dispute

5. Could the third parties elaborate on the circumstances under which a Member should modify its Schedule through the process in the 1980 Decision on Modification and Rectification (L/4962), and the circumstances under which a Member should use the process in Article XXVIII of the GATT 1994?

17. By its terms, *1980 Decision on Modification and Rectification* ("1980 Decision*"*) governs circumstances where a Member seeks to make "changes" or "rectifications of a *purely formal character*" to its Schedule[9], but does not apply where a Member seeks change its schedule in a way that would substantively "alter the scope of [its] concession[s]."[10] Thus, the United States understands that a Member could, for example, use the process set forth in the *1980 Decision* to make technical changes to its Schedule (*e.g*., in order to ensure conformity with the World Customs Organization's Harmonized Tariff Schedule), but cannot use this process to change the bound rates inscribed in its schedule.

18. On the other hand, when a Member seeks to made substantive modifications to the scope of its concessions, the Member must use the process set forth at Article XVIII of the GATT 1994. Specifically, Article XXVIII provides in relevant part that a Member

> *may, by negotiation and agreement with any contracting party with which such concession was initially negotiated* and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, *modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement*.

19. Thus, the United States understands a Member could avail itself of the Article XXVIII process to raise or otherwise adjust the bound rates set forth in its Schedule (subject to the negotiation requirements of that provision). In addition, the United States understands that where a Member makes substantive modifications to its Schedule pursuant to the Article XXVIII process, a Member would also need to follow the procedures in the 1980 Decision on Rectification to modify formally its Schedule annexed to the GATT 1994.[11] In those circumstances, the *1980 Decision* would be proper vehicle for making and certifying those conforming changes.

6. With reference to paragraph 21 of the European Union's first written submission, do the third parties agree with the European Union that as a consequence of its objection to the Russian Federation's rectification request, the authentic text of the Russian Federation's Schedule remains unchanged?

20. Under the *1980 Decision*, Member are required to circulate a "draft" of the changes that it is seeking to make to its Schedule. The United States understands that the changes reflected in that draft would be deemed certified within three months of circulation unless another Member objects. Such an objection may arise because the draft does not accurately reflect the modifications as previously agreed to by Members or the changes in the draft "alter the scope" of the concessions reflected the Member's current Schedule.[12] The United

[9] L/4962, para. 2.
[10] L/4962, para. 2.
[11] *See*, L/4962, para. 1
[12] *See*, L/4962, para. 3.

States understands that the authentic text of a Member's Schedule would remain unchanged pending resolution of the objection raised by another Member.

> ***7. Could the parties please comment on the reasons for the inclusion of the procedure in paragraph 313 of the Working Party Report for the Accession of the Russian Federation to the WTO? Is it linked to the request by some Members to replace "combined (mixed) and specific rates" with ad valorem duties that is mentioned in paragraph 312 of the Working Party Report?***

21. The United States understands that the procedures set forth in paragraph 313 were prompted by a request from several Members – including the European Union – that Russian convert its combined and specific duties with ad valorem duties.

> ***8. With reference to paragraph 136 of the Russian Federation's first written submission, could the third parties please elaborate on their understanding of the meaning and relevance of paragraph 313 of the Working Party Report to the Panel's analysis of under Article II:1(a) and (b) of the GATT 1994?***

22. Russia argues that the EU has not established a breach of Articles II:1(a) or (b) because the EU has failed to proffer evidence demonstrating that Russia on average – pursuant to the three- and five- year methodology in paragraph 313Working Party Report – applies rates in excess of the bound combined rates set forth in Russia's Schedule. [13] But as previously explained by the United States, Russia's argument is not a valid defense to the EU's *prima facie* showing of a breach of Article II:1 of the GATT 1994.[14]

23. Specifically, the United States notes that based on the plain language of paragraph 313, Russia has made an *additional* commitment to make annual adjustments to its specific duty rates to ensure that bound *ad valorem* rates are not exceeded; nothing in this additional commitment can be read as relieving Russia of its fundamental obligations to comply with Articles II:1(a) or (b) in *all* instances. Indeed, paragraph 313 is explicit on this point: it states that "[i]n no case [will] the applied duty . . . exceed the bound rate of the combined duty." In sum, the United States is of the view that paragraph 313 of Russia's Working Party Report in *no* way circumscribes Russia's obligations under Articles II:1(a) and (b) of the GATT 1994. In this regard, the United States does not understand paragraph 313 of the Working Party Report to be relevant to the Panel's analysis of Russia's obligations under Article II:1(a) and (b) of the GATT 1994.

> ***9. With reference to paragraph 46 of the United States' third party written submission, do the third parties agree that "a mere showing of repeated actions is not sufficient to establish the existence of a rule or norm of general application"? If so, what more is required to prove the existence of an unwritten rule or norm of general application?***

24. As noted in the U.S. third-party submission, a mere showing of repeated actions by a government or even consistent government practice is *not* sufficient to establish the existence of rule or norm of general application.[15]

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[13] *See* Russia's First Written Submission, paras. 163-167.
[14] *See*, *generally*, U.S. Third Party Oral Statement, paras. 6-7.
[16] *See*, *Argentina – Imports Measures (AB)*, para 4.14.

25. With regard to the question of what more is required to prove the existence of an unwritten rule or norm of general application, the findings in *Argentina – Imports Measures* are instructive. In that dispute, the existence of the unwritten measure was established by evidence that certain actions were the product of a deliberate government strategy and directed towards the realization of an articulated policy goal. [16]

10. How should panels assess whether "different components [of an alleged unwritten measure] operate together as part of a single measure" such that it can be said that "a single measure exists as distinct from its components"? (Appellate Body Report, Argentina – Import Measures, para. 5.108). What kinds of evidence might show the existence of such "cooperation"?

26. The United States submits that it is somewhat problematic to engage in theoretical discussions about what types of evidence may prove a particular fact or may meet a particular burden in WTO dispute settlement. Rather, the United States considers that the key points to consider in this context are that the complaining Member has the burden of establishing the existence of an unwritten measure, and that a panel should examine all of the evidence presented by that Member in support of its *prima facie* case.

11. With reference to paragraph 8 of Japan's third party oral statement, could the third parties please comment, and Japan elaborate, on what in their view is the relevance of the "mandatory/discretionary" distinction in the context of Article II:1 of the GATT 1994?

27. The United State agrees with Japan's statement at paragraph 8 that "a future tariff treatment in excess of the bound rate under the subject measure would be *presently* in violation of Article II:1(b)" where the measure at issue is "mandatory" and implementation of the measure is "certain and definitive."[17] As previously noted by the United States, "a measure that provides for a delayed implementation date is still a "measure" that exists" for purposes of WTO challenge.[18] This view is consistent with the reasoning of the panel in in *US – Superfund*, which found that it could properly examine a tax measure that was not yet in effect, but where the relevant legislation made clear the imposition of the tax was "mandatory" and specified a date certain upon which the tax would go into effect.[19]

28. The United States sees no reason why the same reasoning would not apply in the context of challenge to a duty measure under Article II. Specifically, the United States considers that where a measure provides for the application of a duty in excess of Member's bound rates upon a future date certain, and the measure provides the customs authorities with no discretion with respect to application of the duty, the measure is *presently* in violation of Article II:1(b).

[16] *See*, *Argentina – Imports Measures (AB)*, para 4.14.
[17] *See*, Japan's Third Party Oral Statement, para. 8. (emphasis added)
[18] *See*, U.S. Third Party Submission, para. 24.
[19] *See*, U.S. Third Party Submission, para. 24 (referencing, *US – Superfund*, para. 5.2.2).