RUSSIA—TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

(DS485)

EXECUTIVE SUMMARY OF
THE UNITED STATES OF AMERICA

October 9, 2015

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. INTRODUCTION

1. 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).

II. BACKGROUND

2. 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.

3. 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. 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. 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."

III. RUSSIA'S REQUEST FOR PRELIMINARY RULING

4. 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

5. 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." The United States, however, 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. 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 legal instruments through which the "significant other tariff lines" are implemented meets the specificity requirements of Article 6.2 of the DSU.

B. Articles 4 and 6 of the DSU

6. 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. 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." This conclusion is consistent with the text of the DSU.

7. 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*.

8. 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

9. Russia alleges that the European Union seeks to challenge a measure that "simply does not exist" 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. Specifically, Russia emphasizes that the duty currently applied with respect to tariff line 4810 92 100 0 "is fully consistent with [Russia's] commitments" 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."

10. *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. 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.

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

11. 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

12. 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.

13. 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.

14. 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

15. 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.

16. 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).

17. 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" 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.

C. Measures 10-11

18. 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).

V. THE EUROPEAN UNION'S CLAIM THAT RUSSIA ENGAGED IN A "SYSTEMATIC DUTY VARIATION" (MEASURE 12) IN BREACH OF ARTICLE II:1(A) AND (B)

19. 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." 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. 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.

20. 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:

> 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.

21. 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.

EXECUTIVE SUMMARY OF U.S. THIRD-PARTY ORAL STATEMENT AT THE THIRD PARTY SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES

A. Introduction

22. The United States appreciates the opportunity to provide our views as a third party in this dispute. In our third-party submission, we presented views on a number of the issues pertaining to the European Union's (EU) claims on certain measures of the Russian Federation (Russia) under Articles II:1(a) and (b) the General Agreement on Tariffs and Trade 1994 (GATT 1994). Today, the United States will focus its remarks on two matters related to these claims not specifically addressed in the U.S. third-party submission.

B. The Relevance of Russia's Additional Commitments in the Working Party Report

23. With respect to the tariff lines under measures 10 and 11, Russia appears to present a defense based on certain language in the Working Party Report that accompanied Russia's Protocol of Accession. Russia notes that, pursuant to paragraph 313 of its Working Party Report, Russia committed to calculate applied *ad valorem* rates based on trade "data […] from a three year period, determined by taking trade data from a recent five-year representative period and excluding data for years with the highest and lowest trade for that period." In Russia's first written submission, 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 the Working Party Report – applies rates in excess of the bound combined rates set forth in Russia's Schedule.

24. The United States does not find this argument to amount to a valid defense to the EU's *prima facie* showing of a breach of Article II:1 of the GATT 1994. Based on the plain language of paragraph 313 of the Working Party Report, 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. And, 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. 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.

C. The EU's Consequential Argument Regarding the Alleged "SDV Measure"

25. The United States is not situated to take a position on whether the EU has adequately demonstrated the existence of the alleged SDV measure. However, the United States would like to address the EU's consequential argument – namely, that the Panel should find the existence of an alleged "SDV" measure in order to facilitate the presentation of claims in the current proceeding. On reflection, we are not fully convinced by these arguments.

26. The EU contends that a finding on the existence of an alleged SDV measure is warranted because Russia's duties "are subject to frequent changes" and are therefore a "moving target." The United States further notes the EU's related concern that "requiring legal challenges…to zero in on the specific situation of any given tariff line at a specific point in time would make it impossible to address the numerous similar violations in any practical way, other than by identifying the SDV as a distinct violation of Article II."

27. The fact that a panel reviews the measures in existence at the time of panel establishment does not imply that a complaining Member must initiate an entirely new dispute to address a revision to a measure found to be in breach of WTO obligations. That is, if the responding Member substantively changes the challenged measure during the dispute settlement proceeding – or at some time thereafter – that measure could be subject to review as a measure taken to comply in a proceeding under Article 21.5 of the DSU.

28. Applying that principle here, if the Panel were to find that duties *currently* applied by Russia's measures are inconsistent with Russia's obligations under GATT 1994 Article II, and Russia subsequently amends the duty rate measures at issue, the United States understands that the EU could choose to challenge those measures in an Article 21.5 compliance proceeding to the extent they continued to provide for the application of duties in excess of Russia's bound rates. Accordingly, the United States is not fully persuaded that a concern with a "moving target" of potential future tariff changes warrants a "general finding" on an alleged SDV measure.